Carlos v Republic (Criminal Appeal 45 of 2016)
[2019] KEHC 12481 (KLR) (13 June 2019) (Judgment)

Neutral citation: [2019] KEHC 12481 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 45 OF 2016

LW GITARI, J

JUNE 13, 2019

BETWEEN

FREDRICK EKISA CARLOS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in criminal Case No. 638 of 2013 of the Senior Principal Magistrate's Court at Gichugu)

JUDGMENT

1. The appellant was charged before the Senior Principal Magistrate's Court at Gichugu Criminal Case No. 638 of 2013 with the offence of trafficking in Narcotic Drugs Contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act; No. 4/1994.

2. It was alleged that on 29.10.13 along Mwea – Embu road at Mururi area Mirichi sub-location in Kirinyaga East District within Kirinyaga County being a driver of Motor vehicle KAY 959 X make Toyota Platz white in colour driving towards Embu direction was found trafficking Cannabis Sativa (bhang) to wit 1,322 stones with a street Ksh.661,000/=.

3. After a full trial, the appellant was convicted and sentenced to life imprisonment in addition to a fine of Ksh.1,983,000/=.

4. The appellant was dissatisfied and lodged this appeal. He was granted leave to file amended grounds. He raises the following grounds: -

    1. That the trial magistrate erred in law and facts in returning a finding of culpability on the part of the appellant in a case wholly dependant on circumstantial evidence.

2. That the trial court erred in law and facts by not considering that the appellant was not the owner of the owner of the vehicle alleged to have been trafficking drugs, he was also not in possession of the alleged vehicle and he was not an occupant or passenger.

3. The learned trial magistrate erred in law and facts by not considering that the owner of the vehicle was not produced in court to confirm the person who was in possession of the vehicle at the said time of crime.

4. That the trial court erred in law and facts by not considering that none of the members of the public alleged to have arrested the appellant was not called to court to confirm the same and the reason why they made the arrest.

5. The learned trial magistrate erred in law and facts by not considering that he breakdown service provider was not called to court to confirm the same and the reason why they made the arrest.

6. The learned trial magistrate erred in law and facts in failing to appreciate that the quantity alleged to have been recovered aa per charge sheet was not the same quantity alleged to have been recovered as per the charge sheet was not the same.

7. The learned trial magistrate erred in law and facts by failing to take into account that the quality and value of the bhang alleged to have been recovered was not the quantity and value testified by the government expert.

8. The learned trial magistrate erred in law and facts by failing to take into account that scene of crime experts who took the photographs did not testify in court to confirm their evidence.

9. The learned trial magistrate erred in law and facts by failing to take into account my alibi defence.

10. The learned trial magistrate erred in law and facts by not giving the appellant a chance to submit and mitigate his case.

10A. The learned magistrate erred in law and facts by wholly relying on the evidence by the prosecution witnesses and totally failing to consider them merits of the defence tendered by the Appellant and or miscomprehending the said defence and its legal effect on the case before her.

10B. The learned magistrate misdirected herself in law and in fact in finding as she did, a conviction against the weight of the evidence on record and in total disregard of the glaring discrepancies, contradictions and blatant falsehoods in the evidence tendered by the prosecution witnesses.

10C. The learned trial magistrate erred in law and facts by failing to find and or hold that prosecution (did not) prove its case beyond reasonable doubt as she was enjoined by law so to do, and further erred in law in finding and or holding that the Appellant was guilty of attempted murder.

10D. The learned trial magistrate erred in law and fact in completely by failing to consider the Appellant's mitigation on record and thereby passing a sentence which was manifestly harsh and excessive in the circumstances.

5. The Appellants prays that the appeal be allowed, the conviction and sentence be set aside.

6. The state opposed the appeal and filed written submissions through G. Obiri Assistant Director of Public Prosecution.

7. The brief facts of the case are that on 29.10.2013 P.W.1 Police Constable Daniel Livai, P.W.3 Police Constable Denis Juma and P.W.4 Senior Sergeant Caleb Wiliam Manyaga who were all police officers attached to Kianyaga Police station together with other police officers were on night patrol along Embu- Mwea road. They were using the official police station motor vehicle. On reaching a place called Kianjiru they noticed a motor vehicle which was coming from Mwea direction heading towards Embu. They noticed that one motor vehicle was being towed. The officers flagged the motor vehicle to stop but the driver refused to stop and passed the police motor vehicle. The vehicle being towed was motor vehicle KAY 959 X Toyota white in colour. The police officers decided to follow the vehicle. Before the vehicle could go far the police officers overtook the vehicle at Mururi trading center and tried to stop it to no avail. The vehicle reached a place where there were bumps. The rope which was towing the vehicle snapped and the vehicle which was towing sped of. The vehicle being towed continued moving but before it could go far it swerved off the road and landed in a ditch. The driver came out and tried to run away. Police officers gave chase and were also assisted by members of the public. The driver was arrested and is the appellant in this case. Police conducted a quick search and noted a sack full of plant material wrapped into bundles (stones). The sack was in the back seat. The accused was arrested. They called a break-down and the vehicle was towed to the police station.

8. At the police station the police searched the vehicle and recovered additional plant material suspected to be cannabis which was hidden in the boot and under the seats of the vehicle. There were 1,322 stones of cannabis. Police took samples of the plant material and sent them to the government chemist for analysis. The government analyst PW-2 examined the plant material and found it to be cannabis which falls under the first schedule of the *Narcotic Drugs and Psychotropic Substances (Control) Act* 1994. The report was produced as exhibit -1.

9. The drug was weighed and found to contain 146.44 kilograms with a street value of Ksh.292,870/=. The appellant was then charged.

10. Directions were given that the Appeal be disposed of by way of written submissions.

11. For the appellant submissions were filed by Mugendi Karigi & Co, Advocates. His submissions is that arising from the grounds, there are three issue for determination namely: -

    - Whether prosecution proved its case beyond any reasonable doubts.

    - Whether the conviction and sentence is too excessive.

    - Whether trial court's entire judgement should be set aside.

12. For the state submissions were filed by G. Obiri Assistant Director of Public Prosecution. He submits that the evidence which was availed by the prosecution witnesses proved that the appellant was trafficking in narcotics. The sentence meted out to the appellant was legal appropriate and commensurate to the offence committed. That the appeal be dismissed for want of prosecution.

13. This is 1st appeal and this court may hear appeals on both matter of law and facts. The court has a duty as a first appellate court to hear re-evaluate the evidence at the trial analyze it and come up with its own independent finding. The court must however keep in mind that it did not have an opportunity to see the witnesses when they testified and observe their demeanor. This court must therefore leave room for that.

14. I have considered all the evidence, re-evaluated it and analyzed it as required in the leading authority that is Okeno - v - R (1972) E.A 32.

15. The appellant has reduced the grounds to three and I will therefore consider the three issues for determination:-

1. Whether the prosecution proved its case beyond any reasonable doubts.

It is submitted that the prosecution failed to place the appellant at the scene of the crime. The appellant refers to page 39 of the proceedings on how the appellant was arrested. It is submitted that the members of the public who assisted to arrest the appellant were not called. The prosecution relied on the evidence of PW-1 -3 & 4 who were the eye witnesses and witnessed the arrest of the appellant. The evidence of these three witnesses was consistent and well corroborated.

16. It is the mandate of the police to effect arrest. The police have powers to arrest without a warrant subject to Article 49 of *the Constitution* Section 58 (c) of the Police Service Act provides that,

> " Subject to Article 49 of *the constitution* a police officer may without a warrant arrest a person where the police officer suspects on reasonable grounds of having committed a cognizable offence".

17. The police officers PW1, 3 & 4 suspected the vehicles which they saw as they were on patrol when they failed to stop. When the vehicle landed in a ditch they found what was suspected to be cannabis. They then arrested the appellant as he tried to run away. The three police officers were sufficient witnesses to the fact. It is trite that no particular number of witnesses shall be required to proof a fact. It is the prerogative of the Director of Public Prosecution to decide which witnesses they wish to call in support of their case. Section 143 of the *Evidence Act* Provides: -

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

18. Failure to call witnesses will only be fatal to a prosecution case if the evidence tendered is barely enough to prove a fact. The witnesses may be required to corroborate the evidence. However, where the evidence is sufficient the prosecution cannot be faulted for failing to call certain witnesses.

19. The trial magistrate at page 78 of the record from line 22 stated that: -

> " it's my finding that the prosecution has in this case adduced sufficient evidence against the accused. They have proved this case to the required degree of beyond any reasonable".
>
> Page 79 line 9 & 10
>
> "The police did their work perfectly and effectively and that is how they managed to nab the cannabis"

20. The conclusion by the trial magistrate is supported by the evidence. The Appellate court will only interfere with the findings of the fact by the trial magistrate if they are not supported by the evidence or there are no basis of reaching that finding. I find that the witnesses who testified on the fact of arrest were sufficient and proved the charge against the appellant. Failure to call the members of the public does not weaken the prosecution case. The ground has no merits.

21. The evidence tendered by the witnesses who testified proved that the appellant was trafficking narcotic drugs.

22. It is stated that the police officer did not give the details of the vehicle which was towing the one they arrested. This vehicle escaped before police arrested the appellant and realized he had carried narcotic drugs. Failure to take its particulars is immaterial to the prosecution. It does not cast any doubt in the prosecution case. The appellant has not suffered any prejudice.

23. On recovery of the exhibit it is submitted that the witness stated that they recovered 1,322 stones of cannabis but what was produced in court was less. PW3 testified that the exact number of stones were1,322. At page 41 he stated that some of the khaki papers have been eaten by rats and some were torn. There is no evidence on record to show that what was produced in court was less than what was recovered. The submissions as without substance.

24. It is alleged that the person who took photographs was not called. The submission does not shake the prosecution case. The court visited the police station and viewed the vehicle. This was direct evidence. The prosecution did not rely entirely on the photographs. There was direct evidence showing the vehicle and the exhibits. Even without a calling the person who took photographs, there was overwhelming evidence to prove the charge and more so that the appellant was the driver of the vehicle. Failure to call the person who took the photographs is cured under Section 143 of the *Evidence Act*. Furthermore, the appellant never objected to the production of the photographs. Section 78(1)(2)(3) of the *Evidence Act* provides:-

> " (l) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
>
> (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
>
> (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (l), regard shall be had to".

At page 52 of the record, the testimony of PW5 the certificates of the scenes of crime was produced as exhibit 4. The law allows its production. There was no prejudicial.

25. The appellant submits that the prosecution did not prove the ownership of the motor vehicle. The trial magistrate did consider this and stated as follows at page 77 from line 20 to page 78 line 20 of the record the trial magistrate stated-

> " The person who was arrested after he was found driving the car is the accused person hereon. He had the immediate physical possession of the car and therefore the cannabis.
>
> In any case, even if it were to be determined that the owner of the car is different from the accused herein, such owner would have been considered for prosecution for abetting the crime herein.
>
> Further to the foregoing, it's important to state here that the accused is not a stranger to motor vehicle registration No. KAY 959 X, Toyota Platz (Exh. No. 10). I have carefully considered the record herein, and two instances which occurred in court would not escape my notice in respect of the said exhibit.
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> On 31.10.2013, when plea was taken, the court record capacity the follows:(sic)
>
> "Accused; I pray that my medicines be retrieved from my motor vehicle and they be handled to me".

> The second incident is in respect of the proceedings for 3.3.2015. the record of typed proceedings indicate that the matter was adjourned, the accused had a request to make to the trial court;
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> "Accused: I ask that the motor vehicle be releases so that it can assist my family. I am single parent".
>
> From the foregoing excerpts from the record, its clear that the accused was laying claim over the subject motor vehicle right from day one when plea was taken. I am aware of the principle of the lie of evidence that the owes of proof lies squarely on the prosecution and not an accused person, but once an accused makes an admission of any fact before it the court can use it against him:".

26. The appellant was found in possession of the vehicle and the trial court found that he claimed to have other items in the said vehicle and applied to have the vehicle released to his family. This confirms the prosecution evidence that the appellant was in the vehicle and more so the vehicle was his. The submission in view of this evidence is a sham. There was no prejudice.

27. The appellant submits that the defence was not considered. The magistrate at page 79 stated that she had considered the defence in its entirety. She found – "the same was a fabricated theory and therefore does not hold any water in a clear case like this one where he was arrested in the cause of conveying drugs".

28. The court considered the defence and based on the evidence tendered before her the finding was supported by the evidence. I find that based on the evidence tendered before the trial court which was consistent, well corroborated and cogent, the prosecution did discharge their burden to proof the case beyond any reasonable doubts. The prosecution proved that what appellant was transporting was cannabis. This was proved by the testimony of PW -2 the government analyst who examined the plant material and found it was cannabis. The report was produced as exhibit 1.

29. I agree with appellant submissions that the prosecution bears the burden to prove the charge against an accused person and that burden never shifts. I find that having considered the evidence and evaluated it, the prosecution discharged the burden to proof the case beyond any reasonable doubts.

2. Whether the sentence and conviction is too excessive;

The appellant submits that he was aggrieved by the conviction and the sentence. The appellate court will not normally interfere with the sentence of the trial court unless the sentence is manifestly excessive in the circumstances of the case, or that it was based on wrong principles, considered matters which were irrelevant or failed to consider relevant matters.

30. The trial court imposed a fine of Ksh1,983,000/= in addition to imprisonment for life. The appellant was charged under Section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act which provides; -

> Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable — in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life;

31. The court of Appeal in Moses Banda Daniel -v- R 2016 eKLR stated that Section 4 (a) of the Act has conclusively been interpreted as discretionary and that imposition of life imprisonment in addition to a fine of 1,000,000/- was in error. The court of Appeal set aside sentence of life imprisonment and a fine of 1,000,000/= and substituted it with a sentence of 10 years' imprisonment and a fine of 10,000/ = and in default (30 months' imprisonment).

32. The trial magistrate erred by holding that the Act provides for a minimum mandatory sentence for the offence. The trial magistrate found the value of the drug was Ksh. 661,000/=.

33. This was the value given on the charge sheet. However the prosecution adduced evidence which proved that the market value of the drugs was Kshs. 292,880 exhibit II. The court of Appeal has stated that the sentence under Section 4(a) is discretionary and gives the court room to exercise discretion.

Daniel Kyalo Muema v Republic [2009] eKLR

The Court of Appeal advanced the view that the Act does not provide for mandatory sentences and stated;

> " Thirdly, the preamble to the Act does not show that one of the purposes of the Act is to provide for mandatory sentences. Indeed, for the more serious offence of trafficking in narcotic or psychotropic substances in Section 4, for example, the Parliament uses the phrase – "shall be guilty of an offence and liable" – which phrase does not import a mandatory sentence. That is why in Kolongei vs. Republic [2005] 1 KLR 7, the appellant who was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine (see also Gathara vs. Republic [2005] 2 KLR 58 where the appellant was sentence to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa."

Caroline Auma Majabu v Republic [2014] eKLR

The Court of Appeal reasoned as follows:

> " On her part, the learned Judge of the High Court followed Kingsley Chukwu v R Criminal Appeal No. 69 of 2010 (actually Criminal Appeal No. 257 of 2007 cited as Kingsley Chukwu v R2010 eKLR), where the Court differently constituted held that a person convicted for an offence under Section 4(a) of the Act shall be fined Kshs.1,000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life. With respect, that is not the purport of section 4(a). We find it appropriate to revisit the question whether section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act states provides for a mandatory sentence.
>
> .....
>
> In our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as
>
> "(i) Responsible by law, legally answerable, (liable to) subject by law to;
>
> (ii) (Liable to do something) likely to do something;
>
> (iii) (Liable to) likely to experience (something undesirable).Black's Law Dictionary defines "liable" as

(i) Responsible or answerable in law; legally obligated,

(ii) Subject to or likely to incur (a fine, penalty etc.)

Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms."

34. I have pointed that the trial magistrate erred by passing sentence on the basis that the sentence was mandatory when it was not. Section 354(3) 1 (30 of the *Criminal Procedure Code* provides that on Appeal, "The court may then if it considers that there is no sufficient ground for interfering dismiss the appeal or may in an appeal from conviction alter the finding maintaining the sentence, or with or without altering the finding reduce or increase the sentence.....or alter the nature of the sentence"

35. The penalty under Section 4 (a) is a fine of Kshs 1,000,000/= or three times the market value of the drugs which even is greater. Despite this provision the court has discretion in imposing the fine as the sentence is not mandatory. The second limb of the sentence is life imprisonment. The court has discretion. Based on the value of the drugs Ksh. 292,880/= and three times is ksh8,768,649/= the fine imposed was manifestly excessive.

36. The appellant was given a chance to mitigate. That ground is without merits.

3.Whether the judgement should be set aside

The appeal on the conviction is without merits s the prosecution proved the charge beyond any reasonable doubts. The judgement was based on facts and the law and the trial magistrate arrived at the proper conclusion which is that of guilt of the appellant.

37. In Conclusion

The appeal against conviction is without merits and is dismissed.

38. The appeal on the sentence succeeds for the reason I have stated. I order that the sentence imposed by the trial magistrate is set aside. The appellant will pay a fine of Ksh. 500,000/= i/d serve one year imprisonment. In addition, he will serve 15 years imprisonment. To be calculated from the date he was sentence by the trial court.

DATED AT KERUGOYA THIS 13TH DAY OF JUNE 2019.

L. W. GITARI

JUDGE