



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 2 OF 2019

(CONSOLIDATED WITH CRIMINAL APPEAL NO.22 OF 2019)

ROBERT NYAMASYO MWOLOLO.....1ST APPELLANT

CHARLES MUTUA MUSYOKA.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence (Hon. Okuche SRM) dated 11th August 2017

in criminal case No 162 of 2015 Republic v Robert Nyamasyo Mwololo & 2 others)

JUDGMENT

1. These are two consolidated appeals that arose from the same trial. The appellants were charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994. Particulars were that on the 4th day of September 2015 along Namanga -Mashuru road in Loitokitok District within Kajiado County the two appellants and another person who is not party to this appeal, were found trafficking 31Kgs of narcotic drugs; namely bhang, with a street value of Ksh. 310,000/= in motor vehicle Reg. No. KAK 681L a Nissan sunny Saloon.

2. After a full trial in which the prosecution called 7 witnesses and that of the appellants' defence, the appellants were found guilty, convicted and sentenced to seven years' imprisonment each and a fine of Ksh. 930,000/=. In default of the fine they were to serve one-year imprisonment each.

3. The appellants were aggrieved with the conviction and sentence and lodged their separate appeals which were however consolidated on 2nd July 2019. The appellant in Appeal NO 2 of 2019 became the 1st appellant while the appellant in appeal No. 22 of 2019 became the 2nd appellant. They will hence forth be referred to as the 1st and 2nd appellants respectively.

4. The 1st appellant raised the following grounds of appeal, namely:

1. That the Learned Trial Magistrate erred in law and facts by convicting him on the evidence which was not proved beyond reasonable doubt as required by law.

2. That the Learned Trial Magistrate erred by concluding that he was found in possession of bhang when the existing facts and evidence adduced before court pointed the contrary.

3. That the Learned Trial Magistrate erred in law and fact by giving an opinionated judgement which was heavy and filled with assumptions and not backed by any facts.

4. That the trial court failed to adequately consider his defence.

5. The 2nd appellant raised the following grounds of appeal, namely:

1. That Learned Magistrate erred in law and fact in holding that the offence was proved beyond reasonable doubt against him

2. That the Learned Trial Magistrate erred in law and fact in putting reliance on evidence by prosecution witnesses which was however not supported in any material way.

3. That the Learned Trial Magistrate erred in law and fact by failing to notice that there was no nexus between the drugs in question and him

6. During the hearing of this appeal, the 1st appellant relied on his submissions that he had filed in court. The 2nd appellant though given time to file submissions did not do so. He relied on the 1st appellant's submissions.

7. The 1st appellant submitted through the written submissions that there were huge gaps in the prosecution case. According to the 1st appellant, PW1 the arresting officer, testified that he was called by Sgt. Sindiyo and told that there was a motor vehicle Reg. No. KAK 681L which had got stuck some 500m from the KWS main gate at Amboseli Camp; that he had already been arrested and that two other people had run away. It was submitted that Sgt. Sindiyo had no opportunity to see the people who had run away.

8. The 1st appellant argued that since PW1 told the court that he gave chase along Namanga road, he was going to arrest people he had not seen and was only relying on information that the people were wearing red T-shirt. The 1st appellant submitted that such form of identification was faulty given that any person wearing red T-shirt could be arrested. He submitted that he was arrested along Namanga road and that the witness did not tell the court the distance he was from the alleged motor vehicle when he was arrested. He stated that the evidence was clear that he was not arrested at the scene of crime and, therefore, the description that led to his arrest was insufficient. The 1st appellant further argued that he was forced to sign the inventory and that he had stated so before the trial court. He contended that the prosecution case has not proved beyond reasonable doubt.

9. On ground 2, the 1st appellant argued that prosecution witnesses confirmed that he was arrested a distance away from the vehicle that was carrying bhang and that it was not proved that the vehicle was associated with him. He therefore submitted that the issue of possession was not proved. He relied on Mwangi v Republic [1974] EA 105 for the submission that when an exhibit is not found in possession of the accused, then he is not liable for it.

10. With regard to grounds 3 and 4, the 1st appellant submitted that the judgment of the trial court was based on assumptions; that the trial court erroneously dismissed his defence and relied on insufficient prosecution evidence given that there was no link between him and the exhibits. He argued that it was not the duty of the defence to fill gaps left by the prosecution and relied on Burunyi & Others v Uganda [1969] EA 123. In that case the court stated that it is not the duty of the court to stage manage the prosecution's case nor is it the duty of the court to endeavour to make a case against the accused where there is none.

11. The 1st appellant also argued that the burden to prove the case against the accused was with the prosecution and did not shift to the defence. He relied on Joseph Shitandi & Another v Republic on the burden of proof.

12. As already stated, the 2nd appellant relied on the 1st appellant's written submissions and urged the court to find in their favour.

13. Mr. Njeru, Learned Assistant Deputy Prosecutor, submitted orally in opposition of this appeal. He supported both conviction and sentence. He argued that the prosecution proved its case to the required standard; that the evidence of PW1 and PW2 is clear that the appellants were in the vehicle and they arrested them. He further submitted that when the appellants refused to open the vehicle, it was towed to Loitokitok Police Station and when it opened, the drugs were recovered in the vehicle.

14. According to Mr. Njeru, the drugs were tested by PW6 and confirmed to be bhang. He submitted that since the appellants were conveying the drugs, they were actually in possession. He argued that the trial court analyzed evidence and dismissed that of the defence. On sentence, counsel argued that under section 4(a) the fine may be pegged on the value of the drugs and where there is no value, a fine of Kshs. 1 million may be imposed. In his view, the fine of Kshs. 930,000/= is less than Kshs.1 million and the sentence of 7 years was a legal sentence since they were liable to life imprisonment. He urged the court to dismiss the appeal, uphold conviction and affirm the sentence.

15. In reply, Robert argued that he was not arrested in the vehicle, that he was arrested while walking on the road. The 2nd appellant also stated in reply that he was not arrested in the vehicle but was arrested while walking on the road and had nothing to do with the drugs.

16. I have considered this appeal submissions and authorities relied on. I have also perused the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court to reanalyze, reassess and reconsider the evidence adduced before the trial court and make its own conclusions. In doing so, the court must remain alive to the fact that it did not see the witnesses testify and give due allowance for that. (See Okeno v Republic [1972] EA 32).

17. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

18. The Supreme Court of India underscored the duty of the duty of the appellate court in Garpat vs State of Haryana (2010) 12 SCC59 stating that: ***“The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and***

if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other.”

19. **PW1 Joseph Kimani**, a KWS officer attached at Amboseli camp, told the court that on 4th September 2015 he was on duty when he was called by Sgt. Sindiyo and informed that there was a Nissan Sunny vehicle registration No. KAK 681L which was stuck about 500m from their main Gate. Sgt. Sindiyo informed him that he had arrested the driver of the vehicle but two other people had run away. He told the court that they gave chase after the two men using a motor bike and arrested them on the Namanga road. They took them to the motor vehicle where the driver was but they refused to open the boot of the vehicle. The vehicle was towed to their gate, opened the boot and found two sacks and paper bag containing bhang. They informed Loitokitok Police Station who came and took over the case and rearrested the suspects. They also took handed over the vehicle and the drugs to the police. He told the court that he arrested the two appellants.

20. Cross-examined by the 1st appellant, the witness told the court that he chased them using a motor bike on Namanga road but that he had not seen him alight from the motor vehicle. He further told the court that Sgt. Sindiyo had informed him that the two people were wearing red T-shirt and it was this information that led him to arrest the themst appellant. Cross-examined by the 2rd appellant, the witness told the court that the driver of the motor vehicle told them that it was him who had hired the vehicle.

21. **PW2 No. 3427 Sgt. Job Sindiyo** of KWS told the court that on 4th September 2015 at 11 am he was on patrol when he got a report that a vehicle had stalled 500m from the gate. He went to the vehicle found 3 occupants trying to push the vehicle Reg. No. KAK 681L Nissan Sunny. He asked them what they were carrying and they told him that they were carrying French beans and cabbages. He asked them to open the boot of the car but they did not. He called for reinforcement and two of them started running away. His colleagues chased them using a motor bike and arrested them. They took the vehicle to their camp where they forced the driver to open the boot. When he opened the boot they found two sacks of bhang and one malbora sack also with bhang. They detained them and later handed them and the exhibits to the police. Cross-examined by the 1st appellant, he told the court that the 1st appellant was one of the people in the vehicle but he did not know whether he was a passenger or not.

22. **PW3 No. 231543 Mongare Thomas** the OCS of Loitokitok Police Station told the court that on 4th September 2015 at about 12 noon, he got a call from KWS Office informing him that a vehicle had been intercepted at Mashinani Gate with 3 persons ferrying bhang. He together with PC Chacha and a driver proceeded to the scene where they found PW2 and his colleagues. They had detained a motor vehicle Reg. No. KAK 681L and suspects. He prepared an inventory of the items he recovered namely; two sacks of bhang and a black polythene paper also with bhang. The KWS officers witnessed the inventory confirming the items recovered. He together with CPL Chacha and Harrison Korir also witnessed the inventory and signed it. The suspects included the two appellants who also signed the inventory. He rearrested them and took them to the station. The bhang weighed 31kg. He produced bhang as PEX 1; the motor vehicle as PEX 2 and the inventory as PEX 3. He denied forcing the appellants to sign the inventory.

23. **PW4 Michael Mutua**, the owner of the vehicle, told the court that on the material day he was called by the 1st accused before the trial court and informed that he had been arrested and was at Loitokitok Police Station. He went to the Police Station where he was told that the vehicle had been detained for carrying bhang. He told the court that the vehicle was a Taxi and the 1st accused was the driver. He testified that he never authorized the driver to drive the vehicle outside Machakos he did not know that the vehicle had been driven to where it was found since the driver never sought his permission.

24. **PW5 CPL Simon Chacha** told testified that on 4th September 2015 he and PW3 went to Mashimoni gate and rearrested the appellants. He told the court that he later forwarded samples of the exhibit together with an exhibit memo dated the same day to the Government Chemist and produced the exhibit memo as PEX 5.

25. On his part, **PW6, Mechau Melimo** a Chemical Analyst with the Government Chemist told the court that on 10th September 2015, he received an exhibit memo from PW5 marked Loitokitok PS/733/55/2015 containing 90 grams of plant material and asked to ascertain whether the sample was narcotic drugs. He carried out tests which confirmed that the plant was cannabis which is a narcotic drug. He prepared a report which he produced as PEX 6.

26. **PW7 No. 55088 Virginia Wanjiku** attached at Crime Scene Department told the court that on 19th October 2016 while at CID Headquarters, she received an envelope marked XCL7 from Victor Baraza together with an exhibit memo in a CD. She developed six photographs of a vehicle and produced them as PEX 7. She prepared a report which she supplied on 24/10/2016.

27. The 1st appellant who testified as DW2 told the court that he is a Livestock tracker; that on 3rd September 2015 he went the 2nd appellant's home at Sultan Hamud; that they then took a boda boda ride to Amboseli gate where they alighted and went to the market. A motor bike came from behind stopped them and they were arrested and taken to Amboseli Park where they were placed in custody. They were later transferred to Loitokitok Police Station; forced to sign an inventory the following day and later charged with the offence. He denied being in the vehicle or in possession of bhang.

28. The 2nd appellant testified as DW3 and told the court that on 3rd September 2015, the 2nd appellant went to his place and after breakfast, he called a boda boda to take them to buy goats. Then a motor cycle approached from behind stopped them claiming that they had stolen some cattle. They were arrested and detained at Amboseli before they were transferred to Loitokitok Police Station where they were forced to sign an inventory the following day before they were charged in court.

29. After considering the above evidence, the trial court convicted the appellants and sentenced them leading to this appeal. After analyzing the evidence, the trial court was satisfied that the prosecution had to prove the ingredients of the offence of trafficking as defined in section 2(1) of the Act. He was satisfied that indeed what was recovered was narcotic as defined in the Act and that the evidence of PW6 confirmed that to be the case.

30. The trial court then went on to consider whether the offence of trafficking had been proved and had no difficulty in finding this to have

been proved considering the evidence of PW1, PW2, PW3 and PW5 that they found the drug in the boot of the vehicle which had got stuck. It concluded that for that reason, the vehicle was being used to traffic the drug but that there was however no proof of the origin or destination of the drug.

31. The trial court then went about to decide the question whether the appellants could be placed at the scene. The trial court correctly stated that for one to be said to be trafficking, he must be in possession of the item being trafficked. Regarding the 1st and 2nd appellants, the trial court stated:

“...Accused person 2 and accused person 3 avers that they were on a mission to buy goats. They state that this was the first time they were on this mission to buy goats. They however does (sic) not state where in particular they were going to buy these goats from. They were strangers in this area, this being their first day, therefore goes without saying that they must have had a contact in the area. They did not have any. Their mission was definitely fishy. On the other hand, they were travelling by motor cycle. They had not reached their destination, why had they to alight specifically at the gate of Amboseli Park if they were not in this vehicle which had stalled.”

32. The court went on to state:

“The accused avers that they were forced to sign the inventory note the following day subsequent to their arrest. However, the evidence on record shows that the inventory was signed on 4th day of September 2015 and not 5/9/2015. Their statement/evidence is therefore contradicting. I will not find for them. There is overwhelming evidence that the three accused persons were found in actual possession of the drugs produced in court and they were conveying it. Their defence does not rebut the defence of the prosecution I will dismiss them”.

33. The appellants have argued that the trial court’s decision was based on assumption; that they were not found at the scene and that they were arrested far away from the scene. The 1st appellant stated that he was arrested because, according to PW1, he had been informed that the people who had run away were putting on red T-shirt. According to the 1st appellant, this was not sufficient identification for purposes of his arrest. They both argued that they were going to buy goats which the trial magistrate however dismissed.

34. I have considered the appellants’ grounds of appeal and perused the trial court’s record. I have no doubt that the first two questions; whether the plant was bhang and whether it was being trafficked were properly answered by the trial court. Nothing really arises for determination in this appeal on those issues. This is so because the evidence of PW1 PW2 and PW6 is clear that the plant was recovered from the vehicle and that PW6 tested the sample he received from PW5 and concluded that it was cannabis, a drug as defined under section 2 of the Act, The fundamental question is whether the prosecution proved beyond reasonable doubt that the appellants were in possession of the drug.

35. There is no doubt from the record that the appellants were arrested away from the scene. PW1 and PW2 told the court that the appellants ran away from the vehicle which was trafficking bhang. According to PW1, PW2 called and informed him that he had intercepted a motor vehicle and arrested one person but two others had run away towards Namanga. PW1 went after them on motor bike and arrested them. He told the court that PW2 had informed him that those running away wore red T-shirt. However, the fact that he had been told that they had a red T-shirt was only mentioned during cross-examination. He did not state so in his evidence in chief. PW1 never told the court that PW2 had given any description of the persons who were running away. I have also gone through the evidence of PW2. Nowhere in his testimony did he mention that one or all the appellants wore a red T-shirt. He did not tell the court that he had given any of the appellants’ description when he alerted his colleague to go after the people running away.

36. The other troubling issue in the prosecution’s evidence is how far from the scene appellants were arrested. I have gone through the prosecution evidence but it is salient on this. The evidence only mentions that the vehicle was stuck some 500 metres from the gate but that is not where the appellants were arrested. Further, it is not clear whether this is a private road and that no other members of the public were expected to be on that road at the time other than the appellants. This raises the question of whether there was the possibility of other people being on the road. If that was possible how safe was it for the trial court to convict the appellant on such evidence?

37. The learned trial magistrate remarked in his judgment that this was the first time the appellants were using that road. I have not seen this statement anywhere either in the prosecution or defence evidence. From both the prosecution and defence cases as recorded, some difficult question has arisen as to whether the prosecution proved beyond reasonable doubt that the appellants were in possession of the drugs. Possession is a question of fact. One must have in his custody and control the thing he is said to be in possession of.

38. Addressing the issue of being in possession in ***Zainal bin Hamad v Public Prosecutor and another*** [2018] 2 SLR 1119, the Supreme Court of Singapore held court:

“[12] [W]here the Prosecution wishes to prove the fact of possession, it must prove not only that the accused was in possession of the package or the container but also that the accused knew that it contained something, which may later be established to be the shipment of controlled drugs. However, in proving possession, it is not incumbent on the Prosecution to prove that the accused specifically knew that he was in possession of drugs, or even of something that turns out to be contraband, as long as it proves that he was in possession of something and that thing turns out to be the drugs in question.”

39. In ***Adili Chibuike Ejike v Public Prosecutor*** [2019] SGCA 38 Criminal Appeal No 18 of 2017, **Menon, C.J. held:**

“[A]ll that is required in this context of establishing the fact of possession is that the accused person must know of the existence, within his possession, control or custody, of the thing which is later found to be a

controlled drug; it is not necessary that the accused person also knows that the thing was in fact a controlled drug, much less its specific nature.”(emphasis)

40. And in *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 the court again expressly stated at page 34 that in order to prove the fact of possession, the Prosecution had to “prove beyond a reasonable doubt that the accused person not only had physical control over the item but also that the accused person knew or was aware that the item was a controlled drug.

41. From the authorities, the prosecution did not prove that the appellants had in their possession the plant that turned out to be the prohibited drug. The trial court correctly referred to the provision of law that defines the offence as well as a decision that sets the principle of possession. However the court did not attempt to determine whether the prosecution proved that the appellants were in actual possession that is custody and control of the plant that was later confirmed to be a prohibited drug.

42. The prosecution alleged that the appellants were in the vehicle. That was evidence from PW2 only since PW1 was not there when the people allegedly ran away from the vehicle. No description of the people was given and no evidence was given on how far away they were arrested. Even if they had been arrested in the vehicle, the prosecution was still required to prove that they were in custody and control of the drugs.

43. In the circumstances, and for the reasons given above, I find that the Prosecution failed to establish beyond reasonable doubt a key element of the offence of being in possession namely, that the appellants had in their control and custody the plant that turned out to be drugs.

44. Consequently, I allow the appeal, quash the conviction and set aside the sentence. The appellants shall be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Kajiado this 15th day of November 2019.

E. C MWITA

JUDGE