REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 83 OF 2015

MAINA THIONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Mukurweini Principal Magistrates' Court Criminal Case No. 319 of 2015 (Hon. O. Chianda, SRM) on 3rd November, 2015)

JUDGMENT

The appellant was 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**. According to the particulars of the offence, on the 11th day of July, 2015 at about 5:30 hours within Gathea sublocation in Mukurweini subcounty within Nyeri County, the appellant was found trafficking by storage 139 g of cannabis sativa which was not in its medicinal preparation form.

The appellant pleaded not guilty to the charge and therefore his case proceeded to full trial at the end of which the trial court convicted him as charged; he was sentenced to serve 10 years' imprisonment. Being dissatisfied with the conviction and sentence the appellant appealed to this Honourable Court on the following three grounds:

1. The learned magistrate erred in law and in fact in relying on the prosecution evidence that was not cogent enough to justify conviction of the appellant;

2. The learned magistrate erred in law and in fact in convicting the appellant on charges that were not proved to the required standard;

3. The learned magistrate erred both in law and in fact in rejecting the appellant's defence that was not challenged by the prosecution.

The state opposed the appeal and its counsel briefly submitted that the appellant was found in possession of a narcotic drug and which was certified as such by a government analyst. He urged that the appellant's defence was considered and rightfully rejected by the trial court.

It is necessary, and indeed obligatory, for this honourable court to look at the evidence afresh and come to its own conclusions but at the same time bearing in mind that the trial court had the advantage of hearing and seeing the witnesses.

The prosecution case was this: on 10th July, 2015, a security team made up of the chief of Mori location,

Peter Kimari (PW1), the assistant chief of Kanguruwe location, **Joyce Wangui (PW2)** together with corporal **Jackson Muindi (PW4)** and police constable Nganga raided the appellant's home. They found the appellant in his house together with his wife and his son. Corporal Muindi went straight to the appellant's bedroom where he recovered what was alleged to be cannabis sativa in a black polythene bag hidden beneath a mattress. Constable Nganga, on the other hand, found a sachet of the same substance hidden on a sofa seat in the living room.

The officers arrested the appellant and took him to the administration police patrol base. **Police Constable Alex Gitau (PW3)** who too was in the team testified that the appellant declined to sign the inventory of the items recovered from his house. **Corporal Muindi (PW4)** confirmed that indeed he made the recovery of a stone and a sachet of cannabis in the appellant's house. He testified that the Government chemist confirmed that the substance recovered from the appellant's house was cannabis and so he preferred the appropriate charges against the appellant.

In his defence under oath, the appellant simply denied the charge; his wife who also testified in his defence confirmed that indeed her husband was arrested on the material date but denied that the police recovered any cannabis from their house. According to her, **corporal Muindi(PW4)** held a grudge against them hence the arrest and the charges against the appellant.

Without considering the other aspects of the prosecution evidence, there was one glaring omission from the prosecution case which, in my humble view, left the charge against the appellant without any evidentiary basis; the government analyst did not testify and therefore there was no proof that the substance alleged to be cannabis was such a substance. Corporal Muindi testified that he preferred the charges against the appellant after confirmation from the government analyst that the material or substance recovered from the appellant's house was cannabis; however, without the evidence of the government analyst, there was no proof that the substance or material collected or allegedly collected from the appellant's house fell under prohibited drugs under the first schedule of the **Narcotic Drugs and Psychotropic Substances (Control) Act.** Although the investigations officer purported to produce the analyst's report, he was not competent to produce it and for reasons which will become clear in due course, the trial court improperly admitted it in evidence.

The government analyst's evidence would have fallen under the category of expert opinion evidence; this sort of evidence is generally admissible to assist the court in respect of matters which lie outside the experience or understanding of the trial court **(see Folkes v Chadd (1782) 3 Doug KB 157; R v Turner [1975] QB 834, 60 Cr App Rep 80, CA**).

Coming back to the appellant's trial, the decision whether the substance allegedly recovered in the appellant's house was a prohibited drug or not was going to be based on the opinion of an expert who is knowledgeable in the area of analysis of such substances; I suppose it is for this reason that the substance was sent for scientific analysis at the government laboratory. In such circumstances, it is only the expert who analysed the substance that is competent to testify and inform the court how he came to his conclusions. It is only then that the trial court would have formed its own opinion based on the evidence by the government analyst.

It follows that failure to call an expert whose report was not only the foundation of the charge against the appellant but was also the basis of the appellant's conviction was a blatant and serious miscarriage of justice; it was a miscarriage of justice because first, by concluding the trial without the evidence of the expert the court deprived itself of the opportunity to interrogate and satisfy itself of his opinion and, second, the appellant was also denied the opportunity to test the accuracy of the expert's opinion by way of cross-examination.

Section 48 of the **Evidence Act**, **Cap 80** under which opinion of experts is catered for contemplates that the expert must testify; that section provides as follows:

> ***48. Opinions of experts***

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts.

The application of this provision of the law was explained by the Court of Appeal in **Mutonyi versus Republic (1982) KLR 203 at 210 where Potter JA said:**

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.

In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.

2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.

3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

Without calling the expert to testify there is no way the trial court could have been satisfied that it had been established by evidence that the person on whose opinion the charges against the appellant were based was specially skilled in that particular area he held himself out as being competent. Again, without his evidence, it is obvious that there is no way the court could tell the criteria upon which his opinion was based so that the court itself could test the accuracy of his opinion and also form its own independent opinion by the application of the criteria to the facts proved. The investigations officer who purported to produce the report was, for obvious reasons, ill-equipped to do any of the foregoing things; he could also not adduce evidence of facts which he had not ascertained.

Afortiori, according to **section 62** of the Evidence Act, all facts must be proved by oral evidence and **section 63** of the same Act provides further that such evidence must be direct evidence which is defined to include opinion evidence; for better understanding, it is necessary that I reproduce this section here:

63. Oral evidence must be direct

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means —

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

It is therefore obvious that, by admitting the government analyst's report without the analyst himself being present in court and without any explanation why he was not available to produce the report himself and testify to his findings, the trial court flouted **sections 48, 62** and **63 of** the **Evidence Act** to the prejudice of the appellant. In the face of these contraventions, it cannot be concluded that the appellant was accorded a fair trial and more importantly, it is apparent that the offence for which the appellant was convicted was not proved beyond reasonable doubt. His conviction was, in the circumstances, unsafe. Accordingly, I allow his appeal, quash the conviction and set aside the sentence. He is set at liberty unless he is, for any other reason, lawfully held.

Dated, signed and delivered in open court this 13th day of January, 2017

Ngaah Jairus

JUDGE