



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 57 OF 2016

MAKORI SAMUEL MARANDO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. P. N. Maina, Principal Magistrate in Kehancha Principal Magistrate's Court Criminal Case No. 1105 of 2015 delivered on 27/10/2016)

JUDGMENT

1. MAKORI SAMUEL MARANDO, the Appellant herein, faced the charge of trafficking in narcotics drugs contrary to **Section 4(1)** of the **Narcotic Drugs and Psychotropic Substances Control Act (the Act)**. The particulars of the offence were that: -

“On the 18th day of December 2014 at Isebania village, Isebania Location of Kuria West Sub County within Migori County trafficked by transporting Cannabis Sativa (bhang) to wit 124Kgs of street value kshs. 1240,000/= with motor vehicle Registration Number KAP 389 F- Toyota 110 White in colour in contravention of the provision of the said act.”

2. On denying the charge, the prosecution availed four witnesses in support of the case. They were **Micah Makori Ondieki** who was the owner of the motor vehicle registration number KAP 389F make Toyota 100. He testified as **PW1**. **No. 90998 PC Rasto Wanjala** from Isebania Police Station testified as **PW2**. **PW3** was **No. 87407 PC Aron Kosgey** from Kehancha Police Station and **No. 87004 PC Reuben Nyongesa** of the Anti-Narcotics Unit in Isebania testified as **PW4**.

3. The brief facts of the case were that PW1 who owned the motor vehicle registration number KAP 389F make Toyota 100 (hereinafter referred to as **‘the vehicle’**) had given the vehicle to the appellant herein to operate it as a taxi at Isebania town. PW1 hailed and lived in Kisii town. The appellant then used to remit the proceeds of the business to PW1 through the MPESA service.

4. PW1 was also undertaking further studies at the Kisii University and was due to graduate with a Master’s in Education (EAPE) on 19/12/2014 at the University’s Main Campus Pavilion. In the course of the day on 18/12/2014 PW1 called the appellant and requested him to avail the vehicle to him on 19/12/2014 so as to enable PW1 carry his family to the graduation ceremony. Although the appellant informed PW1 that the vehicle had been booked by a customer for use on the said 19/12/2014, the appellant nevertheless agreed to avail the vehicle very early on 19/12/2014. The vehicle was however not availed as agreed and since the appellant could not be reached on phone, PW1 made alternative arrangements and proceeded on with his graduation ceremony. In the evening of 19/12/2014 PW1 again tried to reach the appellant by phone but the phone was still off.

5. PW1 then reported the matter at the Kisii Central Police Station. He was referred to the CID offices where the police eventually managed to get the appellant over the phone who told them that he was unwell at Migori town. The police however detected that the appellant was at Manga area. The police then liaised with their colleagues in Isebania and were informed that the vehicle had been intercepted with substances suspected to be *cannabis sativa* but the occupants had fled and that the vehicle was detained at the Isebania Police Station. PW1 was then referred there and he managed to report there the following day; 20/12/2014.

6. As investigations went on, PW1 was given an Order of Arrest of the appellant which he took to the police at the Kisii Police Station, Marani Police Station and the Manga AP Post. The police also obtained a Warrant of Arrest against the appellant. The appellant was arrested around one year later; that is on 23/12/2015 and was arraigned before court on 28/12/2015.

7. PW2 and PW3 were on mobile patrol on 18/12/2014 at around 10:30pm while at around Isebania Boys Secondary School they spotted the vehicle driven from a feeder road and was about to join the main Migori – Isebania road. On sensing the presence of the police van the vehicle stopped and reversed back into the feeder road. The police van also stopped. The vehicle was then hurriedly driven towards Isebania town and the police gave chase. When the police managed to catch up with the vehicle, the same had been abandoned by the roadside and no one was inside it. The police inspected the vehicle and saw four bundles of dried plants. The vehicle was then towed to the Isebania Police Station and the matter was reported to the Anti-Narcotics Unit. PW4 took over the matter. He weighed the four bales of the dry plant material and found that they had a total weight of 154 Kgs with a street value of Kshs. 1,240,000/=. He then referred some samples of the dry matter for analysis by the Government Chemist and the same was confirmed to be *cannabis sativa*. A report was produced in court. PW4 also issued a seizure notice over the vehicle. PW4 then preferred the charge against the appellant when he was arrested around a year later.

8. At the close of the prosecution's case, the appellant was placed on his defence where he opted to give a sworn defence. The Appellant denied the charge and alleged that he was not the driver of the vehicle but a mechanic who had repaired the vehicle sometimes back and had been loaned some money by PW1 and that the evidence of the MPESA transactions were towards the refund of the loan. He contended that he was being framed because of the debt. He also stated that on the material day he was at his home in Kisii and not at Isebania.

9. The Appellant was found guilty as charged and accordingly convicted. He was sentenced to a fine of Kshs. 3,270,000/= in default to serve one year in prison and also to a further term of 10 years' imprisonment.

10. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal and preferred five grounds which were contained in the Petition of Appeal filed on 02/11/2016. The grounds were as follows: 1. **THAT I, pleaded not guilty to the charge herein**

2. THAT, the trial court erred in both law and facts by meting a sentence which was excessive and harsh in the circumstances.

3. THAT, the trial court erred in both law and facts by conducting this case on a defective charge sheet.

4. THAT, the trial court erred in both law and facts by failing to consider my defence and mitigation.

5. THAT, the trial court erred in both law and facts by failing to consider that the prosecution had failed to proof their case to required standard, since the whole case had a lot of contradictions.

11. At the hearing of the appeal, the appellant relied on his filed written submissions and challenged the

lower court findings on several grounds including that there was no evidence that he was an employee of PW1, that the vehicle was not proved to be a taxi, that he was not arrested at the scene or with the vehicle neither was the vehicle dusted for fingerprints, the investigations were inadequate and that he was arrested a year later. The prosecution relied on the record.

12. As this is the Appellant's first appeal, the duty of this court is well settled. It was so held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

13. I have carefully perused the lower court record including the judgment and the appeal before this Court together with the submissions. I will therefore deal with the grounds in this appeal more or less together. As to whether the charge was defective, no submissions were tendered although that was one of the grounds. I will therefore deal with it. **Section 2 of the Narcotic and Psychotropic Substances Control Act No. 4 of 1994** (hereinafter referred to as '**the Act**') defines '**Trafficking**' as follows:

"Trafficking means the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof."

14. This very issue of the meaning and implication of the word '**trafficking**' in the Act was comprehensively dealt with by the Court of Appeal in the case of **Madline Akoth Barasa & Ano. vs. Republic (2007) eKLR** where my Lordships stated as follows: -

".....It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance," In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.....'

15. Likewise, in the case of **Wanjiku vs. Republic (2002) 1 KLR 825** Learned **Justice Onyancha** (as he then was) dealt with the said issue in the following manner:

"...It is therefore logical and indeed sensible that a charge of trafficking should clearly specify the exact kind of trafficking to enable not only prosecution to know what evidence to lead to prove the charge but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing.

.... The purpose of this is both obvious and fundamental. It is that the accused has a right to know the charge he is facing to enable him to fully prepare the defence. Failure to specify which one or more of the specific trafficking is charge is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. It is also possible that failure to specify the actual act as aforesaid may as well possibly lead or mislead the trial court to convict the accused on the more serious charge of trafficking as defined under Section 4 of the Act instead of rightly convicting on a lesser or cognate offence under Section 5 or 6 of the Act, with the dire consequences in terms of the type of sentence that is done under section 4 of the Act.....'

16. I have reproduced the charge and its particulars elsewhere above in this appeal. The charge sheet was very specific on the form of trafficking in this case. It was '**transporting**' cannabis sativa using the vehicle. The charge sheet was hence not defective.

17. On the relationship between the appellant and PW1, it is not in doubt that the two were known to each other. PW1 on one hand stated that he had given the vehicle to the appellant to operate as a taxi in Isebania town whereas the appellant on the other hand insisted that he was a mechanic to the vehicle and was not even at Isebania town on the material day. Evidence was tendered before court that PW1 was the registered owner of the vehicle. There was however no evidence that PW1 had given the vehicle to the appellant and that the appellant operated it as a taxi except only what PW1 stated. If the vehicle used to operate at Isebania town as a taxi, then the police ought to have availed at least a fellow taxi operator or a customer to confirm that indeed the vehicle used to operate from the town as such and was usually in the hands of the appellant. That did not however happen. The only alleged evidence to that end were the MPESA statements. I have keenly looked at the statements. The same are clearly written across not to be used in court or by the police. The reason is however not given. That is a clear caveat. Despite such a caveat, the statements were produced in court and were relied upon by the trial court to find a conviction. The police did not endeavour to get proper statements from the service provider despite the fact that it took close to a year to prefer the charge against the appellant. I therefore find that the statements were improperly used as evidence and are hereby expunged from the record.

18. But even if the said statements would have been so properly obtained from the service provider still there was no evidence to show that the money which the appellant used to send to PW1 was not on account of the loan repayment as alluded to by the appellant. The explanation given by the appellant could not just be wished away without contrary proof.

19. Further, having realized that the occupant(s) of the vehicle had disappeared without trace, the first thing the police were to do was to dust the vehicle for possible fingerprints especially on the part of the driver. There is no evidence that the vehicle had been interfered with such as not to make that exercise possible. The link was basically missing.

20. The evidence on record therefore does not completely rule out the defence tendered by the appellant. That defence indeed casts doubt into the prosecution's case. Further, it is instructive to note that the appellant stated that on the material day he was at home in Manga area in Kisii and not at Isebania town. That evidence was confirmed by PW1 when he stated that the police on tracking the appellant's phone traced it to the very Manga area.

21. In as much as the issue of the drugs in our society has become an eye sore and has caused untold suffering and devastation into innocent lives of the users especially our youths, that does not lessen the duty of the prosecution to prove its case beyond any reasonable doubt. I am afraid that the required standard of proof was not reached in the circumstances of this case. This Court therefore finds that the case was not proved as required in law.

22. Consequently, the conviction cannot stand. It is hereby quashed and the sentence set-aside. The appellant is hereby set at liberty except otherwise lawfully held.

23. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 05th day of April 2017.

A. C. MRIMA

JUDGE