



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. 186 OF 2016**

**(CONSOLIDATED WITH CRA NO. 185 OF 2016 AND CRA NO. 187 OF 2016)**

**(TRAFFICKING IN NARCOTIC DRUG & PSYCHOTROPIC SUBSTANCES)**

**(CORAM: J.A. MAKAU – J.)**

**ANDREW ONYANGU MATENDECHERE .....1<sup>ST</sup> APPELLANT**

**DAVID EBIOKI NGWAMBE ..... 2<sup>ND</sup> APPELLANT**

**EVANS OLUBA SHILINGI ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of Hon. M. Obiero Principal Magistrate, Bondo delivered on 16<sup>th</sup> day of December 2016 in the Principal Magistrate Court at Bondo)***

**JUDGMENT**

1. The Appellants, **ANDREW ONYANGU MATENDECHERE** herein the 1<sup>st</sup> Appellant, **DAVID EBIOKI NGWAMBE**, herein the 2<sup>nd</sup> Appellant and **EVANS OLUBA SHILINGI**, the 3<sup>rd</sup> Appellant were the first, Second and third Accused in the Lower Court. They were jointly charged with the offence of **Trafficking in Narcotic Drug contrary to Section 4 (a) of the Narcotic and Psychotropic substances (Control) Act No. 4 of 1994**. The particulars of the charge are that on the 13<sup>th</sup> day of July 2015 at 11.00 a.m. at Kibuye Village of Barkowino Sub-Location in Bondo Sub-County, within Siaya County jointly with others not before Court trafficked Narcotic Drugs, namely cannabis to wit 112 Kgs with a Market value of KShs.224,000/= by transporting in a Motor Vehicle Registration Number KBV 178U make Toyota Probox White in colour in contravention of the said provision. The three Appellants also faced an alternative charge of being in possession of Narcotic Drug contrary to **Section 3(1) and 3(2) of the Narcotics and Psychotropic substances (Control) Act Number 4 of 1994**. The particulars of the alternative charge are that on the 13<sup>th</sup> day of July 2015 at 11.00 a.m. at Kibuye Village of Barkowino Sub-Location in Bondo Sub-County within Siaya County jointly with others not before Court in possession of Narcotic Drugs namely cannabis to wit 112 Kgs with a market value of KShs.224,000/= by transporting in a Motor Vehicle Registration Number KBV 178U make Toyota Probox White in colour in contravention of the said provision.

2. After full hearing the Appellants were acquitted of the main charge but convicted on the alternative

charge and each sentenced to serve 9 years imprisonment.

3. Aggrieved by the conviction and sentence each of the Appellant preferred separate Appeal being as follows. The 1<sup>st</sup> Appellant's Petition of appeal raised 5 grounds of Appeal as follows:-

- a. That the Learned trial Magistrate erred in law and in fact by ignoring glaring contradictions of the Prosecution case.***
- b. That the Learned trial Magistrate erred in law and fact by failing to find the Prosecution did not prove all the ingredients of the charges before it.***
- c. That the Learned trial Magistrate erred in law and fact by failing to find to find the Investigating Officer did shoddy investigation.***
- d. That the Learned trial Magistrate erred in law and in fact by failing to hold that Investigating Officer did not keep the sanctity of the exhibits.***
- e. That the Learned trial Magistrate erred in law and in fact by dislodging the defence of alibi.***

The 2<sup>nd</sup> Appellant's petition of appeal raised seven (7) grounds of appeal being as follows:-

- a. That the Learned trial Magistrate erred in law and in fact by ignoring glaring contradictions of the prosecution case.***
- b. That the Learned trial Magistrate erred in Law and fact by failing to find the prosecution did not prove all the ingredients of the charges before it.***
- c. That the Learned trial Magistrate erred in law and fact by failing to find the investigating officer did shoddy investigation.***
- d. The Learned trial Magistrate erred in law and fact by failing to hold that investigating officer did not keep the sanctity of the exhibits.***
- e. That the Learned trial Magistrate erred in law and in fact by dislodging the defence of alibi.***
- f. That the Learned trial Magistrate erred in law and in fact by failing to appreciate the production of defence exhibit was proper and procedural.***
- g. That the Honourable Court did hand down excessive sentence.***

The 3<sup>rd</sup> Appellant Petition of Appeal raised 5 grounds of Appeal being as follows:-

- a. That the Learned trial Magistrate erred in law and fact by relying on unpredictable witnesses to find that the Prosecution had proved a prima facie case against the Appellant.***
- b. That the Learned trial Magistrate erred in law and fact by failing to give the defence due consideration.***
- c. That the Learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant hence misled himself during the trial.***
- d. The Learned trial Magistrate erred in law and fact in relying on Prosecution's evidence which was mated with fabrications and contradictions.***
- e. That the Appellant cannot recall all that transverse during the trial hence pray for trial***

***proceedings to adduce more grounds hence order for habeas corpus.***

4. I am the first appellate court and as expected of me I have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISAAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

***“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***

***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 finding and conclusion; it must make its own findings and draw its own 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 (See Peters Vs. Sunday Post, (1958) EA 424)'***

5. The Prosecution case is contained in the record of Appeal and I need not reproduce the same, however I shall make a brief summary of the prosecution case and the defence.

6. The Prosecution case is as follows:- that on 13<sup>th</sup> July 2015 at 11.20 a.m. PW1 No.22256, Cpl. Matala Shem Luke while at Bondo Sub-County Administration Police Office, he received information from Jackson Otieno Mongo, instructing him to look for another officer so that they can be armed to accompany him with the District Commissioner Mr. Akach (PW4) saying he had received intelligence report that there was an offence being committed within Kibuye Village within Bondo-Sub-County. that PW1, while armed with Michael Kimuri, they accompanied Mr. Jackton Mango and the D.C. Mr. Akach (PW4) and proceeded to Kibuye Village. On arrival, at one homestead, they intercepted four (4) suspects at the said homestead. Two of the suspects ran away on seeing PW1 and his team while they managed to arrest two who had a Probox motor vehicle registration No. KBU 178U white in colour, that inside the vehicle there were three bags at the rear seat and on the ground, there were other 3 bags next to a motor cycle Registration number KMCT 507W, red in colour, make Bajaj. The two suspects were unable to explain why the other two ran away nor could they tell who the owner of the home was. The two stated one of them had come from Busia whereas the other had come from Butere-Mumias. Mr. Akach (PW4), subsequently conducted officers from the scene of crime from Siaya, who came and took photographs at the scene.

7. PW1 and the Officers at the scene, proceeded to Bondo Police Station where the exhibits were confined and received, the suspects booked and witnesses recorded their statements. The bags were checked and inside noted they were carrying bhang. PW1 produced the six bags as exhibits MFI 1 (a) – (f). PW1 identified photographs in respect of motor vehicle registration No. KBU 178U white in colour as MFI 2 (a), photograph show motor vehicle and the bags on ground and one suspect standing MFI 2 (b), the photograph showing three bags and contents on ground, two suspects standing and a police officer next to them MFI, 2 (c) and 4<sup>th</sup> photograph showing right side view of the vehicle with its door open, inside at the back seat, with two bags as exhibit-MFI 2 (d) PW1 stated the suspects they arrested were Matendechere and David Ngwabe.

8. That PW6, Richard Kimutai Langat, Government Analyst, working in the Government Chemist based at Kisumu gazetted Officer vide notice number 1873/18/3/2015 testified that on 15/7/2015, he received Police exhibit memo from C.I.D. Bondo Cr. 6B1/108/2015 under escort of Linus Musa (PW9) from

C.I.D. Bondo in the name of the accused David and Andrew. PW6 marked the memo K454 2015 which was forwarding in 6 gunny bags marked C.I.D. Bondo Cr. 6B1/108/2015 with the names of the two accused persons, all containing dry plant materials weighing 112 kilograms. PW6 was requested to ascertain whether the plant material in gunny bags, was bhang or cannabis sativa. PW6 examined the materials physically, chemically and instrumentally and found out that all of them were cannabis which is included in the 1<sup>st</sup> schedule of the Narcotic Drugs. Handed his report on 15.7.2015, signed the report and produced it as exhibit 4 and the exhibit memo as exhibit memo MFI 5.

9. PW7, No. 86440 P.C. Douglas Wamalwa of the Scene of Crime on instructions of P.C. Musa (PW6) of C.I.D. Bondo proceeded to Kibuye Village within Bondo on 13.7.2015 at about 2.00 p.m. where there was motor vehicle Registration number KBU 178U Probox by make and took four photographs of the scene being a an officer gazetted under gazette No. 217/28/12/2012. He produced the photographs as exhibits 2(a)-(d) 1<sup>st</sup> being general view of the motor vehicle, 2<sup>nd</sup> being general rear view of the motor vehicle with 3 sacks, 3<sup>rd</sup> being general rear closer view of the motor vehicle and of 4<sup>th</sup> bearing general side view of the motor vehicle. PW7 produced certificate as exhibit 6.

10. PW8, number 58509 Cpl Clety Kurgat, based at Kisumu International Airport, dealing with anti-narcotics duties, upon receiving report that some narcotics had been intercepted at Bondo, proceeded to Bondo met the OCS Bondo, who informed him the matter had been taken over by DCIO he went to DCIO Office from where he was briefed and made an inventory, recording six bags of bhang, motor vehicle registration number KBU 178U, motor cycle Reg. No. KMCT 507W. as the inventory was witnessed by Police Officers and accused persons but only one suspect signed. PW8 produced the inventory as exhibit 7, seizure notice exhibit 8 and made a record of seizure of the substance being cannabis sativa, produced as exhibit 9 and made a notice of intention to tender records in evidence, produced as exhibit 10.

11. PW9, number 101915 PC Linus Omuse, the investigating officer conducted the scene of crime personnel on 13.7.2015 at 1400 hour and directed them to proceed to the scene of crime but he was later instructed by the DCIO to take over the investigation . He was handed over 6 bags of plant material suspected to be bhang, one white Probox registration No. KBU 178U, motor cycle Reg. No. KMCT 507W and two suspects namely Andrew Matendechere and David Ebioki PW9 started investigation by conducting the anti-narcotics personnel Kisumu who came and did the weighing of the packed material and found them to weigh 112 kilograms which was done in presence of the two suspects and the people who were at the scene . The package and labeling of the plant material was done and seizure documents prepared, signed by the 2<sup>nd</sup> Appellant on 15.7.2015. PW9 prepared the exhibit memo and forwarded the six sacks to the Government Chemist in Kisumu for analysis. That on the same day in the evening PW9 found another suspect had been arrested, thus the 3<sup>rd</sup> Appellant by Cpl. Dennis (PW4 and APC Kimungi), who explained PW9 he was amongst the suspects who had escaped during the arrest. PW9 further stated that on 22.7.2015 he proceeded to KRA Kisumu to confirm the ownership of the vehicle and found that it belonged to David Ebioki, the 2<sup>nd</sup> Appellant, producing letter from KRA on ownership of M/V Reg. No. KBU 178U as exhibit 11 and copy of the record as exhibit 12, Exhibit Memo of the photographs as exhibit 5 and confirmed that he received a report from Government Analyst confirming the plant material was cannabis sativa. He stated the other items thus, six bags, the vehicle and motor cycle were at the Police Station. Later PW9 at Bondo Police Station produced 6 Bags of bhang as exhibit (a) to (f) motor cycle Registration No. KMCT 507 W, as exhibit 3, motor vehicle Reg. No. KBU 178U exhibit 13, ignition keys to the motor vehicle as exhibit 14.

12. The 1<sup>st</sup> Appellant Andrew Anyangu Matendechere gave a defence of alibi. He stated that on 13.7.2015 he left Busia at 11.00 a.m. and went to Bumala from where he and the 2<sup>nd</sup> Appellant left at 11.50 a.m. proceeding to Bondo, however at the junction near Bondo station, they found Administration Police Officers who stopped them, interrogated them and they told them they were going to sale milk and fruits. That upon search, the Police told the Appellants that the milk was illegal since it was from Uganda. That one of the Police Officers entered into the Appellant's car and told them to talk to their boss and give him some money to which they declined. That upon refusal they were taken to D.C's Office at which place some vehicles came, offloading some sacks from the pickup, some of the sacks

which were loaded into Appellant's vehicle and others were next to the car. That the milk and fruits were removed from the Appellants vehicle, photographs of the vehicle and the items were taken. That the 1<sup>st</sup> Appellant saw news reporters and the County Commissioner. The Appellant stated that he was told by Officers that AP Boss wanted to frame the Appellants and as he was told so by Cpl. Matale (PW1) that the County Commissioner advised the meeting and they left. The Appellants were taken to Police vehicle, meeting recorded and that the 1<sup>st</sup> Appellant came to learn the same was in the news on 14.5.2016 at 7.00 p.m. and 4.00 p.m. in the Citizen Television. That he found the clip from his friends laptop and watched it. That after the meeting the 1<sup>st</sup> Appellant and second Appellant were put in a Police Vehicle and taken to a village and one was able to see behind within Kibuye and taken to a certain home where they found a child and a motor cycle. That the luggage in the pickup was removed and put into the Appellants vehicle and others next to the vehicle and photographs were taken and then returned to Bondo Police Station. The Appellants were booked and he stated he can identify the one in the court from which he could see the County Commissioner addressing the meeting, that he could see himself and one of the Police Officers who testified as marked DMFI-1. He stated that he was later charged with this offence.

13. The 2<sup>nd</sup> Appellant denied the Commission of the offence and gave a defence of Alibi. He stated that on 13.7.2015 he was at Bumala. That he and the 1<sup>st</sup> Appellant left Bumala at 11.55 a.m. He stated he could remember the time as he transacted an Mpesa transaction at 11.50 a.m. depositing KShs.730 . That he went to Kisumu and was given the Mpesa transaction sheet, DMFI-2. That on approaching Bondo, they found administration Police Officers, who stopped them as they stopped other vehicles, at the junction along Siaya-Kisumu road. That in the vehicle they had fruits and boxes of packets of milk. That Police told them the milk was illegal, that they were travelling in M/V Reg. No. KBU 178U white in colour, Toyota Probox. That one of the Police Officer entered into the Appellants vehicle telling them they shall be framed with serious offence, telling them to give money to which they refused. That they were taken to DC's Office from where Cpl. Matale (PW1) talked to the Acting Deputy County Commissioner at 12.40 p.m. and at the same time the 2<sup>nd</sup> Appellant went and made a deposit at Mpesa at DC's Office within a shop at the DC's place. That the Acting Sub-County Commissioner called News Reporters, while bags were removed from the Pickup and Polythene papers spread on the Appellants vehicle and put some items on the Polythene, that the item were bhang. The Appellants were then handcuffed and framed they were found transporting bhang. That Press briefing was done. That the news was later aired in the T.V. The Appellant stated he saw the clip which was recorded within the DC's compound and that he was able to see his image. That after the Press briefing the bhang was packed into the bags, loaded on the pickup, Appellants placed in Land cruiser, taken to Kibuye , where PW1 and PW5 joined them at the scene. Then the luggage was offloaded from the Pick-up, photograph taken and they left Kibuye at 3.00 p.m. for Bondo Police Station. That at Bondo Police Station they were booked, the 2<sup>nd</sup> Appellant stated the Investigating Officer is P.C. Omuse (PW9). That 2<sup>nd</sup> Appellant stated at 11.30 a.m. he was in Bumala and that the Mpesa agent can confirm and that 12.30 p.m. he was at DC's compound in Bondo.

14. The 3<sup>rd</sup> Appellant denied the offence in his brief statement of defence. He stated that he was arrested on the 15<sup>th</sup> day of July 2015 when he had gone to Bondo Police Station after receiving information that some people from Busia, had been arrested. He denied that he was at Kibuye on 13.7.2015. He denied that he was together with the Appellants.

15. DW4, Fredrick Otieno Okello, testified that he operates an Mpesa business and also sells electrical, under business name of Ronimor Enterprises for the last 5 years. He produced the licence for 2015. He produced the original permit from 2014, D exhibit 1, and copy permit for 2015, D exhibit 2. He stated that he knows the 2<sup>nd</sup> Appellant for more than three years. He testified that he has an Mpesa receipt for David Mbioki Phone No. 0725070995 in respect of 13.7.2015 over a transaction of deposit of KShs.730/= at 11.52 a.m. That from Bumala to Bondo is a distance which takes about 1 ½ hours. DW4 averred he could remember on the material date David was at his shop for him to have transacted he must have been there and that David saw him, that after one hour he was told the 2<sup>nd</sup> Appellant had been arrested at Bondo, that at 1.00 p.m. He stated the extract is from Safaricom and produced the same as exhibit D exhibit 3.

16. Mr. Juma, Learned Advocate, appeared for the 1<sup>st</sup> and 3<sup>rd</sup> Appellants, whereas Mr. Wakla appeared for the 2<sup>nd</sup> Appellant and Mr. Ombati, Learned State Counsel, jointly with M/s Maurine Odumba appeared for the State.

17. The Appellants Counsel filed separate written submissions which each relied upon and highlighted on the same. Whereas the State Counsel relied on oral submissions. The Counsel for the Appellants as well as the State Counsel filed several authorities in support of their respective opposing positions. I have very carefully considered the written submissions, highlighting on the written submissions by the Appellants' Counsel, their authorities as well as oral submissions by the State Counsel in oppositions to the Appellants' Appeal as well as the authorities in support.

18. Mr. Juma, Learned Advocate, for the 1<sup>st</sup> and 3<sup>rd</sup> Appellant contends that the prosecution case is riddled with contradictions, has glaring gaps in the investigation, that exhibits were handled in a shoddy manner, that defence of alibi was not appreciated by the trial Court, that the Court erred in finding the 3<sup>rd</sup> Appellant was properly identified. Mr. Wakla for the 2<sup>nd</sup> Appellant on his part faulted the Prosecution's case from three facts, that the prosecution's case was insufficient, contradictory and inconsistent to sustain the alternative charge, that further of the trial Court failed to consider the 2<sup>nd</sup> Appellant's defence of alibi and lastly the sentence was based on extraneous matters, hence excessive.

19. The defence contend that the Prosecution case was insufficient, contradictory and inconsistent, that it could not sustain a conviction. The state on its part while conceding that there were some inconsistencies and some contradictions, it urged such contradictions and inconsistencies were so minor that they do not go to the root of their case, urging where contradiction are minor they ought to be rejected so long as they do not go to the truthfulness of the witnesses' evidence.

20. In **Erick Onyango Ondeng V. R. CRA No. 5 of 2013 (2014) eKLR the Court of Appeal** addressed itself as follows:-

***“Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial Court, after hearing all the evidence accepted that the offence was committed at “about 7 pm” in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in TWEHANGANE AFLRED VS UGANDA, Crim. App. No. 139 of 2001 [2003] UGCA, 6 it is not every contradiction that warrants rejection of evidence. As the Court put it:***

***“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”***

21. In the instant case are their grave contradictions and inconsistencies? In this case it is not clear how the Police Officers were able to proceed to the scene of the crime as the lead witness PW2 never took the Police Officers and Administration to the scene. PW1 never informed the Court who showed them the direction. PW1 never mentioned PW2 being at the scene. PW2 stated he gave PW5 directions to the scene, yet in cross-examination he stated he met the convey on the road a fact that was not corroborated by PW5, whereas in cross-examination, PW5 stated PW2 led them to the scene, a fact disowned by PW2. PW3 did not indicate how they located the home and in cross-examination he admitted, PW2 is not mentioned amongst the people who were at scene in his statement. PW4 did not state who directed them to the scene and admitted in his statement he did not mention PW2. The role played by PW9 as investigating Officer is not clear as his name does not appear in any of the exhibits relied upon by the prosecution. It is not shown whether at any one time, he was present where investigation was being carried. His name does not appear in the investigation Diary. He recorded his statement after three witnesses had testified in Court. He never directed events at the scene of crime or at the Police Station. He did not have control of the exhibits nor kept them in custody. Anyone had access to the exhibits without his knowledge and control. PW8 made inventory at DCIO Officer at Bondo Police Station in

absence of PW9 and without his authority PW9 never gave the name of the anti-narcotic personnel who he called from Kisumu nor did he state he was an **“authorized officer.”** He claimed investigation were done in his presence yet he could not produce any evidence that he signed any document. The Arresting Officer did not state to whom they handed the exhibits to at the DCIO’s Office so as to ensure the exhibits were not tampered with. The inventory was not prepared by the actual officer who seized the substances, raising questions why it was made by the seizing officer and not at the scene. The seized motor vehicle was strangely not signed for by the Investigating Officer. That the record of seized substance is not signed by the officer who prepared it and further there is no evidence it was prepared by him. That the notice of intention to tender record is not signed nor was it done in presence of the investigation officer. That the officer who prepared the document did not prove to the required standard that he is **“authorized officer”** or competent as per the requirement of the Act. No evidence was adduced to show that the recordings were done as required by law, which goes to the root of the charge.

22. PW5, stated he was informed by PW2, the bhang was being offloaded at the home of Potters Odhiambo Obia, whereas PW2 said he was told the bhang was being offloaded at the home Obiero Abiya. That the home in question was not of the Appellants and the owner of the home was not traced nor called as a witness PW1 in his evidence stated they intercepted the suspects at the homestead but two of the suspects ran on seeing them while they arrested two, PW2 stated on reaching the home they found four suspects but managed to arrest two and two of them escaped. PW3 testified at certain homestead they found two occupants inside a Probox KBU 178U and other two male suspects escaped on seeing them. PW4 stated on arrival at the scene they managed to arrest two male adults but two managed to escape while PW5 testified on arrival they found two suspects.

23. From the contradictions and inconsistencies pointed out by the defence, I find the Appellants were able to pin point the contradictions and inconsistencies which dent the Prosecution’s case. The defence did not only point out the inconsistencies and contradictions but that the Prosecution’s evidence was insufficient. There are grave contradictions and inconsistencies and no explanation has been given for such contradictions and inconsistencies. I find the Prosecution’s evidence insufficient to sustain the charge as it lends credence to the defence case, that they were stopped at the Siaya-Bondo junction carrying milk and fruits and that they did not have bhang, that they saw it at the D.C’s Office. Secondly I find that it would have been daring of the Appellants to go to someone’s home, whose relationship the Prosecution did not bother to explore, the Appellants being residents of Busia and on broad day time carrying 6 bags of bhang, which the Prosecution did not bother to explain how the 6 bags could fit in a Probox with 4 passengers and start offloading the bags of bhang from 10.00 a.m. for 1 ½ hours. It is not normal human behaviour for someone carrying bags of bhang to offload six bags of bhang for 1 ½ hours in broad day time or engage in such criminal activities within such abandon and carefree attitude. I find that the Prosecution did not adduce sufficient evidence to connect the Appellants with possession of the narcotics drugs at the purported homestead.

24. **Section 74A (1) of the Act** requires that the dry substance be weighed by an authorized officer before samples are released to the Government Analyst for analysis. In this case PW9 conducted Anti-Narcotics Personnel in Kisumu, who came and did weighing of the Plant material and found the same to be 112 kilograms. The weighing was done in presence of the two suspects and the people present. PW8 prepared the exhibit marked and forwarded the six sacks to Government chemist for analysis.

**Section 74 (a) provides:-**

***“(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorized officers”) shall in the presence of practicable:-***

***(a) the person intended to be charged in relation to the drugs (in this section referred to as “the accused persons”);***

***(b) a designated analyst;***

*(c) the advocate (if any) representing the accused person; and*

*(d) the analyst, if any, appointed by the accused person (in this section referred to as “the other analyst”) weigh the whole amount seized and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analyzing and identifying the same.”*

25. PW8 in his evidence did not adduce any evidence nor he did record anywhere that the drugs were weighed in his presence and that of the Appellants. **Section 74 (A)** is specific that the authorized Officer do take part in the exercise of the weighing, it is therefore expected of the authorized officer, who weighed the drugs to specifically state so. **Section 74 A** is specific and provides that the weighing of the drugs be done by an “**Authorized Officer**” who is authorized Officer in terms of the Act.

26. **Section 86 of the Act** provides the answer as it provides:

*“(1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.*

*“(2) In this section “proper officer) means the officer authorized by the Minister by notification in the Gazette for the purposes of this section.*

Under the aforementioned section “**Proper Officer**” means the Officer authorized by the Ministry by notifications in the Gazette for the purposes of this section.

27. PW8, No. 58509 Cpl. Clety Kurgat, introduced himself as based at Kisumu International Airport and that he performs Anti-Narcotics duties which duties involved in detecting Narcotic drugs. PW8 travelled to Bondo Police Station and prepared inventory exhibit 7. Seizure Notice exhibit 8, record of seizure substance exhibit 9 and Notice of intention to tender records exhibits 10. PW8 in his evidence and that of PW9, none of them provided any evidence to the Court that they were gazetted Officers nor could they provide any evidence in writing that any of them was an Authorized Officer to carry out the exercise of weighing the substance and could release the samples to Government analyst for analysis.

28. The charge sheet states that the Appellants were jointly found with others not before Court in possession of Narcotics drugs namely Cannabis to wit 112 kg with market value of KShs 224,000/= by transporting it in a m/v Reg. No. KBU 178U make Toyota Probox white in clear in contravention of Section 3 (1) and 3(2) of the Narcotic Psychotropics substances (Control) Act 1994. The Prosecution in their evidence did not attempt to demonstrate how they arrived at the value of KShs.224,000/=. That save for the figure of KShs.224,000/= being in the charge sheet no single witness talked about the value of the drug upon which the sentence could have been based.

29. In **Kolonger V Republic (2005) KLR**, the **Court of Appeal** held that there is no express provisions in the Act as to how to calculate the value of the prohibited drugs except **Section 86 of the Act**. In that case the Court accepted the evidence of the “**Proper Officer**” or “**Authorized Officer**” who gave the value based on intelligence and his associations with drug addicts. After considering the issue of value of the drugs the Court of Appeal said:-

*“The solution therefore in our view, where the trial Court is faced with scanty material on valuation, is not to throw one’s hands and dismiss the valuation, but to do their best to find the willing seller willing buyer price, or simply the market value.”*

30. In the instant case, the prosecution did not attempt to ascertain how much the street value or market value was save for what was stated in the charge sheet.

31. I find that this case squarely falls within the decision in **Hamoyan Khan V R CRA 159/2000** where

**the Court of Appeal** allowed an appeal on the basis that no evidence was adduced at the trial as to the value of the drugs upon which the sentence was pegged and the sentence was therefore invalid. In the said case the Court held thus:-

***“There was no evidence adduced at the trial as to the value of the heroin and upon which the sentence of KSh.39 million or in default one year imprisonment could be based. The value of the heroin such in the charge sheet is by itself no evidence as to the value of the heroin the sentence imposed in the report invalid unfortunately the Learned Judge of the superior Court did not notice the necessity”***

32. I find that it was also the duty of the Authorized Officer to take samples of the drugs and send them to the Government Analyst for investigation but not PW9, who claimed he was the investigating Officer. PW9 claimed to have prepared the exhibit memo and forwarded the 6 sacks to the Government Chemist, Kisumu for analysis. The exhibit Memo exhibit 5 do not indicate who carried out the exercise as it bears the stamp of Divisional CID Officer Bondo.

33. PW9 the Investigating Officer did not take possession of the seized plant material immediately as per PW1 as the exhibits were taken to Bondo DCIO's Office. PW8, when he came to enquire on the exhibits, the OCS Bondo told him, that the matter had been taken over by the DCIO. PW8, saw DCIO who told him that the DCIO had not made any inventory. PW8 made the inventory, recording 6 bags exhibit 7, which the Investigating Officer did not sign. PW9 did not similarly sign record of seized exhibit 8, record of seized substances (Bhang) exhibit 9. Exhibit in Report on Government Analyst indicates exhibits of 6 bags but do not indicate who forwarded the bags to him. It cannot be said with certainty that the substance intercepted was the same one sent to the Government Analysts.

34. The Appellants contend that the Prosecution's case is riddled with a lot of contradictions, inconsistencies and insufficient to sustain the conviction. I have perused the Prosecution's case and no doubt I have found a lot of contradictions and inconsistencies in the Prosecution's case. The contradictions and inconsistencies do go to the root of the prosecution's case. As held in **Erick Onyango Odeng V. R (Supra) grave contradictions, unless satisfactorily explained will usually but not necessary lead to the evidence being rejected.**

35. In the case of **Samwel Karanja Kuria V. Republic CRA No. 459 of 2007, the Court of Appeal at Nairobi** held thus:-

***“The appellant's suggestion that the potential witnesses who were not called to testify knew something about the killing was not supported by any evidence and the fact that they were not called as witnesses could not have reasonably invited an inference from the trial court because the prosecution evidence was already strong enough to support a conviction.”***

36. **Section 143 of the Evidence Act** provides:

***“143. 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. ”***

37. In the instant case, I find the evidence of the Prosecution witnesses who were called regarding the offence the Appellants, are charged with was in the circumstances of the case not sufficient to have implicated the Appellants with the commission of the offence with which they were charged and the failure to call the owner of the home where Appellants were purportedly found. Such failure leads to Court's making an adverse inference that had the owner of the home been called he would have given adverse evidence against the Prosecution.

38. Whether the Appellants defence was considered? The 1<sup>st</sup> and 2<sup>nd</sup> Appellants gave a defence of Alibi, the Appellants case is that as of the time of the commission of the offence they were at Bumala, because by 11.52 a.m. the 2<sup>nd</sup> Appellant was transacting an Mpesa transaction and they did not leave Bumala till 11.55 a.m. DW2, David Ebioki Ngwabe identified the transaction DMFI2 which was produced by DW4

as exhibit 3. The trial Court considered the Appellants defence of Alibi and found that admissibility of the electronic evidence is governed by the provisions of **Section 106 B (4) of the Evidence Act (Cap 84) Laws of Kenya**. The Court finds the evidence inadmissible for failure of production of a certificate in terms of **Section 106 (b) (4)**. The trial Court further considered the defence of alibi against the evidence of the Prosecution's witnesses specially evidence of PW1 to PW5 and PW7 and found the Prosecution Evidence well corroborated and found that the 1<sup>st</sup> and the 2<sup>nd</sup> Appellant were found and arrested at the scene of crime. He found the defence of the 1<sup>st</sup> and the 2<sup>nd</sup> Appellant was accordingly dislodged and/or displaced by the evidence tendered by the Prosecution. The trial Court found that the Appellant did not satisfy the conditions in regard to admissibility of electronic evidence and the fact that the Appellants were placed at the scene of the crime do not mean that their defence was not considered.

39. I have considered the 1<sup>st</sup> and the 2<sup>nd</sup> Appellant's defence of Alibi. The defence was not raised early enough for the Prosecution to check out on it and disapprove it. The prosecution witnesses PW1, PW2, PW3, PW4 and PW5 in their evidence dislodged the 1<sup>st</sup> and the 2<sup>nd</sup> Appellants defence. The defence could not have been disapproved as it came too late on the day. I find the defence of alibi is not sustainable.

40. The 3<sup>rd</sup> Appellant contends that there is an error in his identification by Prosecution. The Counsel for the third Appellant urges that PW1, PW2 and PW3 told the Court that two people ran away from the scene and no description was given, that only two people were arrested and that the 3<sup>rd</sup> Appellant was not taken through Pre-trial process of documents.

41. In **R V Turnbull & Others (1976) 3 AllER 549** the Court address itself the:

"The appellant contend that the learned Judges erred in failing to re-evaluate the evidence on record. In **Salim Juma Dimiro -v- R, Criminal Appeal No. 114 of 2004** at Mombasa, this Court state that revaluation of evidence is a matter of law. In the present case, the appellant is faced with a **charge of robbery with violence contrary to Section 296 (2) of the Penal Code**. It is our duty to examine if the two courts below erred in law in dealing with the evidence on identification of the appellant. In **Abdala Bin Wendo V R, (1953) 20 EA CA 166**, it was held that where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. **R V Turnbull & Others [1973] 3 ALL ER 549**, the court considered what facts the should take into account when any evidence from an identification by a single witness. The court said:

*".....the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way .....*

*Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ....Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

42. In the case **Wamunga V. R (1986) KLR 424** the Court of Appeal held inter alia:-

*"Where the only evidence against the defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the ..... of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."*

43. In **Republic V Eria Sebwala CRA No. 37 of 1960 (UR)** the Court held that where the evidence alleged to implicate an Appellant is entirely of identification, that evidence must be absolutely water tight to justify conviction.

44. In the instant case, applying the above principles to the rival arguments on this issue, it is my finding that PW1, PW2, PW3, PW4 and PW5 did not identify the two suspects who escaped. That though the offence took place during broad day light, none of the Prosecution witnesses stated, that he was able to see the faces of the two suspects who escaped. No evidence was adduced to show how close, the Prosecution witnesses were in relation to where the two suspects were before they escaped. The investigating Officer never mentioned that PW3 and PW4 ever giving him the description of the two suspects who escaped. PW3 stated that on 15.7.2015 his colleague Cpl. Dennis Ogero went and told him that he had seen and positively identified one suspect who had escaped. That PW3 went and found him, that the two interrogated the 3<sup>rd</sup> Appellant who told them he had come to see his friends who had earlier on been arrested, introducing himself to the two hence they arrested him. PW4, he claimed that D.C's compound at an Mpesa Kiosk, he saw and positively identified one of the persons who had ran away from the scene. PW3 and PW4 did not state what it was that enabled them to identify the 3<sup>rd</sup> Appellant as one of the suspects who had escaped. They did not produce the O.B. of the 13<sup>th</sup> July 2015 to confirm they had given the description of the persons who escaped. PW3 and PW4 did not state that they had known the 3<sup>rd</sup> Appellant or seen him prior to 13<sup>th</sup> July 2015. I note the offence was committed during daytime and it was only 2 days after the offence was committed that PW3 and PW4 met the 3<sup>rd</sup> Appellant and after interrogating him, confirming he had come to see the 1<sup>st</sup> and the 2<sup>nd</sup> Appellants and that he was from Busia they arrested him. In view of PW3 and PW4 failure to have given the description of the 3<sup>rd</sup> Appellant, before and in view of the fact that two suspects escaped before the Prosecution witnesses got in conduct with them, I find that it was not possible for PW3 and PW4 to have identified the two suspects who ran away, I am upon examination of the prosecution evidence not satisfied that the circumstances of identification were favourable and free from possibility of an error. The chance of mistaken identification is very high in this case. I find it was unsafe to base conviction of the 3<sup>rd</sup> Appellant on identification by PW3 and PW4 I therefore find the conviction of the 3<sup>rd</sup> Appellant was unsafe and should not be allowed to stand.

45. I find that PW9 and PW8 were very casual in the handling of the case, did a shoddy investigation and failed to carry out very vital procedures in the handling of this case. PW1, PW2, PW3, PW4 and PW5 testified that they received 6 bags of plant material from the 1<sup>st</sup> and the 2<sup>nd</sup> Appellants, yet in PW8 exhibit 7 the number of bags were changed from five to six but the alteration was not countersigned, exhibit 9 record of seized substance (Bhang) talks of five bags, yet the figure is altered with no counter signing. Exhibit 9 on page two weight of 112 kg was added later as it is by a different ink not bearing the writing below of the same date or by same pen as the one before the insertion of the weight. In exhibit 9 the exhibit had initially been marked A1 – A5 but changed to A6 without any countersigning on page 2 of exhibit 9. I find failure of the Prosecution to comply with **Section 74 (A) of the Act** is fatal to the Prosecution case.

46. In **Patrick Odoyo Jabuya V Republic CRA No. 91 A of 2012** Hon. Justice Wendoh faced with similar case held:-

***“Failure to comply with Section 74 A of the Act is fatal to the Prosecution case.”***

47. I find in the instant case the 3<sup>rd</sup> Appellant was not positively identified as circumstances of identification were not favourable and free from a possibility of an error.

**48. The upshot is that the Appellant's respective appeals Nos. 185 of 2016, 186 of 2016 and 187 of 2017 are allowed. The conviction is quashed and sentence set aside. The Appellant's are set at Liberty unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 15<sup>TH</sup> DAY OF JUNE, 2017**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT THIS 15<sup>TH</sup> DAY OF JUNE, 2017.**

**IN THE PRESENCE OF:**

**MR. JUMBA FOR 1<sup>ST</sup> AND 3<sup>RD</sup> APPELLANT**

**MR. WAKLA FOR 2<sup>ND</sup> APPELLANT**

**MR. ODONGO FOR THE ACCUSED**

**MR. ODUMBA FOR STATE**

**COURT ASSISTANTS:**

**1. LABAN ODHIAMBO**

**2. PATIENCE OCHIENG**

**3. SARAH OORO**

**J. A. MAKAU**

**JUDGE**