



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

HCRA No. 42 OF 2016

RAMADHAN DHIDHA DIWAYU.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence of 5 years imprisonment in addition to a fine of Ksh. 90,000/= ID 12 months imprisonment by Hon. MD KIPRONO (SRM) at Hola Law Courts on 31/08/2016 in CR. Case No.43 of 2015)

JUDGMENT

1. The Appellant was sentenced to 5 years imprisonment in addition to a fine of Ksh. 90,000/= ID 12 months imprisonment for a charge of trafficking Narcotic Drugs contrary to section 4 (a) of the Narcotic Drugs and psychotropic substances (control) Act No. 4 of 1994.

2. The particulars of the charge were that on 24th December, 2014 at Mwangaza area at Hola town within Tana River Sub County within Tana River County, the Appellant was found trafficking Narcotic drugs by motorcycle Reg. No. KMDB 544R make boxer to wit 30 kgs of cannabis sativa (bhang) not in its medicinal preparation form whose street value was Ksh. 30,000/=.

3. The prosecution evidence in summary was that PW1 No. 85888 SGT KWENDO WYCLIFF of Hola police station was on patrol on 23/12/2014 with PW2 and PW4 when they received information that the Appellant was selling bhang.

They went to the gate of the Appellant where they saw a motorcycle with a rider.

They saw a woman opening the gate. They waited for the rider to offload but he ran away as they approached.

They recovered 30 kgs of bhang in two sacks. They arrested the woman on 24/12/2014 and the man was arrested on 12/02/2015.

4. PW3 a Government analyst carried out an analysis of the plant material and he found it to be cannabis sativa. PW3 produced the Report as an exhibit.

5. The Appellant said in his defence that on 10/12/2014, he travelled to Witu to fish. He left his motorcycle Reg. No. KMDB 544R to Said Dhadho to operate as a boda boda.

On 25/12/2014, the Appellant said his wife told him that police had come to their home on 24th night and took her to the police station where they showed her the motorcycle with bhang.

She was placed in the cells for 30 kg of bhang. She paid a cash bail of Ksh.20,000/= and she was told to attend court on 30/12/2014.

The Appellant said he returned after one month and 20 days and he was arrested and charged with this offence.

6. The Appellant called his wife as DW2. She said on 23rd December 2014 police went to their house and knocked on her door. She opened the door. She was interrogated about her husband. She told police he had gone to Garsen for fishing on 10th December 2014.

The police took her to the police station where they showed her the motor cycle and some two sacks on it. They demanded Ksh. 150,000/= in order to release the motor cycle and clear the matter. They took her round and returned her home.

The following day she was booked in the police cells and released on a cash bail of Ksh. 20,000/= and told to report on 30th December 2014.

On 13/02/2015 when her husband came home, he was arrested and charged with this offence.

7. The court found the Appellant guilty as charged and sentenced him to 5 years imprisonment in addition to a fine of Ksh. 90,000/=. The motor cycle Reg. No. KMDB 544R was also forfeited to the Government.

8. The Appellant has appealed against both conviction and sentence on the following grounds:-

(i) That the Appellant was not properly identified as the culprit.

(ii) That the learned trial Magistrate denied the Appellant an opportunity to cross examine a crucial witness pertaining to exhibits presented in court.

(iii) That the trial Magistrate erred in law by allowing a case to proceed with a defective charge sheet.

(iv) That the conviction and sentence handed to the Appellant are unsafe.

9. The Appellant submitted in writing as follows:-

(i) That the Appellant was not identified as the culprit since the arrest was done under unfavourable circumstances

(ii) The trial Magistrate denied the Appellant an opportunity to cross examine PW3 as a crucial witness and therefore contravened the basic fundamental rights and freedoms of the individual as entrenched under Article 22 (1), 23 (1), (3) (f) and Article 152 (2) (c) and 3 (e) of the constitution of Kenya 2010.

(iii) That the trial Magistrate allowed the case to proceed on a defective charge sheet and that the Appellant was not aware what charge he was facing so that he could prepare his defence.

(iv) Finally the Appellant submitted that the sentence was unfair and that an application under section 20 (1) to have the motor cycle forfeited was unwarranted and uncalled for since the Appellant was already convicted to serve a custodial sentence of 5 years and a fine of 90,000/=.

The Appellant urged the court to quash the conviction and return the motor cycle to the owner.

10. The Respondent opposed the Appeal and submitted in writing as follows:-

(i) That the Appellant was properly identified by PW1, PW2, and PW4 who were involved in the operation. Further that the analysis of the evidence available showed the following: -

- That there was enough security light at the Appellant's residence.
- That the information given to the police turned out to be true.
- That the motor cycle on which the cannabis was being transported belonged to the Appellant.
- That the Appellant managed to escape police operation and went into hiding for more than one month.
- That the Appellant did not call SAID DHADHO whom he claimed was his employee and finally
- That the Appellant did not sufficiently remove himself from the events of that night, saying that he tried to raise a defence of alibi but he did not call evidence to support the alibi.

(ii) It was submitted that the defence assertion that the Appellant was not allowed sufficient time to cross examine witnesses was not factual for reasons that the defence counsel did not appeal against the orders of the trial Magistrate and further that the Appellant was not vigilant in engaging Advocates who were committed to defend him.

(iii) It was submitted by the Respondent that the assertion that the charge sheet was defective was a sham and further that the defence counsel raised a preliminary objection and the trial court made a ruling which the defence counsel did not appeal against. The Respondent amended the charge sheet and the Appellant pleaded to the amended charge sheet without objecting.

(iv) Finally it was submitted that section 86 of the Narcotic Drugs and psychotropic substances (control) Act which requires a certificate under the hand of a gazette/authorized valuation officer be produced in evidence "whenever a sentence or fine is to be based on the value of the Drugs" is not applicable in this case.

11. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in Kiilu & Another Vs

Republic the court citing **Okeno v. R** held:

'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 courts findings and conclusions; 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. '

12. My findings are as follows:-

(i) The main ground of appeal is that the identification of the Appellant was not proper. This was considered by the Court of Appeal in the case of **John Njeru Kithaka & Ano. Vs. Republic Criminal Appeal No.436 of 2007**. The court stated as follows;

"... On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable "

(ii) For the reason that the Appellant was not properly identified since the conditions were not favourable for proper identification, I find that the conviction herein is not safe. The arresting officers said they had laid an ambush at around 0300 hrs when they saw a motorcycle and a rider. They did not say that they knew the Appellant prior to that date or how they were able to identify him at that hour of the night. The source of light was not identified.

(iii) I also find that the prosecution did not counter the alibi defence by the Appellant. The Appellant and his witness said that the Appellant was away fishing and he had left the motorcycle with one Said Dhadho to operate it as boda boda. In the case of **Elias Kiamati Njeru v Director of Public Prosecution [2015] eKLR** the High Court held as follows:-

"In the case of **KIARIE VS REPUBLIC [1984] KLR** the Court of Appeal held:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".

The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant."

(iv) Since the appellant raised the defence of alibi during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant's defence.

Section 309 of the Criminal Procedure Code provides:-

"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

(v) Finally, I also find that *Section 86 of the Narcotic Drugs and Psychotropic Substances (control) Act was not complied with*. That section provides that the prosecution has to produce proof of the street value of the bhang as required by section 86 of the Narcotic drugs and psychotropic substances control Act No. 4 of 1994. In the case of **GABRIEL OJIAMBO NABESI Vs REPUBLIC [2007] eKLR** the Court of Appeal stated as follows:-

"Section 4 (a) of the Act under which the appellants were charged and convicted provides that a person who trafficks in any narcotic drug or psychotropic substance "shall be guilty of an offence and liable"

"(a) In respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater and, in addition to imprisonment for life

Section 86 of the Act provides for valuation of goods for penalty, thus:-

"86 (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 a proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by court as prima facie evidence of the value.

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

(vi) For the above reasons, I quash the conviction against the Appellant and I set aside the sentence against him and I order that the Appellant be set free unless lawfully held for any other reason. I further order that the motorcycle to be released to the Appellant forthwith.

Dated, Delivered and Signed at Garsen this 7th June, 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.