



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.150 AND 152 OF 2011

BETWEEN

SILVIAN OUMA OWINO

JOSHUA OMONDI..... APPELLANTS

AND

REPUBLIC RESPONDENT

(Being appeal against conviction and sentence of the SRM's Court at Nyamira

in CRC No.199 of 2009 by Hon. J. Macharia, SRM dated 20th June 2012)

JUDGMENT

1. The appellants herein SILVIAN OUMA OWINO and JOSHUA OMONDI OKELLO were charged with the offence of trafficking in Narcotic Drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substance Control Act No.4 of 1994**. The particulars of which were that on 3rd day of April 2009 at Obwari market in Nyamira District within Nyanza Province jointly with another not before the court being in motor vehicle KAW 396 X were found trafficking cannabis sativa (bhang) to wit 1565 stones.
2. They both pleaded not guilty to the said charges, were tried, convicted and sentenced to a fine of Kshs.1,000,000/= in addition to serve 30 years imprisonment.
3. Being aggrieved by the said conviction and sentence, they have filed an appeal and raised the following grounds:-
 - a. *The charge sheet was defective.*
 - b. *The sentence was overly harsh, excessive and illegal.*
 - c. *The prosecution case was not proved beyond reasonable doubt.*
 - d. *Their alibi defences were rejected without giving reasons of the same.*
 - e. *The prosecution case was full of contradiction.*
1. At the hearing hereof the two appeals were consolidated and the appellants who were unrepresented filed amended grounds of appeal and written submissions which they relied upon while Mr. Majale appeared for the state and opposed the appeal.

SUBMISSIONS

2. It was submitted by the first appellant that there was contradiction as to the place where the motor vehicle alleged to have been used in trafficking the drugs was abandoned. It was submitted that according to PW1 it was at Ekerenyu, while PWIII stated it was at Riomego and PWIV at Ikonge. It was further submitted that there was contradiction as to where the appellants were arrested. Further there was also contradiction as to the identification of the appellants. It was therefore submitted that there was the possibility of mistaken identity the benefit of which should have been given to the appellants.
3. In support of the submissions the 1st appellant submitted the case of **Collins Otieno Angwech -vs- R. Kisii High Court Criminal case No.256 of 2010.**
4. On behalf of the 2nd appellant it was submitted that the charge sheet was defective since it was contrary to **Section 2 of Narcotic Drugs and Psychotropic Substance Control Act of 1994** which requires clear definition of the same as “**importation, exportation, manufacturer, buying, sale, giving, supplying, storing, administering, conveyance etc**” and in support thereof the case of **Madline Akoth Barasa -vs- R. Cr. Appeal No.193 of 2005** was submitted.
5. It was further submitted that the particulars and ownership of the motor vehicle in which the drugs were allegedly found so as to link him with the offence were never proved. It was submitted that the value of the alleged drugs was never ascertained contrary to **Section 74(a)(1) and 86 of the Act.**
6. It was submitted that when the trial court allowed the prosecution to amend the charge sheet, the same did not comply with the provisions of **Section 214(1) (i) CPC** which requires the accused person to plead to the altered charge. It was submitted that the prosecution did not prove their case beyond reasonable doubt and that the evidence tendered only raised suspicion to which the case of **James Mwangi -vs- R** was submitted.
7. It was further submitted that the appellant's alibi defence was not taken into account by the trial court and that it was upon the prosecution to adduce evidence to show that the defence was false which it did not do and in support thereof the case of **Stephen Ndungu Maina -vs- R Criminal Appeal No.147 147 of 2005 CA at Nairobi** was submitted.
8. This being a first appeal, the court is under a duty to reassess the evidence tendered before the trial court afresh and to come with its own conclusion, though taking into account the fact that it did not unlike the trial court have the benefit of hearing and seeing witnesses.
9. On behalf of the prosecution, PW1 Philip Masange an Assistant Chief of Bokurati sub location mobilized the youth who arrested the appellants after PW2 Cpl Robert Nyangaresi had seen motor vehicle Reg. No. KAW 396X which he suspected had bhang and alerted PWIII Wilfred Omboga Nyamanga and they gave chase upon which the said motor vehicle lost control and entered into a ditch. Thereafter the three people who were in the motor vehicle came out and ran away on foot. He was able to identify the appellant after they had been arrested.
10. PWIV PC Igaad Kiplagat re-arrested the appellant and carried out investigation before charging the appellant while PWV Gregory Auyo government Analyst based in Kisumu examined the drugs and concluded that it was cannabis sativa a prohibited substance.
11. When put on their defence, the 2nd appellant gave a sworn statement and stated that on 3rd day of April 2009 he was going to work at Gekano area at the home of one Collins. In support thereof he produced a receipt. When he was going back in the evening he met a group of people who were after some robbery that had happened in the area and asked him for his identity card. He was thereafter arrested and charged with the offence.
12. The 1st appellant testified that he had left Nairobi and on 3rd April 2011 at 2 o'clock he was in his

grandmother's place. He went to the market and upon reaching Matongo market he met the area Assistant Chief with a group of people who arrested him as a suspect. Under cross examination he stated that he had gone to visit his friend called Jane Otieno Okumu who is married in the area and that he had known the assistant chief before but did not have any grudge with him.

13. In convicting the appellants the trial court had this to say:-

“The chain from the time the accused were spotted to their arrest was immediate and not broken at all.

The accused were arrested in broad daylight and indeed the two accused in their cross-examination and defence shows that they were arrested near the scene but according to them they were going to work.

I have looked at the car hire contract. I note that 1st accused name and signature are appearing.”

14. From the proceedings and submissions the following issues have been identified for determination:-

- a. *Whether the charge sheet was defective;*
 - b. *Whether the appellants were adequately and properly identified;*
 - c. *Whether their defences were taken into consideration;*
 - d. *Whether the prosecution case was proved beyond reasonable doubt.*
1. It was submitted by the appellants that the charge sheet was defective since it did not contain the correct registration number of the motor vehicle which was used in trafficking the drug and that the particulars of nature of trafficking was not stated in the charge sheet and therefore the act of trafficking was not proved.
 2. Whereas it is true that the charge sheet did not indicate the nature of trafficking, the evidence tendered shows that the appellants were trafficking the drug by conveyance since the same was found in motor vehicle Registration No. KAW 396X. I am therefore not persuaded that the charge sheet was defective by the said omission. I am also olive to the fact that under **Article 159 (2) (d)** of the **Constitution** in exercising judicial authority justice should be administered without undue regard to procedural technicalities. It is further clear that the appellants were aware of the charge they were facing and were able to offer an appropriate defence and therefore the omission to indicate the mode of trafficking did not prejudice the same.
 3. On the issue of identification of the appellants, PW1 in his evidence stated that he saw two people who were running and were suspicious and were making telephone calls. He mobilized the youth and were able to arrest the two at Nyageita. PWIII was able to identify the appellants as those he had seen near their post where the 1st appellant was in the group of three who had hired the subject motor vehicle for which he had presented his identity card. It is therefore clear that there was no mistaken identity as regards the appellants herein.
 4. On the appellants' defences it is clear that whereas the same was under no obligation to prove the alibi defence, the first appellant contradicted his defence under cross examination since his evidence in chief was that he had gone to his grandmother's place, whereas under cross examination he stated that he had gone to visit his friend Mrs. Jane Otieno Okumu who is married there. As regards the second appellant, the same admitted under cross examination that the receipt he had produced in support of his alibi defence shows that the motor vehicle does not ply the route to Nyamira. I therefore find no fault with the trial court's finding that none of the issues raised by the appellant in their defence featured anywhere during cross examination and therefore find their defence as an afterthought and mere denial.

5. As regards the appellants' submissions that the procedure under **Section 74 (a) (1) and 86 of Narcotic Drugs and Psychotropic Substance Control Act No.4 of 1994** were not complied with, the appellants did not raise the same when PWIV and PW5 testified and therefore there is no evidence on record to show that the same was not complied with.
6. It is clear that the prosecution case against the appellants was proved beyond reasonable doubt and therefore find no merit on the appeal herein which I hereby dismiss.

Delivered, signed and dated at Kisii this 6th day of May 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Miss. Boyon for the State

In person for Appellants