REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 198 OF 2011

DAVID NDUNG'U WAMBUI……..…….APPELLANT

-VERSUS-

REPUBLIC…….....…….…….....RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (J. N. Mwaniki) at Baricho, Criminal Case

No. 94 of 2011 dated 27th November, 2011)

JUDGMENT

1. DAVID NDUNGU WAMBUI, the appellant herein was charged at Baricho Senior Resident Magistrate's Court **Criminal Case No. 94 of 2011** with two counts:-

i. ***Making paper of forgery contrary to section 367 of the Penal Code. The particulars being that on 5th February, 2011 at Kwa 'V' village in Kirinyaga South District within Central Province without lawful authority or excuse knowingly had in custody Kshs.420,000 papers in 1000 notes intended to resemble and pass as a special paper such as is provided and used in making bank notes.***

ii. ***Being in possession of cannabis sativa contrary to section 3(1) as read with section 2(a) of the Narcotic Drugs and Psychotropic substances Act No. 4 of 1994. The particulars being that on 5th February, 2011 at Kwa 'V' Village in the same locality the appellant was found in possession of 10 stones of cannabis sativa valued at Kshs.2000 which was not meant for medical purpose.***

2. The Appellant after trial was found guilty by the learned trial magistrate on both counts and was convicted and sentenced to serve 15 years imprisonment on count 1 and 2 years imprisonment on the 2nd count. He was dissatisfied with both the conviction and sentence and filed this appeal raising eight grounds as follows:-

3. (i) That the learned magistrate erred in law and fact in convicting the appellant when the charge sheet did not disclose offences known in law.

iii. ***That the learned magistrate erred in law when he convicted the Appellant when the charge was defective.***

iv. ***That the learned magistrate erred in law and fact by not seriously considering the***

circumstances under which the exhibits were recovered which pointed out that the same could have been planted by somebody else.

v. ***That the learned magistrate erred in law by sentencing the Appellant to a longer term in count 1 than is permitted by the law.***

vi. ***That the learned magistrate erred in law by allowing the production of the Government Analyst report by a police officer whereas he was not the author of the document and more so without any basis for its production by another person other than the maker.***

vii. ***That the learned magistrate erred in law by relying on the report by the document examiner which report did not in any way support the charges in the first count.***

viii. ***That the learned magistrate gravely misdirected himself when he justified the conviction by taking into consideration factors which were not relevant thus arrived at a wrong decision.***

4. At the hearing of this appeal, the Appellant appearing in person made oral arguments in support of his appeal pointing out the apparent inconsistency on the evidence of P.W.1 as compared with the evidence of P.W.2. The Appellant submitted that P.W.1 told the trial court that the Appellant was found at his home while P.W.2 told the trial court that he was away bathing in a river nearby.

5. The Appellant further argued that while some prosecution witnesses told the trial court that the offending items were found in his house others stated that they were found in another house which belonged to someone else. He submitted that the 3rd party should have been arrested arguing that his wife should have been arrested as well since she was the only person found present in the compound where the items were recovered.

6. The Appellant submitted that he voluntarily went to the Police Station because of his pigs which had strayed into a neighbour's farm and caused crop destruction and that this fact was not considered by the learned trial magistrate.

7. Mr. Sitati for State, supporting the conviction opposed the appeal though he conceded that the sentence meted out in count 1 was excessive and unlawful since the offence attracts a maximum sentence of 7 years imprisonment. He however, submitted that the 2nd count attracted a maximum sentence of 20 years imprisonment but the Appellant was handed only 2 years imprisonment. He therefore urged this Court to correct the anomaly on the sentences meted out against the Appellant and pass the correct sentences accordingly.

8. On ground one of the petition of appeal, the State submitted that the Appellant denied the offence and was not prejudiced by any defect on the charge sheet since the matter proceeded into full trial and the Appellant got the chance to defend himself against the charge facing him.

9. Mr. Sitati submitted in response to ground 3 of the appeal that the prosecution witnesses, P.W.1 and P.W.2 who were the prosecution witnesses, gave consistent and well corroborated evidence as both were present at the scene when the items or exhibits were recovered. He submitted that the evidence of the two was sufficient to found a conviction and supported the trial magistrate in basing the conviction on the same.

10. On the 4th ground of the appeal, Mr. Sitati responded that the Appellant had failed to demonstrate why the Police wanted to fix him arguing that the exhibits were recovered in the presence of Appellant's wife after the Appellant had taken off after seeing the Police officers.

11. On the question of production of Government Analyst report by P.W.3 the State submitted that the trial court had a discretion under *Section 77* of the **Evidence Act** to call or not to call the maker of the document and submitted that in any event the Appellant did not oppose the production of the report during trial.

12. The State also submitted that the evidence tendered at the trial court was sufficient to sustain the charge and that the conviction of the Appellant was safe in the circumstances.

13. I have considered submissions from both the Appellant in person and the office of Director of Public Prosecutions through Mr. Sitati. I have also considered the grounds in the petition of appeal.

The 1st and 2nd ground in the petition of appeal relates to the charge sheet. The Appellant pointed out in his petition that the charge was defective and failed to disclose the offence.

14. To begin with the 1st count, the charge read as follows:

"making paper of forgery" contrary to Section 367 (a) of the Penal Code"

The charge was ambiguous as an offence under ***Section 367 (a)*** of the Penal Code reads as follows:

"making or having in possession papers or implements for forgery"

That was not the only awry facing the prosecution. A look at the particulars contained in the charge sheet really did not help matters as it is indicated that the Appellant "had in custody" Kshs.420,000 in 1000 notes intended to resemble and pass as a special paper such as is provided or used in making bank notes. The evidence tendered by prosecution showed that what was recovered at the scene of crime was 420 papers. The particulars on the charge sheet gave the value of the papers found when there was no evidence tendered that the papers had any value attached to them. This Court finds that count 1 and the particulars thereon were both defective and did not sufficiently disclose an offence for which the Appellant could be convicted.

15. The 2nd count is a bit odd for two reasons (i) spelling error on the word "phychotropic" instead of "psychotropic" in the charge. Furthermore we have the **Narcotic Drugs and Psychotropic Substance Act No. 4 of 1994** in our Statutes and not Narcotic Drugs & "Phsychotropic" substance Act. (ii) The 2nd count also indicated that the Appellant had violated Section 3(1) as read with *"section2(a)"* of the above Act. *Section 2(a)* of the **Narcotic Drugs and Psychotropic Substance Act** is irrelevant to the charge or the offence that the Appellant was accused of. It could have been an error made by the prosecution because they must have meant *Section 3(a)* which is relevant to the charge that faced the Appellant. Be that as it may the Appellant cannot be faulted for pointing out that he was charged with an offence which is unknown in law. This however, is a small error or an anomaly which I could have corrected under the law but for reasons which will come out shortly in this judgment.

16. The Appellant argued in his appeal that the evidence adduced at the trial court was insufficient to sustain the charge. The State however, maintained that the evidence was sufficient and pointed out the evidence of P.W.1 and P.W.2. I have evaluated the evidence tendered by P.W.1 and P.W.2. P.W.1 told the trial court that they were acting on a tip off and went to conduct a search at the house of the Appellant where they found fake currency notes and 10 stones of cannabis sativa. He further told the trial Court that they found the Appellant's wife in the homestead as the Appellant fled on seeing them. P.W.2 however, told the court that the Appellant was not at home and was informed by the wife that he had gone to a nearby river to bathe. It is therefore evident from the evidence tendered that the Appellant was absent when the search was conducted and when the items were recovered. The question posed by the Appellant as to why they did not arrest his wife or take a statement from her appears legitimate because how did the Police officers form the opinion that it was the Appellant and not anyone else who was connected to the recovered items. It is instructive to note that the charge as I have indicated above read that the offending items were in the 'custody' of the Appellant. This court finds that the Appellant was not found in possession of the items recovered.

17. I find that the learned trial magistrate misdirected himself by apparently shifting the burden of proof to the Appellant when he held that the Appellant had not successfully challenged the evidence that the recovered items were found in his house. The prosecution were under an obligation to prove beyond

reasonable doubt that the fake currency notes and cannabis sativa were found on the accused person. The element of 'possession' was important to be established and proved in order to sustain the charge especially given that 2nd count related to "being in possession" of cannabis sativa. In the absence of that element the prosecution case at the trial court fell short of the threshold required in criminal cases.

18. The Appellant's defence appeared not to have been well considered by the learned trial magistrate. P.W.1 told the trial court that the Appellant took off when he saw them. This however, was well countered by the Appellant defence that he took himself to the Police Station because he thought that the O.C.S. wanted to deal with the issue of his pigs and a neighbour whose crops had been destroyed by the pigs. The Appellant's contention was well corroborated by the defence witness (D.W. 2) who gave a clear account of the events that led to the Appellant being arrested. Had the learned magistrate addressed his mind on this fact, then perhaps at the very least he could have entertained some doubts about the prosecution case and find that it was not safe to find a conviction under such circumstances. This Court has considered the evidence adduced by P.W.3 who told the Court that he was the investigating officer in the case. He told the Court that fake currency had also been recovered elsewhere on the same date that the Appellant was arrested. Although there was no further interrogation about the fact this Court finds that the same evidence created some doubts on the prosecution case when taken in relation to the defence put forward.

It is on the basis of the above that this Court finds merit in this appeal. This Court agrees with the Appellant that the charge sheet was fatally defective to found a conviction and the evidence tendered insufficient to sustain any conviction on both counts. This Court also wishes to point out that the sentence that was meted out was obviously beyond the limit set by law which the State correctly pointed out is 7 years. But that for now is academic as conviction in the first place was not well founded. Consequently this appeal is allowed. The conviction against the Appellant is quashed and sentence passed against him is reversed and set aside. He is set free forthwith unless lawfully held. It is so ordered.

Dated and delivered at Kerugoya this 1st day of July, 2015.

R. K. LIMO

JUDGE

1.7.2015

Before Hon. Justice R. Limo

Court Assistant Willy

Omayo for State present

David Ndungu Wambui present in person

COURT: Judgement signed, dated and delivered in the open court in the presence of the appellant in person and Omayo for State.

R. K. LIMO

JUDGE