



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 272 OF 2010**

**CONSOLIDATED WITH CRIMINAL APPEAL NO.268/2010**

***(Being an appeal from original conviction and sentence in criminal case No.654 of 2010 by Hon. W. KORIR SPM, Nakuru Law Courts dated 15th September, 2010)***

**TOM OKELLO & PATRICK BILLY OLANG.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants were charged and convicted of the offence of trafficking in a Narcotic drug contrary to section 4(a) of the Narcotic and Psychotropic Substances Control Act No. 4 of 1994 (hereinafter called “the Act”).

The particulars of the offence were that on the 30th day of January, 2010 along Nakuru-Nairobi Highway, in Nakuru Township, Nakuru District of the Rift Valley Province, jointly with others not before court trafficked in Narcotic drug to wit 319 Kg of *Cannabis sativa* with a street value of Kshs.319,000/= by transporting it in a motor vehicle registration number KBH 841X make Toyota Corolla NZE in contravention of the Act.

Upon conviction, the appellants were fined Kshs.1,000,000/= each and in addition sentenced to life imprisonment.

Aggrieved by the conviction and sentence, the appellants have appealed on the grounds that the case was not proved beyond any reasonable doubt as in law required; that the case was not properly investigated; that the prosecution failed to call crucial witnesses which fact rendered its evidence insufficient to sustain the charge; and that that the trial magistrate did not evaluate their defences alongside that of the prosecution as required under section 169(1) of the Criminal Procedure Code.

A background to the case is as follows; On 30/1/2010 P.W.1 P.C John Mwiti (PW1) and his colleagues P.C Habiba Chumba (P.W.2), PC Malakwen and PC Kirimi (P.W.5) were on patrol using motor vehicle registration number GK A470N when they received a report that there was a motor vehicle transporting bhang from Kisumu. According to the report which they received, the registration number of the motor vehicle was KBH 841X Toyota NZE grey in colour.

Upon receiving the information, they proceeded to Gatehouse at the fly-over on the Nakuru-Nairobi Road

whereat they laid an ambush. After a shortwhile, they spotted the vehicle and P.C Kirimi (P.W.5) ordered the driver to stop but he defied the order prompting him (P.W.5) to fire at the rim of the right front wheel. The car stopped just about 3 metres from where P.W.5 was. He (P.W.5) ordered the driver and the passenger to alight and after they complied they arrested them.

According to the testimony of the three police officers, P.W.1, P.W.2 and P.W.5, the first appellant was the one who was driving the car at the material time. The second appellant was a passenger in the car. He sat in the passenger's seat at the front of the car.

Upon inspecting the motor vehicle, they found rolls of bhang covered with black polythene bags and sacks.

After asking for reinforcement, the three officers, took the motor vehicle and the two suspects to the Divisional Headquarters whereat the motor vehicle and its contents were photographed. Later on the bhang was removed from the car and weighed in the presence of the appellants. It's weight was found to be 319 Kgs. It was put in 12 sacks.

P.W.6, David Kiiru, who investigated this case, took 12 samples from the twelve sacks and prepared an exhibit memo which alongside the 12 samples he took to the Government analyst. Later on, he received a report from the Government analyst, Mr. James Michael Werimo (P.W.7) confirming that the 12 stones he had taken to the Government Chemist was *Cannabis sativa*.

P.W. 6 also led evidence to the effect that he interrogated the owner of the motor vehicle used to ferry the bhang, Daniel Mbugua Njau (P.W.4) and the director of the firm which had hired out the motor vehicle, Mr. Francis Ngaru Ngugi (P.W.3). From his investigation he confirmed that the motor vehicle used to ferry the bhang had been hired by one Charles Amollo. From P.W.3 he obtained a photocopy of the identity card and driving licence of the hirer, Charles Amollo Karano. He also got documents which confirmed that the motor vehicle was bought on credit by P.W.4.

Both P.W.3 and P.W.4 who testified in this case shed light on how the motor vehicle moved from its provisional owner, P.W.4 to P.W.3 and thereafter to Charles Amollo Karano. Both were categorical that they did not know the appellants before. They only saw them for the first time when they appeared as witnesses in this case.

P.W.6 who is attached to Anti Narcotics Unit said that after the vehicle was impounded he was with those who offloaded the bhang from the vehicle, had it photographed and he weighted it in presence of the applicant.

James Michael Welimo (P.W.7) a gazetted Government Analyst, testified that on 10/2/2010 he received from PC David Kiiru (P.W.6) two evidence polythene bags marked provincial crime, Nakuru police station. The bags contained 12 bundles of 12 bags of plant material together with three exhibit memo forms duly filled in which he was asked to ascertain whether or not the dry plant material was a Narcotic drug. The exhibits related to Cr 760/86/10 accused persons being Martin Tom Okello and Patrick Billy Olang (the appellants herein).

After carrying out both physical and chemical tests on the material, he made a report confirming that the plant material was examined and found to be *cannabis sativa* which falls under the 1st schedule of the Act. He identified the report which had earlier on been marked for identification and produced the same as ExhP12B. He also produced the exhibit memo which had earlier on been marked for identification, as EXHP12A.

P.W.8, Chief Inspector Sambu Wafula, got information about the offence herein at about 11.00 a.m. His informant requested him to take photographs of the motor vehicle registration No.KBH 841X Toyota Saloon and bhang wrapped in Khaki papers. He took a total of 11 photographs which were printed under his supervision. Later on, he made a report in respect of the photographs he took. He produced the photographs as exhibits in this case.

Put on their defence, the appellants gave sworn statements and led evidence to the effect that they resided at LangaLanga; that on the material day, they were going to the Provincial General Hospital to visit the 1st Appellant's sister who was admitted in the hospital; that they had travelled to town by a motor cycle and since they did not have enough fare, they decided to do the remaining part of the journey by foot.

At Gatehouse, they found an oil tanker which had been involved in an accident. They joined the big crowd that had come to witness the accident. After they had walked a short distance from the accident scene, they heard a gunshot. When they looked back they saw people running away. Two police officers came and arrested them. The police officers told them that they had a motor vehicle. They took them to the police station and latter charged them with the offence herein.

The appellants denied having any knowledge about the bhang herein and the motor vehicle used to transport it. They also denied having been in the motor vehicle. They blamed the police for failing to photograph them and/or to dust the motor vehicle for their finger prints. They also denied having witnessed the taking of the photographs produced in court.

Cross-examined by the prosecution the appellants stated that they did not know who their neighbours at Langalanga were (by name). Interestingly, the second appellant who alleged that he had lived at Langalanga for two and half years stated that he had never seen his landlord. Despite his allegation that he sold shoes at Langalanga he stated that he neither knew the road leading to Langalanga nor its neighbouring estates.

Upon considering the foregoing evidence, the trial magistrate believed the prosecution case and disbelieved the explanation offered by the appellant.

As the first appellate court, it is my duty to consider and re-evaluate the evidence presented in the lower court in order to arrive at my own independent conclusion, bearing in mind I neither heard nor saw the witnesses testify. See **Okeno v. Republic (1972) E.A 32**.

It is common ground that motor vehicle registration number KBH 841X make Toyota Corolla NZE was impounded on the material day, near Gatehouse round-about along Nakuru-Nairobi Highway ferrying 319 Kilogrammes of dry plant material which P.W.7 confirmed to be *Cannabis sativa*. The only issue for determination is whether the appellants were rightfully identified as the persons who were trafficking the drug.

Whereas P.W.1, P.W.2 and P.W.5 led evidence to the effect that the appellants were the two occupants of the motor vehicle ferrying the drug at the time they impounded the motor vehicle, the appellants contend that there is no evidence that they were in the motor vehicle at the material time. The appellants arguments is that the persons who arrested them ought to have photographed them while in the motor vehicle. They also contend that the photographs produced in this case were not taken at the scene of the crime and do not show the owner of the drug that was being trafficked.

They also complain that the motor vehicle was not dusted for their fingerprints.

The appellants have submitted that the prosecution evidence does not link them to the motor vehicle, the same having been hired by one Charles Omollo Karano; that there was no evidence that the motor vehicle ever left the legal hands of Omollo Kerano; and that the police ought to have investigated how the motor vehicle left the hands of Omollo Kerano.

The appellants have also attacked the evidence led by P.W.1, P.W.2 and P.W.3 on the ground that they did not reveal who their informer was.

While I agree with the appellants that the police ought to have investigated how the motor vehicle changed hands from the hirer to the appellants, I must point out that for purposes of proving the offence herein it was not necessary for the police to prove who the owner of the drug being trafficked was. All what the prosecution needed to prove in order to sustain the charge that the appellants faced is that they

were indeed the person caught ferrying the drug.

The question as to how the motor vehicle moved from the hirer to appellants, in my view, cannot form the basis of quashing the conviction herein, if there is sufficient evidence that the appellants were indeed the persons in control of the motor vehicle at the material time. Section 2 of the Act No. 4 of 1994 defines trafficking as:-

**“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 making of any offer in respect thereof, but does not include—**

**( a) the importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefor under this Act in accordance with the licence;**

**( b) the manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefor under this Act in accordance with the licence; or**

**( c) the selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or**

**( d) the selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist.”**

Under this section, all what the prosecution was required to prove is that the appellants were the persons conveying the bhang. As observed by the trial court, to prove that the appellants were the persons trafficking the drugs, the police were not obligated to photograph the appellants in the car or even dust their finger prints. All what they were required to do is to lead evidence capable of proving that fact. The trial court believed the evidence of the witnesses. PW1, PW2 and PW5 who took part in intercepting the appellants.

In the circumstances of this case, I find the evidence adduced by P.W.1, P.W.2 and P.W.5 to be consistent and credible.

I also note that the trial magistrate considered the defence offered by the appellants and found it to be incredible due to, among other reasons, the fact that on cross-examination it emerged that the appellants did not know Nakuru yet they had claimed to be residents.

Having considered and re-evaluated the defence offered by the appellants, I have no reason to doubt or fault the trial magistrate's finding on their defence. It was utterly incredible.

Was the sentence imposed by the trial court harsh and excessive?

The sentence for the offence the appellants were charged with is provided for under Section 4(a) of the Act thus:-

**“4. Penalty for trafficking in narcotic drugs, etc.**

**Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a 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.”**

The sentence meted on the appellants is legal land the court will not interfere with it. In the end, i find the appeal to be without merit. It is hereby dismissed.

**DATED and DELIVERED this 14<sup>th</sup> day of March, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Both appellants in person

Mr. Chebii for the State

Kennedy – Court Assistant