REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.51 OF 2012

(Appeal from the judgment, conviction and sentence of Hon. W. N. Kaberia – SPM

on 3rd August 2012 in Kericho PMCRC. No.2086 of 2011– Republic vs Vincent Orina Ogoa)

VINCENT ORINA OGOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Vincent Orina Agoa, the Appellant, herein was jointly tried with Grace Atieno Ochieng on a charge of trafficking in Narcotic drugs contrary to Section 4 (a) of the Naroctic Drugs and Psychotropic substances Control Act No.4 of 1994. After undergoing a full trial, the Appellant and his co-accused were convicted. Grace Atieno Ochieng was sentenced to serve 9 years imprisonment while the Appellant was sentenced to 10 years imprisonment. The duo were also each ordered to pay a fine of Ksh.1,856,500/=. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds:

1. That the learned trial magistrate erred in law and fact by convicting the Appellant by not considering that evidence adduced in court were contradictory and inconsistent.

2. That the learned trial magistrate erred in law and fact by convicting the Appellant on the presumption that the recovered driving license and identification card were for the Appellant, yet the mentioned vehicle was not his.

3. That the learned trial magistrate further erred in law and fact by not seeing that the recovered vehicle was not proved to be for the Appellant.
4. That the learned magistrate erred in law and fact by overlooking that even the number of recovered Cannabis Sativa was not brought to court as it was alleged it was 2064 in number but only 120 stones were brought to court.

5. That the learned trial magistrate further erred in law and fact when he failed to notice that the evidence adduced in court was fabricated.

6. That the Appellant's defence was not considered as required by law.

When the appeal came up for hearing, Mr. Mutai learned Senior Prosecution State Counsel conceded the appeal on the basis that the trial magistrate who concluded the case did not comply with Section 200 of

the Criminal Procedure Code. He urged this court to allow the appeal and make an order for retrial. Mr. Maengwe learned advocate for the Appellant did not oppose the application for retrial.

I have carefully perused the record and it is apparent that Hon. N. Wairimu learned Resident Magistrate heard the evidence of PW1 the prosecution's first witness who produced the Cannabis sativa, the Government Chemist report and motor vehicle registration number KAJ 905J as exhibits in evidence. The case was adjourned to another date and PW1 was stood down to be recalled for cross-examination. Hon. N. Wairimu was thereafter, transferred from Kericho hence the case was placed before Hon. Kaberia, learned Senior Resident Magistrate to hear and determine the same. It would appear that on 22nd March 2012, Hon. Kaberia, the learned Senior Resident Magistrate who took over the case from Hon. N. Wairimu explained to the Appellant and his co-accused their rights under Section 200 of the Criminal Procedure Code. The accused persons are recorded to have stated that they would wish their case to begin denovo. The court prosecutor too concurred with the accused. The court then proceeded to make the order directing the hearing of the case to start afresh. Later on the same date the prosecutor informed the court that the exhibits had been eaten by rats hence it could not be produced in the state they were. The prosecutor applied to the court to order directing the case to proceed from where the former magistrate rested the case instead. The accused persons stated that they had no objection to the request. Again, the learned Senior Resident reviewed his previous order and issued an order directing the case to proceed for hearing from where his predecessor had left. It is clear in my mind that the learned Senior Resident Magistrate who took over the case fully complied with Section 200 of the Criminal Procedure Code. I am convinced that Mr. Mutai improperly conceded the appeal on this ground.

Having come to the conclusion that the provisions of Section 200 of the Criminal Procedure was never breached, I am bound to consider the other grounds put forward by the Appellant in his Petition of appeal and the written submissions.

In the first ground of appeal, the Appellant pointed out that plea and the immediate subsequent proceedings were taken before Hon. J. Kwena learned Principal magistrate. It would appear the coram indicates Hon. J. Kwena but a close perusal of the handwritten notes will reveal that the case was actually before Hon. N. Wairimu, learned Resident Magistrate. What appears to have happened is that the file was meant to be initially placed before Hon. J. Kwena but was later placed before Hon. Wairimu without cancelling the name of Hon. J. Kwena. For this reason I find this ground without merit.

In his written submissions, Mr. Maengwe, learned advocate for the Appellant argued that the prosecution's case was full of contradictions. He pointed out that the charge sheet talked about cannabis yet there are different types of cannabis. It is argued that there is confusion as to whether the prosecution meant Cannabis Sativa or simply Cannabis. It is true the charge sheet talks of Cannabis. The Appellant does not state that he was confused as to what was meant by Canabis. I find this argument perplexing because the Government Chemist Analyst report clearly shows that the substance taken for analysis was found to be Cannabis Sativa, popularly referred to as bhang. I see no merit in this ground.

The Appellant also argued that the prosecution failed to prove its case to the required standard of proof in criminal cases of beyond reasonable doubt. I have re-evaluated the case that was before the trial court. A total of four (4) witnesses testified in support of the prosecution case. PC. Kyalo (PW2) flagged down motor vehicle registration number KAJ 905J upon receipt of information that the motor vehicle was transporting Cannabis Sativa from Kisii. The motor vehicle was stopped by PW2 at Kapsuser Trading Centre but instead of stopping the driver sped off. PW2 called Brooke Patrol Base to set up a road block. PC. David Munyambu (PW3) and PC. James Irina (PW4) erected a road block at Brooke Trading Centre where they managed to intercept the aforesaid motor vehicle. The Appellant and his co-accused were arrested and 2064 stones of bhang were recovered from motor vehicle registration number KAJ 905J. Cpl. Andayi (PW1) took possession of the bhang and had the same weighed. The same weigh 275 kgs. PW1 took the samples for chemical analysis at the Government Chemist, Kisumu and the substances were found to be cannabis sativa. It is now clear that the case against the Appellant and his co-accused was proved beyond reasonable doubt.

The final ground argued by Mr. Maengwe is that the Appellant's defense was not considered. I have

looked at the judgment of Honourable Kaberia. It is crystal clear that the learned Senior Resident Magistrate considered and gave due attention to the Appellant's defense. It is also clear that Hon. Kaberia did not believe the defense set up by the Appellant and his co-accused. I have reconsidered the same and I do not believe the Appellant's defense. The same appears to have been a makeup story.

In the end, I find no merit in the Appellant's appeal. The same is ordered dismissed in its entirety. The Appellant is hereby ordered to serve the remainder of his sentence. The surety is hereby discharged and the collateral *i.e*. L.R . No. S. Mugirango/Boikanga/1770 should be released to the surety.

Dated, signed and delivered in open court at Kericho this 16th day of May 2014

J. K. SERGON

JUDGE

In the presence of:

Lopokoiyit for Director of Public Prosecution

Maengwe for Appellant

Appellant: present in person.