



No. 349/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 131 OF 2013

MUTUA MULI ALIAS KATOOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 83 of 2011 by B.M. Kimemia , PM on 5/6/13)

JUDGMENT

1. The appellant was charged with;-

- i. Escape from lawful custody contrary to **Section 123** as read with **Section 36** of the **Penal Code**. Particulars of the offence being that on the 11th day of **January, 2010** at about **4.45am** at **Kaveta Sub-location, Mutune Location** in **Kitui District** within **Eastern Province**, being in lawful custody of **No. 81298 Cpl. Josphat Kinyua of Kitui Police Station** escaped from the said **No. 81298 Cpl. Josphat Kinyua**.

Count II- malicious damage to property contrary to **Section 339(1)** as read with **Section 339(7) (g)** of the **Penal Code**. Particulars thereof being that on the 11th day of **January, 2010** at unknown time and place in the Republic of Kenya willfully and unlawfully destroyed one pair of handcuffs **Serial Number 02960** the property of the Government of Kenya valued **Kshs. 5,000/=**.

Count III- being in possession of **Narcotic Drugs** Contrary to **section 3(1) (2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. Particulars of the offence being that on 12th day **February 2011** at **Kaveta Sub-location, Mutune Location** in **Kitui District** within **Eastern Province**, was found being in possession of cannabis sativa to wit twenty stones of street value of **Kshs. 4000/= (Four Thousand Shillings)** which was not in any form of medical preparation.

2. He was tried, convicted and sentenced as hereunder:-

Count I – one (1) year imprisonment.

Count II – Seven (7) years imprisonment.

Count III- Three (3) years imprisonment.

Per the order of the court, sentences were to run concurrently.

3. Being dissatisfied with the conviction and sentence thereof he now appeals on grounds that can be condensed thus:-
 - i. The learned trial magistrate erred in law and fact by failing to consider that evidence adduced failed to support the charges preferred and the charge of malicious damage to property was preferred **sixteen (16)** months thereafter.
 - ii. Evidence adduced was contradictory;
 - iii. Vital and crucial witnesses were not called per the requirement of **Section 150** of the **Criminal Procedure Code**;
 - iv. The defence put up by the appellant was not considered.
4. According to evidence adduced by the prosecution, on the **11th January, 2010** Police Officers from **Kitui Police Station** in Company of PW1, **Cosmas Kyalo Syomuti, Chief- Mutuni Location** went to the appellants house at 4.00am. He was a robbery suspect. They arrested him and handcuffed him as a restraining device to lock his wrists. While escorting him to the motor-vehicle he ran away. Thereafter, handcuffs were allegedly taken to the Police Station by one, **Muinde Munyao**. A year later the appellant was arrested. He was taken to his house that was searched and some plant material suspected to be cannabis sativa was recovered. He was charged.
5. In his defence the appellant stated that he took some charcoal to his customer. He stopped to repair a puncture then he heard gunshots. He ran till Oilibya petrol station only to be arrested. The police took him to the Police Station. His house was searched and nothing was recovered. It was further his evidence that he was held in **Kamiti Prison** for **10 years** in **Criminal Case No. 111 of 2010** and was released in **August 2010**.
6. The appellant relied on written submissions and added that he had a disagreement with the Chief hence his arrest. **Ms Omojong**, learned State Counsel in response opposed the appeal. She stated that the damaged handcuff was adduced in evidence, the appellant was arrested while running away and the search in his house culminated into recovery of the substance ascertained to be cannabis sativa. Sentences passed were within the law.
7. The trial magistrate evaluated evidence adduced and formed an opinion that the charges had been proved to the required standard hence returned a verdict of guilty and convicted the appellant.
8. This being a first appeal, I do remind myself of the necessity to re-consider evidence adduced afresh to come up with my own independent conclusions bearing in mind the fact that I neither saw nor heard witnesses who testified. (see **Okeno versus Republic [1972] E.A. 32**).
9. With regard to count 1, the appellant would be deemed to have been in lawful custody if he had been arrested and detained in a manner authorized by the law.
10. PW2 **No. 81298, Corporal Josphat Kinyua** stated that he arrested the appellant and handcuffed him. He stated that he was investigating a series of robbery with violence cases and Narcotic Drugs cases following reports from members of the public. In his defence the appellant claimed that he was in custody at the time of the alleged offence having been convicted in **Criminal Case No. 111 of 2010** and released in **August, 2010**. No evidence was called by the prosecution to rebut the assertion of the appellant as provided for by **Section 309** of the **Criminal Procedure Code**. In the premises, the question that was not answered by the prosecution was whether the appellant could or could not have been at the scene of the arrest.
11. Another issue which should have been determined was whether the appellant was arrested and detained as authorized by the law. In order for any arrest to be effected there must have been a complaint. The prosecution failed to adduce evidence of any complaint made. A person suspected to have committed a cognizable offence can be arrested without a warrant but there must be evidence of such a complaint. In this case, if at all the appellant was at the scene of arrest, it is questionable if he had been arrested pursuant to the law.
12. It is stated that he was handcuffed and he escaped with handcuffs. PW2 who is the complainant

stated thus;-

“I arrested the accused and cuffed him and he jumped and entered into a hole and he escaped with the handcuffs and we could not trace him. On 13th, the PW1 brought the handcuffs to the police Station and I confirmed they were the ones I had used and it had been damaged. PW1 said the accused sent a lady to return them, the handcuffs had serial no. 02960.”

13.If indeed the witness left the Police Station with handcuffs **Serial No. 02960** there must have been an entry at the Police Station to that effect. If a suspect ran off with the handcuffs, similarly there must have been an entry of the same. No evidence of such a report having been made to the Police Station was adduced. The question to be answered will be if indeed handcuffs **Serial No. 02960** were lost and recovered?

14.It is stated by the witness that the accused sent a lady to return the handcuffs. In his evidence **PW1** said that **Muinde Munyao** the cousin of the accused took to him the handcuffs on the **13th January, 2011**. PW3, the investigating officer stated thus:-

“Accused later took handcuffs to PW1... PW1 took it to PW2 and after arrest, we charged the accused. The cuffs were damaged.”

15. No investigations were carried out to establish how PW1 got the handcuffs alleged to have been taken away by the appellant. The lady or cousin alleged to have taken them to PW1 was not called as a witness to shed some light on how the handcuffs came into existence. Evidence adduced points to PW1 as the person who had handcuffs produced. The court cannot tell with certainty if indeed the appellant was in possession of the handcuffs. Therefore, there is no proof beyond any reasonable doubt that the appellant escaped from lawful custody while handcuffed and he later on destroyed the pair of handcuffs **Serial No. 02960** which was the property of the government.

16.With regard to the count of being in possession of narcotic drugs. Evidence was adduced by PW2 and PW3 that they were informed by the DCIO that the accused had been spotted at **Kalundu**. They saw him some approximately 100 meters away. While approaching him he started running away. They fired shots in the air. He stopped and they arrested him. They took him to his home, searched it and recovered a sack that contained some stones of plant material. The appellant does not deny that it was his home but argues that no recovery was made.

17.With respect to the recovery PW2 stated thus;-

“We went to his home in Kaveta and did a search and recovered a sack of bhang stones.”

On cross-examination he said that the appellant’s home is in the same compound with other homes.

18.PW3 on the other hand stated thus.

“... later we went to his home and did a search and under a bed, PW2 recovered this bag... which had bhang – 20 stones”.

19.There having been what they called many homes within the homestead, it would have been imperative on the part of the prosecution to tender proof that the house in which the stone plant material was recovered did not belong to any other person as opposed to the appellant. As correctly submitted by the appellant the exhibit memo form indicates that the exhibits were recovered by **Mr. Edwin Kamau** and his team. The named individual would have shed some light as to the alleged recovery. However, he was not called as a witness.

20.Looking at the particulars of the offence, it is stated that the appellant was found in possession of cannabis sativa to wit **twenty (20)** stones of a street value of **Kshs. 4,000/=**. The report produced in evidence indicate the envelope that contained **five hundred and eighty nine (589) grams** of plant material was examined and found to be cannabis, which falls under the first

schedule of the **Narcotic Drugs and Psychotropic Substances (Control) Act 1994**. The report was made by **G.N. Anyona** a Government Analyst who was not called as witness. The reports were produced by PW3.

21. The prosecution, I believe purported to produce the report pursuant to the provisions of **Section 77** of the **Evidence Act** which provides thus:-

“77. (1) In criminal proceedings any document

purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

22. Prior to evidence being adduced under the aforesaid provision the law, being an opinion of an expert, leave must be sought from the court following reasons given why the author of the document cannot be availed. A basis must be laid which would enable the court draw an inference that the analyst made the report having held the office and qualifications professed at the time of signing it. The court may even require to examine him on the subject matter. (*vide Section 77(1) (2) (3) of the Evidence Act.*)

23. In the same vein the accused person must also be given an opportunity to respond to the application made just in case he may wish to examine the witness on the subject matter thereof. This was a case where the appellant should have been accorded an opportunity of cross-examining the Government Analyst. The procedure that was adopted by the court was irregular which turned out to be prejudicial to the appellant.

24. From the foregoing, it is apparent that the appeal has merit. Consequently, I quash the conviction on all the **three (3) counts**, and set aside sentences meted out. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KITUI this 17TH day of JULY, 2014.

L.N. MUTENDE

JUDGE