



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CRIMINAL APPEAL CASE NO. 80 OF 2011**

*(From the original conviction and sentence in criminal case no. 300 of 2010 of the Chief Magistrate's Court at Malindi before Hon. L. W. Gitari – CM)*

**OMAR MOHAMED SHEBANA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged before the Chief Magistrate's Court Malindi with the offence of Trafficking narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act (the Act). The particulars of the charge were that on the 7<sup>th</sup> day of March, 2010 at Kwandomo road block in Malindi District within coast Province, was found trafficking in narcotic drugs to wit 83 big rolls of cannabis valued at Kshs. 33,200/- by transporting in a P.S. V. vehicle registration number KBD 818G in contravention of the said Act. The appellant was convicted following a full trial. He was subsequently sentenced to life imprisonment and in addition ordered to pay a fine of Shs. 1million.
2. Aggrieved by the decision of the court the appellant filed this appeal against both conviction and sentence. He raised six amended grounds of appeal. The grounds principally challenge the quality of evidence upon which the conviction was based. In addition, ground No. 3 raises the question of valuation of the drug under Section 86 of the Act while ground 5 challenges the sentence imposed as being excessive. During the hearing the appellant relied on his home-made submissions. The State opposed the appeal through Mr. Nyongesa.
3. The duty of the first appellate court is to appraise afresh the evidence adduced at the trial and to draw its own conclusion. (See **Okeno v R 1972 EA 32**). Even so the appellate court will not easily assail the findings of the lower court based on the credibility of witnesses who appeared at the trial unless those findings are plainly wrong and no reasonable tribunal could have arrived at them on the basis of evidence tendered (see **R v Oyier [1985] KLR 385**).
4. The prosecution called four witnesses during the trial. The sum total of their evidence was that the appellant purchased a bus ticket, on Najah Coach Bus which plies the Mombasa Lamu route. He boarded the vehicle on 7<sup>th</sup> March, 2010 at Mombasa and took his assigned seat, Number 32. The bus registration number was KBD 818G driven by an employee of Najah Coach. The conductor was Aziz Ali Abubakar (PW1).

5. The bus was full, and passengers' bags were duly labelled with their seat numbers. The appellant carried a bag with him and placed it under his seat. PW1 ordered him to put it on the rack above the seats. But the appellant claimed some fragile items therein might break and kept the bag under the seat. When the bus reached Kwandomo on Malindi - Lamu road, it was stopped at a police road block manned by sergeant Karangi (PW3) and Pc W Asha Noor (PW2). All the passengers were ordered out of the bus with their luggage. The appellant allegedly left his bag behind in the vehicle where PW3 found it near his seat and on opening found stashed in it 83 rolls of suspected bhangi. PW1 identified him to the police as the owner. The appellant denied the bag was his but was arrested and escorted with the bhangi to Malindi Police Station. A sample of the drug prepared by PW2 was examined by George Lawrence Ogunda (PW4) a government chemist. He prepared a report (exh.6) confirming the substance to be cannabis, a narcotic drug.
6. In his defence the appellant told the court that he worked as a turn boy in Mazeras although he hailed from Lamu. Having learned of the death of his grandfather he bought a ticket and boarded the already full bus for Lamu on the material date. He was assigned seat no. 27. The bus arrived in Malindi having dropped several passengers on the way. At Kwandomo the bus was stopped by police officers. Like other passengers he complied with the order to disembark with his luggage. Passengers were searched and ordered back inside the bus and he sat on his seat.
7. Thereafter police entered the bus with the exhibit bag demanding the owner to identify himself and when nobody came forward, the police went outside for a discussion with PW2. They returned on board and claimed the bag belonged to the passenger occupying seat No. 27. He resisted the accusation and despite his explanations and protestation of innocence he was arrested and charged.
8. There is no dispute concerning the presence of the appellant on the subject bus as a passenger on the material day at the time police flagged it to a stop along Malindi/Lamu road. The question of his possession of the drug was disputed at the trial. Eventually after analyzing the evidence, the trial court believed the prosecution witnesses, in particular PW1 and PW3. The Lower Court stated:

**“Evidence was adduced by PW1 which I find no reason to doubt. PW1 from what he told the court had positively identified the bag exhibit 1 which was containing the drugs as belonging to the accused. This is because the accused had kept it under his legs and when PW1 asked him why... he said it had things which could break. I find that during this time PW1 saw the bag and knew it belonged to the accused. The accused left the bag in the bus when they were ordered by police to get out with the bags ... (he) was sitting on seat No. 32 and above it is where the bag was...”**
9. The appellant's submissions have dwelt at length on the recovery of the drug, emphasizing correctly, the bag in which the drug was found was not in his physical possession at the time of the recovery. In this regard only PW1 supplied direct evidence on the ownership of the bag and described his discussions with the appellant about it at the commencement of the safari. I have looked at the evidence of PW1 and answers given by him in cross-examination. He acquitted himself well during cross-examination and the trial court was entitled to believe that because of the conversation PW1 had with the passenger over the bag he was in a position to identify it later. The reasons given by the trial court for believing PW1 are unassailable.
10. Secondly, PW1 identified a copy of the bus ticket being also the passenger manifest for the bus seats including seat No. 32, which PW3 produced as exhibit 3. According to PW3 the contentious bag was found in the rack above seat No. 32 at the back of the bus. Surprisingly, even though PW1 and PW3 persistently maintained that the appellant occupied seat No. 32, at no time did he suggest to them that he sat at seat No. 27, which allegation he made during his defence. PW1, PW2 and PW3 said that after the searches, all the passengers were ordered back into the bus to take their seats and that the appellant took seat No. 32. By that time PW1 had already pointed out the appellant to the police.

11. The trial magistrate noted that the passenger assigned seat No. 27 was one Khadija clearly a female, and having observed the appellant's failure to canvass his alleged occupation of seat No. 27 with the prosecution witnesses, she therefore, correctly dismissed that allegation as an afterthought. I also agree with her finding that the evidence of PW1 was corroborated materially by that of PW2 and PW3. The appellant's complaint that his defence was not considered has no basis. The appellant was proved to have been in constructive possession of the offending bag at the material time.
12. Secondly, there is no dispute that the bag contained 83 big rolls confirmed by the government chemist to be cannabis, a narcotic drug. The appellant's feverish denial of possession of the said bag indicates in the circumstances of the case, a guilty mind. According to PW1, once the passengers were on board the bus after inspection, the appellant was confronted by the police. The appellant allegedly started shouting that he had no bag even before police asked him any question about it. Secondly, the ticket No. 32 was booked under the name Osama and PW1 having stuck the name label on the bag, later found the same had been removed.
13. The appellant's protestations that his name was not "Osama" were properly dismissed. He was the passenger physically occupying seat No. 32. The statement in the appellant's submission that "Osama" who had booked the seat did not travel is not an accurate rendering of PW1's evidence. What PW1 said in his regard is that the ticket was booked for an earlier date, however the passenger did not travel on the booked date but took the bus on the next day. That passenger was identified as the appellant. The prosecution evidence and the Lower Court's findings thereon, with regard to the recovery are solid.
14. Turning to the objection regarding the failure by the prosecution to prove the value of the drug, it is true as submitted by the appellant that none of the officers adduced evidence as to whether they were proper officers under Section 86 of the Act.

The section states:

**"Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.**

**In this section "proper officer" means the officer authorized by the Minister by notification in the Gazette for the purposes of this section."**

15. It is the appellant's contention that failure to tender evidence on the value of the drug renders the charge unproved. The State asserted that PW2 was the proper officer in this case and the court ought to consider the valuation she gave. And in the alternative, find that the failure to adduce evidence of valuation cannot defeat a properly proved charge by resulting in an acquittal.
16. In this regard the State cited the case of **Priscilla Jemutai Kolongei v R [2005] eKLR**. Regarding the application of Section 86, the court made an important statement in the **Kolongei case** as follows:

**"In the first place the authorities cited in aid by the appellant are all distinguishable. What irked the court in the Hamayun Shah case is that there was no attempt at all to provide any evidence on the value of the drug only the charge sheet mentioned it. That is not the case here as there was oral evidence which was available for evaluation by the court... We think the enactment of that Section (86 of the Act) was an obvious recognition of the difficulty in the availability of first hand knowledge of what a willing seller would accept from a willing buyer for goods such as narcotic drugs which are illegal. The certificate remains prima facie evidence which may be challenged by other evidence in the absence of which it is the only evidence to be relied upon in addition to any other evidence on record...The solution**

**therefore in our view, where the trial court is faced with scarcity of material on valuation, is not to throw up one's hands and dismiss the valuation, but to do their best to find the willing seller willing buyer price or simply the market price."**

17. My reading of Section 86 of the Act, which is reinforced by Court of Appeal decisions (**Kolongi v R, as well as the case of Ali Mohamed v R (criminal Appeal No. 61 of 2000)**) is that although it is necessary to state and prove the value of drugs in narcotic cases, the omission to do so does not automatically fatally affect the resulting conviction. In the case of **Ali Mohamed** the court said that such conviction will only be vitiated in "an appropriate case". Secondly, the question of the value of the drug is linked directly under Section 86 to the determination of the fine. In this case the fine imposed was the minimum provided for under Section 4(a) of the Act.

18. In her judgment the learned magistrate did not specifically advert to the issue of the value of the drug but seemingly deemed the value proved. This is likely due to the fact that the evidence given by PW2 on the value was not challenged at the trial through cross-examination or other evidence. It is too late in the day for the appellant to raise a challenge at this stage as to whether PW2 was a proper officer. In my considered view this appeal has no merit. The appellant was properly convicted and sentenced. The appeal is dismissed in its entirety.

Delivered and signed at Malindi this 4<sup>th</sup> day of **July, 2014** in the presence of the appellant, Mr. Nyongesa for the State.

Court clerk – Samwel

**C. W. Meoli**

**JUDGE**