



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 245 of 2011

CHRISPINE KENT OTIENO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2546 of 2003 in the Chief Magistrate's Court at Kibera – Mrs. U. V. Kidula (CM) on 05/09/2011)

JUDGMENT

1. The Appellant, Chrispine Kent Otieno has filed this appeal challenging his conviction and sentence by the Principal Magistrate sitting at Kibera Law Courts. The Appellant had been charged together with another in four counts, as follows:

Count I: Trafficking in Narcotic drugs contrary to **Section 4(a)** of the **Narcotic drugs and psychotropic substances (control) Act No. 4 1994**.

Count II: Being in possession of Narcotic drugs contrary to **section 3(1) and 2(b)** of the **Narcotic drugs and Psychotropic substances (control) Act No.4 of 1994**.

Count III: having in possession paper intended to resemble bank note or currency note contrary to **section 367 (a)** of the **Penal Code**.

Count VI: Having in possession uncustomed goods contrary to **Section 185 (d) (iii)** of the **Customs and Excise Act Cap 472 (b)** of Kenya.

2. It was alleged that:

On the 15th day of March 2003 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, jointly with others not before court, they trafficked in 95 pellets to wit 1.255 kilogrammes of Narcotic drugs namely cocaine, with a street value of Kshs. 5.02 million, in contravention of the said act, in **count I**.

That on the same date and place he was found in possession of 1 gram of Narcotic drug namely Diacetylmorphine commonly known as Heroin with a street value of Kshs.1000 in contravention of the said act in **count II**.

That on the same date and place without lawful authority or excuse knowingly had in his possession a

paper s/no. AF 30178830 F intended to resemble and pass as U.S currency note for United States dollars 20 in **count III**.

That on the same date and place he was found in possession of motor vehicle chasis No. GX 813160643 make Toyota Mark 11, which he knew or ought reasonably to have known to be uncustomed goods in count VI.

3. The Appellant was convicted on counts **II**, **III**, and **IV** and sentenced to serve 20 years imprisonment in **count II**, 4 years imprisonment on **count III** and 2 years imprisonment in **count VI** respectively. The sentences were ordered to run concurrently.

4. In the appeal before me the Appellant advanced seven grounds as may be seen from his amended grounds of appeal and stated as follows:

a) There was no link between the Appellant and the narcotic drugs, or the alleged unaccustomed goods motor vehicle chassis no. GX 813160643, or the 20 US dollar note.

b) The evidence tendered by the Prosecution raised serious doubt and was totally insufficient.

c) The charge in count II was fatally defective.

d) The sentence was manifestly harsh in the circumstances.

5. The learned state counsel Miss Maina opposing the appeal on behalf of the state gave a synopsis of the facts of the case and stated that the prosecution had laid a basis for the conviction and sentence that followed. She urged me to dismiss the appeal.

6. On the link between the Appellant and the narcotic drugs in **count I**, I have carefully considered the evidence and findings of the trial magistrate. In **count I**, the trial magistrate found that the prosecution failed to prove that the Appellant had indeed trafficked the 95 pellets that were emitted by the deceased (1st accused).

7. The only nexus between the Appellant and the narcotic drugs which were the subject matter in count I, was the meeting between the appellant and the deceased (1st accused) on the material date. A photograph of the deceased (1st accused) was also said to have been found in the Appellant's wallet when the police arrested him. The learned trial magistrate rightly found this evidence to be insufficient, and acquitted the appellant on this charge.

8. On counts **II**, **III**, and **IV** respectively, **PW1** P.C Marcus Mbithi, **PW3** I.P Koikai, **PW5** P.C. Onyango and **PW7** I. P. Mwasiall of C.I.D Anti-Narcotic Unit, were on duty on 15th March 2003 at Jomo Kenyatta International Airport where they were profiling arriving passengers. One of the names on their watch list of suspected drug traffickers appeared on the screen. It was Nassor Said Salum who held a Tanzanian passport number A.0112778 and he was arriving from Zurich on Swiss flight No. LX. 292.

9. They trailed him to Transnational Bank where he met and spoke with the Appellant. Both men were arrested and taken to the police station. Upon being searched the passenger (Accused 1) was found in possession of assorted currency notes of Kenya, Indonesia, India, Pakistan and Central Africa Republic. The appellant was found with a pay slip which indicated that he was a police officer, a satchel containing powdery substance that was brown in colour, 20 US dollar bill, an ignition key to a vehicle, together with importation documents of a motor vehicle which had no registration number.

10. I have considered the defect referred to by the appellant with regard to **count II** and found that it was a mere irregularity which did not cause any miscarriage of justice. **Section 2(b)** does not exist in the narcotic drugs and psychotropic substances act. The appellant was charged with being in possession of narcotic drugs contrary to **Section 3 (1) and 2(b)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act no. 4 of 1994**.

11. The responsibility of drafting the charge is always that of the prosecution. It is however the primary duty of the trial magistrate to satisfy herself/himself that the section of the respective act under which an accused person is charged is correct before assuming jurisdiction to try the case. Reading the charge in context however, I understand it to mean that the appellant was charged under **Section 3(1)** as

read with **Section 2(b) of Act No. 4 of 1994**. I am satisfied that the appellant in this case was in no way prejudiced by the defect, since he understood the substance and the essence of the charge against him.

12. Two wallets were said to have been recovered in connection with the appellant. One contained a satchel in which the brown substance which was later found to be heroin, while the other wallet contained the US 20 dollar bill which was later found to be fake. The second wallet was also found to contain a pay slip bearing the appellant's particulars as a police officer and was in the car which is the subject matter of **count IV**.

13. The brown substance which is the subject matter in **count II** was taken to the Government Chemist and **PW9** the Government Analyst who analysed the substance found it to contain heroin, a controlled substance under Act No. 4 of 1994. He prepared and produced his report in evidence The US 20 dollar note which is the subject matter in **count III** was forwarded to **PW11** the Document Examiner, who subjected it to infra-red light and established that it was indeed a fake note.

14. The nexus between the Appellant and the alleged unaccustomed goods, motor vehicle chassis no. GX 813160643, in **count IV** was provided by **PW2** an employee of K.R.A Revenue Section, who testified that acting on instructions from his bosses he went to investigate a vehicle at the J.K.I.A Police Station which did not have valid documents. He established that the vehicle had overstayed its transit status from the date of arrival in Kenya. He impounded the vehicle and issued a seizure notice to the Appellant who identified himself as the owner of the vehicle.

15. The appellant was in possession of an ignition key when he was arrested although he denied having a vehicle at the airport. **PW3** and **PW5** testified that they eventually traced the Toyota Mark II, at the airport and found that it had no number plate, and that the appellant opened it using the ignition key recovered from him. The exhibit was not produced in court by either **PW3** or **PW5** who testified of this motor vehicle although they referred to a photograph thereof.

16. **PW7** testified that his investigations at the Port of Mombasa using duplicate copies of the said motor vehicle custom documents, confirmed that the motor vehicle, a Toyota dark blue Mark II was indeed the one that had been recovered at J.K.I.A. He produced the photograph of the said motor vehicle in evidence.

17. No reason was given why the vehicle could not be brought to court for the trial magistrate to have an opportunity to counter check the chassis numbering of the vehicle, and no basis was laid for the production of the photographs in exhibit 14. The Scene of Crime report-exhibit 14(a) was produced in evidence by **PW10** the Investigating Officer, and the trial court was not told why the (maker) Scene of Crime Officer was not called to testify to its content. No evidence was led to establish whether **PW10** was familiar with the signature or handwriting of the Scenes of the Crime Officer, to confirm the authenticity of the report.

18. Apart from the evidence by **PW2** that a vehicle chassis No. CK 813160645 had overstayed in the country based on the documentation allegedly recovered from the vehicle, no certificate, report or printout was produced by the said officer from the Registrar of motor vehicle to confirm and/or corroborate his assertion. For this reason I find that the charge in **count IV** cannot stand.

19. The Appellant's unsworn defence was that **PW10** the Investigating Officer was out to frame him, as he had a grudge against him stemming from a previous incident in which the appellant impounded his pick-up for transporting charcoal. He called one witness who confirmed that he saw through a window the prosecution witnesses examining a wallet recovered from the appellant. I note however, that the Appellant did not refer to this bad blood or any other incident between him and **PW10** during cross examination. The trial magistrate did consider the appellant's defence and dismiss it as a mere denial.

20. As a court of first Appeal I re-examined and re-evaluated the evidence to make my own findings and draw my own conclusions. I am satisfied that the Appellant was indeed found in possession of the narcotic substance. Several witnesses from the Anti Narcotic Unit were present when the wallet containing satchel with the brownish powdery substance was recovered from the appellant. I am also satisfied that the fake 20 dollar bill was found in a wallet containing his other personal effects.

21. I find therefore, that the prosecution proved its case against the appellant in **count II** and **count**

III and that the defence has no basis. It appears to be an afterthought meant only to exculpate the appellant.

22. On the severity of the sentence imposed upon the appellant, **Section 3(1)** of the **Narcotic and Psychotropic Substances Act** provides that:-

“Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

(2) A person guilty of an offence under subsection (1) shall be liable—

“(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.”

23. The learned trial magistrate sentenced him to 20 years imprisonment in **count II**, 4 years imprisonment in **count III**, and 2 years imprisonment in **count IV**. These sentences are tandem with the law and in the premises cannot be said to be harsh nor excessive.

24. For the foregoing reasons I find that this appeal is lacking in merit. I dismiss the appeal and uphold both conviction and sentence.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **2nd** day of **May 2013**.

L. A. ACHODE
JUDGE