



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APEPAL CASE NO. 625 OF 2007

BARNABAS OBUNGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 708 of 2004 in the Chief Magistrate's Court at Nairobi – Mr. M. W. Muiruri (CM) on 25/9/2007)

JUDGMENT

1. The appellant **Barnabas Obunga**, was charged and convicted for the offence of trafficking in Narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994**. The particulars were that on the 10th day of February 2004 along Juja road in Nairobi area, jointly with another not before the court, were found trafficking 206 kgs (1030) Stones of cannabis valued at Kshs.206,000/= in contravention of the provisions of the said Act. Upon conviction he was fined Kenya shillings one (1) million in addition to serve life imprisonment.
2. He filed an appeal based on four grounds on which learned counsel Mr. Kanyangi, appearing on his behalf, submitted that the learned trial magistrate erred in finding that the evidence adduced against the appellant proved the charge against him beyond any reasonable doubt. Further that his defence was ignored, **Section 169(1)** of the **Criminal Procedure Code** was not complied with, the prosecution's evidence was not properly analysed, and that the sentence was manifestly excessive. Miss Maina the learned state counsel submitted that the prosecution had proved their case to the required standard and urged me to dismiss the appeal.
3. I have carefully analysed and re-evaluated the evidence bearing in mind that I neither saw nor heard any of the witnesses as they testified, and giving due consideration thereto in line with the decision in **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982-88) 1KAR 1134**.
4. A summary of the prosecution case is that on 10th February 2004 at 6.15 p.m., **PW1**, CPL Kariuki of Special Crimes Prevention Unit attached to Gigiri Police Station, was on patrol duties commanding motor vehicle registration number KAP 202G, a GK Land Rover. Together with him were Police Constables Aleka, Ngila, Kamau and Mwitii. While so engage he received information that motor vehicle registration number KZP 075 make Peugeot cream in colour was

moving from Githurai to town with a cargo of Cannabis Sativa. They located the motor vehicle and arrested the appellant after a chase. He was subsequently charged as set out in the charge sheet.

5. The Appellant's defence was that he was going home to Mlango Kubwa on 10th February 2004 at about 7.30 p.m, having finished his work for the day at a garage in Ngara, when he heard sounds of gunfire. He began to run as did other passers-by, but a stray bullet hit him, and rendered him unconscious. Thereafter he was admitted at Kenyatta National Hospital where he remained for eight days. He subsequently regained consciousness and was charged at Kasarani Police station. He denied the offence.
6. The main questions for determination are the identification of both the appellant and of the exhibit which is the subject matter of this case.
7. **PW1** testified that he and his team came upon the subject motor vehicle at Muthaiga round about, and moved alongside it towards Pangani area. At the drift that separates Muthaiga area from Pangani PC Aleka and **PW2**, PC Ngila alighted from the GK Land Rover and directed the driver of the subject motor vehicle to pull to the left side of the road and park. Instead, the driver accelerated when the traffic jam eased up and headed into Pangani shopping centre with CPL Kariuki's team in hot pursuit.
8. **PW1** testified further that after a protracted chase that took them to the Juja round about and back, and during which the subject vehicle stopped and ejected the lone passenger, **PW1's** team ran the motor vehicle to ground near the Pangani Flying Squad Centre. The driver of the subject motor vehicle alighted and fled on foot, and **PW1** also pursued him on foot, shouting "thief thief". Suddenly gun shots rent the air ahead of **PW1** and a short while later, he came upon the appellant seated by the side of the road. Besides the appellant lay another man, and both men had sustained gunshot injuries.
9. The appellant was taken to Kenyatta National Hospital where he was admitted under treatment for 8 days. The second man who turned out to be a police constable out on patrol duties was not so lucky. He died on arrival at Guru Nanak hospital near the scene of the shooting.
10. The Peugeot vehicle was searched and found to contain 1030 stones of plant material. Samples of these were subsequently analysed by **PW5** the Government Analyst and found to be Cannabis Sativa a substance prohibited under the **Narcotics and Psychotropic Substances Act No. 4 of 1994**.
11. I am therefore minded of the case of **KARANJA & ANOR VS. REPUBLIC [2004] 2 KLR pg 140** in the manner in which the trial court dealt with the evidence of identification. In the case of **Karanja and anor** the Hon. Judges of Appeal Githinji, Onyango Otieno and Deverell JJA held *inter alia* that:
 1. **Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.**
 2. **Whenever the case against accused depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.**
12. From the testimony of **PW1** he was chasing the suspect when he heard gunshots from the direction in which he was headed. He stood still for one whole minute trying to establish where the gun shots emanated from. He saw a crowd forming at the Pangani Flying Squad gate some 25 steps from where he had left the GK motor vehicle.

13. **PW1** testified that he neither arrested the appellant nor did he know who had shot the two men. He testified as follows in respect of the arrest:

“He left the vehicle and ran away. It is not me who arrested the accused. We then found him arrested by police officers from Pangani.”

It shall be remembered that the time of the arrest was about 7 p.m. Darkness had therefore fallen and there was heavy human traffic of people returning home from work.

The officer who shot these two men was not identified nor did he or she testify to help the court in understanding how the appellant was connected to the shouts of “thief! Thief!”. **PW1** also testified that the police arrested people after that gun shot.

14. **PW2** who was with **PW1** on the fateful day did not witness the shooting nor the arrest of the appellant because he chased the first man who emerged from the subject motor vehicle into Pangani shopping centre, where he lost him. **PW4** the driver of the GK Land Rover remained in the Land Rover at all times as **PW1** and **PW2** gave chase to the suspects. He also recalled that when they shouted “thief! Thief!” some members of the public joined in to chase the man who was being pursued by the police.

15. On the identification of the offending plant material, the evidence of **PW1** was that 1030 stones of bhang were found in the abandoned motor vehicle. **PW2** on the other hand testified that there were 1200 stones, while **PW5** the Government Analyst testified that there were 113 stones. It is also instructive to note that **PW1** did not witness the weighing of the plant material upon recovery.

16. The learned trial magistrate further misdirected himself in making suppositions not supported by the evidence. Such suppositions as may be found in the judgment are as follows:

“Firstly, I note that PW1, PW2 and PW4 are police officers who are trained to detect commissions of offences and to apprehend the offenders. They must have been interested to look and see at the face (sic) of the occupants of the suspect motor vehicle and especially its driver.....

At another juncture the learned trial magistrate opined as follows:

Since they were looking for him and he tried to escape they must have been very keen to identify him.....

The trial magistrate further stated that:

It is instructive also that as they chased the accused immediately before the arrest, they shouted ‘thief! Thief!’ and that means their sight especially that of PW1 was focused on the accused.”

The foregoing conclusions by the trial magistrate are not borne out by the evidence on record.

17. The inconsistencies in the evidence pertaining to the number of stones of plant material recovered, together with the fact that exhibits were submitted to **PW5** at the Government Laboratories on 5th April 2004 almost two months after the purported arrest and recovery, and that the appellant was held in the police cells for a period of one month before being charged, raises an uneasy suspicion in my mind that the police themselves were unsure as to whether they had arrested the right man.

18. The foregoing being the circumstances of this case, they do not lend themselves to the positive identification of the appellant, nor of the offending exhibits.

19. Reasons wherefore this appeal must succeed. I therefore quash the conviction and set aside the

sentence imposed upon the appellant and order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

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

L. A. ACHODE

JUDGE