Ogoa v Republic (Criminal Appeal 24 of 2014) [2023] KECA 1534 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1534 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 24 OF 2014

F SICHALE, LA ACHODE & WK KORIR, JJA

DECEMBER 15, 2023

BETWEEN

VINCENT ORINA OGOA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kericho, Sergon J), dated 16th May 2014 In HC. CRA NO. 5 OF 2012)

JUDGMENT

1. Vincent Orina Ogoa (the appellant herein), has preferred this second appeal against the judgment of Sergon J dated 16th May 2014, in which he had initially been charged with another person at the Chief Magistrate's Court in Kericho with the offence of trafficking in Narcotic Drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No.4 of 1994, (hereinafter "The Act").

2. The particulars of the offence were that on 22nd September 2011, at Brooke Trading Centre in Kericho District within the then Rift Valley Province, were jointly found trafficking in narcotic drugs namely, cannabis while transporting in a motor vehicle registration number KAJ 905J Subaru Legacy to wit 275 kilograms (2064) stones with approximate street value of Kshs. 619,500 in contravention of the said *Act*.

3. The appellant denied the charge after which a full trial ensued. In a judgment delivered on 3rd August 2012, Hon. W.N Kaberia (then Senior Resident Magistrate) convicted him of the offence and sentenced him 10 years' imprisonment and further ordered him to pay a fine of Kshs.1,858,500.

4. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 16th May 2014, Sergon J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

5. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 22nd May 2014 and a memorandum of appeal dated 16th May 2022, raising the following grounds of appeal:

> " i. That the learned Honourable Judge erred in law and fact by failing to consider and find that the appellant was not accorded the Constitutional right to a fair trial.
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> ii. That the learned Honourable Judge erred in law and fact in failing to consider and find that the appellant was not accorded his Constitutional right to be informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence.
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> iii. That the learned Honourable Judge erred in law and in fact in failing to consider and find that the appellant was not accorded his right to choose and be represented by an advocate and to be informed of this right promptly.
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> iv. That the learned Honourabe Judge erred in law and fact in finding that the charge of "trafficking in narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act* did not require the prosecution to particularly state and lead evidence on "Cannabis Sativa."

6. Briefly, the background to this appeal is as follows, PW1 was Corporal Jane Andai attached to division of CID performing anti- narcotics duties at Kericho and the investigations officer in this case. It was her evidence that on 22nd September 2011, she was called by PC Kyalo(PW2) who informed her that when he tried to stop motor vehicle registration No. KAJ 905J it did not stop whereupon he called police officers at Barclays Bank in Kericho who also tried to stop the motor vehicle but in vain.

7. That, PC Kyalo subsequently sought the assistance of in charge Brooke Patrol Base who erected a barrier at the diversion at Brooke trading center and managed to stop the vehicle which was carrying a large consignment of suspected narcotics and which vehicle was being driven by the appellant. They subsequently counted the stones which were 2064 in number in the presence of the appellant and his co-accused and the appellant acknowledged the weighing and signed the form. She subsequently prepared an exhibit memo form which was taken to the Government Chemist in Kisumu and the Government Chemist confirmed the substance to be cannabis which falls under the 1st schedule of the *Act*.

8. (PW2) Benson Kyalo a police officer attached to Kericho police station testified that on 22nd September 2011, he was on normal duties in Kericho town and acting on information, he proceeded to Kapsuser trading center and laid ambush. However, vehicle registration number KAJ 905 J did not stop when he flagged it down. He called the in charge Brooke Patrol Base and the vehicle was eventually intercepted at Broke trading center by PC David Munyambu(PW3). PW3 told the trial court that the vehicle was being driven by the appellant.

9. PW4 was PC James Irina attached to Chagaik patrol base. He corroborated PW3's evidence and testified how they intercepted motor vehicle registration number KAJ 905J, make Subaru which was ferrying bhang and which they later escorted to Kericho police station. He had intercepted a motor vehicle ferrying bhang along Kericho-Nakuru highway at Brooke trading center.

10. After close of the prosecution's case, the appellant was put to his defence and he gave a sworn statement and elected to call no witnesses. It was his testimony that on 22nd September 2011, he was in Kisii town looking for a vehicle to take him to Nakuru. He got a lift in a Subaru car registration number KAJ 905J and on reaching some diversion after Kericho town, the vehicle was obstructed by a lorry and the driver alighted and ran away. A police officer came and arrested him and that it was then that he discovered that the vehicle was ferrying bhang.

11. When the matter came up for plenary hearing on 24th July 2023, the appellant who appeared in person sought to rely on his written submissions dated 16th May 2022 filed by his advocates Messrs. Oumo and Company Advocates. Miss Kisoo learned State Counsel appeared for the respondent and equally sought to rely on her written submissions dated 15th May 2023.

12. It was submitted for the appellant that the learned judge erred in law and fact by failing to consider and find that the appellant's Constitutional right to a fair trial had been violated as the prosecution applied to proceed with the hearing immediately after plea taking. Further that the appellant did not have adequate time and facilities to prepare for his defence and neither was he represented by an advocate.

13. It was further contended the appellant was not informed in advance of the evidence that the prosecution intended to rely on and that the learned judge erred in law and fact in failing to consider that the appellant's right to choose and be represented by an advocate of his own choice and be informed of this right promptly was violated contrary to Article 50 (2) (g) of the *Constitution*.

14. Lastly, it was submitted that the charge was defective as it did not accord with the evidence given at the trial as the charge was for "cannabis" yet the evidence was for "cannabis sativa." It was thus submitted that the charge sheet in this case was in total variance with the evidence. Consequently, we were urged to allow the appeal.

15. On the other hand, it was submitted for the respondent that the contention by the appellant that he was not accorded his Constitutional right of a fair trial was not true for the reasons inter alia that after he took plea, the prosecution made an application to have the exhibits produced to avoid destruction at the police station and hence it was a production hearing only for safe custody of the exhibits pending the conclusion of the trial. Further, that the court considered the concerns of the appellant and found that he had not demonstrated how the production of the exhibits would prejudice him.

16. The respondent contended that the appellant did not cross examine PW1 at the production hearing as he sought an adjournment to cross examine the witness at a later date and that he subsequently cross-examined PW1 on 22nd March 2012, which was almost 6 months from the date when PW1 testified and that this was adequate time for the appellant to prepare.

17. Regarding the issue of legal representation, it was the respondent's position that the right to legal representation at State's expense is not absolute but rather subject to certain qualifications; and that in the instant appeal it had not been demonstrated nor was it apparent that the appellant was willing but unable to obtain legal representation; that the appellant fully and actively participated in both the initial trial was well as the first appeal in the High Court finally that the appellant had not demonstrated any substantial injustice occasioned by lack of legal representation nor was it apparent from the record.

18. On the issue of the defective charge sheet, it was submitted that the charge was not defective as the appellant was charged with an offence known in law namely: trafficking in narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substance Control Act* No. 4 of 1994, which charge clearly spelt out the statement of the offence which was also particularized.

19. It was further submitted that the government chemist report that was produced as an exhibit confirmed the drug to be cannabis and that the appellant's assertion that the charge sheet was defective because the charge was "cannabis" yet the evidence was for "cannabis sativa must fail."

20. We have considered the record, the rival written submissions, the authorities cited and the law.

21. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v. Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> " …This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law …"

22. In *David Njoroge Macharia v. Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v. Republic* [1984] KLR 213)."

23. Turning to the first ground of appeal, the learned judge was faulted for failing to consider that the appellant was not accorded his Constitutional right to fair trial as the prosecution applied to proceed with the hearing immediately after taking plea.

24. We have carefully looked at the record and the same indeed shows that when the appellant was first arraigned in court with his co- accused on 23rd September 2011, the charges were read to them whereupon they denied the same and a plea of not guilty was entered.

25. The prosecution subsequently, applied to have the exhibits which were before court produced as the storage with the DCIO was full and the exhibit was likely to be destroyed by rats. In response to the prosecution's application, the appellant stated as follows;

> "I object I have no reason I just feel that it is not in order because they will be used against me." (Emphasis ours).

26. The trial court in a short ruling overruled the appellant's objection and noted that the appellant and his co-accused had not stated what prejudice they would suffer if the investigation officer was allowed to testify and produce the exhibits. We note that the appellant did not appeal against this ruling by the trial court and neither was this issue raised in the first appeal. The appellant therefore cannot now be heard to fault the learned Judge for failing to consider an issue that was not before him.

27. Be that as it may, it has not been demonstrated to the satisfaction of this Court that the appellant suffered any prejudice by the mere production of the three exhibits namely; the report from the Government Chemist, the motor vehicle and the cannabis (bhang). As a matter of fact, after production of the same by the investigations officer (PW1), the appellant and his co-accused intimated to court that they had no objection to the production of the same and true to word cross examination of PW1 resumed 6 months down the line after she had testified. Just like the trial court, we are satisfied that the appellant was not prejudiced by the mere production of these exhibits immediately after plea taking. Consequently, nothing turns on this ground of appeal and the same fails.

28. The appellant further faulted the learned judge for failing to consider that he was not accorded his Constitutional right to be informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence. It was further submitted that the appellant did not have adequate time and facilities to prepare for his defence.

29. We have carefully gone through the record and indeed there is no indication that the appellant was supplied with copies of witness statements that were relied on by the prosecution. Additionally, there is nothing on the record to show he applied to be supplied with copies of the statements. Further, this issue was not raised in his first appeal before the High Court. Nevertheless, the record shows that throughout the trial, the appellant actively participated in the trial and ably cross examined the prosecution witnesses and applied for bond and even applied for an adjournment on 26th September 2011 when he stated that he was unwell. Furthermore, he put up a spirited defence in an attempt to discredit the prosecution's case. This clearly shows that he understood the nature of the charges he was facing and was adequately prepared for the same.

30. Regarding the contention that he did not have adequate time and facilities to prepare for his trial, the record shows that the appellant was arraigned in court for the first time on 23rd September 2011, where PW1 who was the investigations officer testified and produced the exhibits. The trial subsequently resumed on 22nd March 2012, where the appellant cross examined PW1 and PW2. This was a period of about 6 months from the date of his initial arraignment in court 23rd September 2011. The appellant therefore had a whole 6 months to prepare for his trial and we are not convinced that he did not have adequate time and facilities to prepare for his trial.

31. From the circumstances of this case and even though it is apparent that copies of witness statements were not supplied to the appellant, we are not satisfied that this omission occasioned him any prejudice as he ably conducted his case as we have demonstrated above. Our view in this regard is further fortified by decision of this Court in *Simon Ndichu Kahoro v Republic* NRB CA Criminal Appeal No 69 of 2015 [2016] eKLR, where the court rendered itself thus;

> "We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the *Constitution*, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case." (Emphasis ours).

32. We think we have said enough to demonstrate that this ground of appeal is devoid of merit.

33. Turning to the next ground of appeal, the learned judge was faulted for failing to consider that the appellant's right to choose and be represented by an advocate of his own choice and be informed of this right promptly was violated contrary to Article 50 (2) of the *Constitution*. Reliance was placed on the case of *Philip Kiema v Republic* [2019] eKLR.

34. Indeed, it is apparent from the record that the appellant was not informed of this right and neither is there anything on record to show that the appellant was not in a position to meet the expenses of his trial and neither did he request for legal representation. Faced with a similar situation in the case of *Charles Maina Gitonga v Republic* [2018] eKLR. The Supreme Court of Kenya rendered itself thus;

> " [9]
>
> (a) It is manifestly clear to this Court that, while the Applicant was tried and convicted in the trial Court, the question of Legal

representation did not arise at all. Similarly, that at the High Court during the hearing of his first appeal, the issue was never raised but was only raised in the Court of Appeal in Criminal Appeal No.78 of 2014 and the matter properly addressed by that Court within its jurisdiction, and;

(b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of the *Constitution* or any provisions of the Repealed Constitution and that under Section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial;

(c) ....

(d) Applying the above principles to the instant Application, we are unconvinced that the Applicant was not accorded an opportunity to obtain legal representation within the law as then in place during his trial and appeals or as later enacted through the *Legal Aid Act*, 2016. We cannot also fault the trial Court and the Appellate Court of first instance for alleged violation of Article 50(2) (g) & (h) of the *Constitution of Kenya*.

(e) ....;

(f) ..”

35. From the circumstances of this case and in light of the fact that the right to legal representation is not automatic but is rather qualified and the appellant having failed to raise this issue in the two courts below and in absence of any evidence that the appellant was unable to meet the expenses of his trial, we find no merit in this ground of appeal and dismiss the same in its entirety.

36. Turning to the last ground of appeal, the learned judge was faulted for finding that the charge of

> “trafficking in narcotic drugs contrary to Section 4 (a) of the *Act* did not require the prosecution to particularly state and lead evidence on “cannabis Sativa.”

It was thus submitted that the evidence given at the trial was for “cannabis sativa” yet the charge was for “cannabis.”

37. PW1 who was the investigations officer testified that once the haul was seized she prepared an exhibit memo form showing 100 stones of green dry plant materials enclosed in a bag which she took to the Government Analyst in Kisumu. According to the report from the Government Chemist dated 23rd September 2011,

> “the 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.”

38. The appellant did not object to the production of the report from the Government Chemist. The contents of the report therefore remained uncontroverted and unchallenged in evidence. Further there is nothing on record to show that the substance that was taken for analysis was anything else other than cannabis.

39. We have also perused the charge sheet. The same shows that the appellant was charged with trafficking in narcotic drugs contrary to Section 4 (a) of the *Act*. The particulars of the charge further state *inter alia* the appellant and his co-accused were found trafficking in narcotic drugs namely cannabis....

40. The *Act* defines cannabis as follows;

> " Cannabis" means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted, by whatever name they may be designated"

41. The *Act* further defines a narcotic drug in the following terms;

> " Narcotic drug" means any substance specified in the First Schedule or anything that contains any substance specified in that Schedule"

42. Additionally, cannabis appears in the first schedule of the *Act* as a narcotic drug and the contention by the appellant therefore that the charge was being in possession of cannabis yet the evidence was for cannabis sativa is therefore clearly and totally without any basis. The evidence given in the instant case was in conformity with the charge and supported the charge and we find no merit in this ground of appeal.

43. The totality of our analysis is that the appellant's appeal is without merit and it must fall by the wayside. Accordingly, the appellant's appeal is hereby dismissed in its entirety.

44. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER,2023.

F. SICHALE

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JUDGE OF APPEAL

L.A ACHODE

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR