Munene v Republic (Criminal Appeal 2 of 2017)
[2022] KECA 519 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 519 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 2 OF 2017

DK MUSINGA, RN NAMBUYE & AK MURGOR, JJA

APRIL 28, 2022

BETWEEN

PAUL MUTHIE MUNENE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment High Court at Embu (J.M. Bwonwonga, J.) delivered on 30th November 2016 in Criminal Appeal No. 13 of 2016)

JUDGMENT

1. The particulars of the charge were that on the 31st of July 2015 at Kutus town, within Kirinyaga County, the appellant was trafficking by conveying 10 stones of cannabis sativa in a motor vehicle registration no. KCA 106 C, Toyota Fielder, along the Kutus-Kagio Road with the value of Kshs. 5,000 in contravention of the Act.

2. The trial magistrate convicted and sentenced him to 11 years' imprisonment after finding that the offence was proved to the required standard. The appellant was dissatisfied with the trial court's decision and appealed to the High Court (J.M. Bwonwonga, J.)who upheld the conviction and sentence. The appellant was further aggrieved and has appealed to this Court against that decision.

3. In substituted grounds of appeal filed in this Court, the appellant advanced 8 grounds which in summary are that, the High Court failed to appreciate that the trial proceedings were not interpreted to him during the sworn testimonies of the prosecution witnesses; that the charge sheet was defective; that no inventory or photographs were taken at the scene of the arrest so as to prove that he was trafficking cannabis in his motor vehicle; that the evidence of the prosecution witnesses was contradictory; that the trial court failed to appreciate that a grudge existed between the him and the arresting officers; that no independent witnesses were called to testify as to the recovery of cannabis at the scene of arrest; in wrongly allowing the continued forfeiture of his Kshs. 33,300 on the allegations that the money was

proceeds from the sale of the cannabis, and further in failing to find that cannabis does not fall under section 4(a) of the Act; that no witnesses testified as to the offence of trafficking and no witness was called to support the allegation that he was selling cannabis; and finally that the sentence was excessive.

4. The appellant who appeared in person on a virtual platform filed written submissions which he relied on in their entirety. It was submitted that, no interpretation was done during the evidence of PC Nicholas Chigiri No.xxxxx (PW1), PC Moses Mwongera (PW 2),and PC Joseph Mutesa No. xxxxx (PW3); that their testimonies were not interpreted into the Kikuyu language. He also complained that the charge sheet was defective, as the year in which the alleged incident took place was not indicated, and that further, he was charged under section 4 (a) of the Act which definition did not include cannabis sativa; that additionally, the offence involved trafficking, but no evidence was produced to support the offence.

5. The appellant went on to submit that no inventory or photographs were taken at the scene of recovery, with the result that there was no evidence proving that cannabis was found in his motor vehicle; that this was supported by his refusal to sign the inventory at the Kerugoya police station. It was further submitted that the appellant's motor vehicle was driven off from the scene of arrest to Kerugoya police station by one of the police officers without the appellant, which circumstances created possibility for the substance to have been planted in the vehicle in the appellant's absence. Turning to the claim that the evidence was contradictory, it was asserted that the evidence of PW1, PW2 and PW3 was contradictory on the time it took to travel to the Kerugoya police station; that PW1 stated that it took about 15 to 20 minutes while PW3 indicated that it took 30 to 40 minutes; that this discrepancy could have been the period when the alleged cannabis was planted in the appellant's vehicle.

6. Concerning the existence of a grudge between the Member of Parliament aspirant, the police officers and the appellant and the contention that he was framed, it was asserted that the trial court and the High Court failed to appreciate that the appellant was earlier arrested and charged with a similar offence by the police officers and his motor-vehicle forfeited, but it was subsequently released. It was also asserted that despite the prosecution stating that there was a hostile crowd at the scene of arrest, crucial witnesses were not called to testify on the offence of trafficking of cannabis.

7. Learned counsel for the State, Ms. Nanjala,also filed written submissions. Briefly highlighting them, counsel submitted that the appellant was arrested after his motor vehicle that was travelling along the Kutus road was stopped and searched, and 10 stones of cannabis and money were recovered from the motor vehicle together with Kshs. 33,300; that he was the only occupant in the vehicle; that at the conclusion of the trial, an application was made for forfeiture of the items seized under section 20 of the Act, and that the appellant's counsel did not object. Counsel asserted that the forfeiture was therefore proper and lawful and was upheld by the High Court and this Court should not disturb that decision.

8. Submitting on the complaint that there was no interpretation of the testimonies of PW1, PW2 and PW3, counsel stated that the appellant and his counsel actively participated in the trial, and the question of the language of interpretation was not at any point raised; that the appellant fully understood the proceedings, so that no prejudice was occasioned to him. On the question of the defective charge sheet, it was submitted that the charge sheet clearly specified the year that the offence occurred, and the prosecution's evidence was clear and consistent on the date the offence was committed; that the appellant was aware of the date on which he was charged. It was further asserted that in any event, the defect in the charge sheet was curable under section 382 of the *Criminal Procedure Code.*

9. Regarding the lack of preparation of an inventory, it was argued that this was not fatal; that when the appellant was arrested at the scene, angry members of the public made it difficult for the officers to

process the documents in respect of the cannabis recovered. But upon reaching the police station, an inventory and analysis report was prepared and admitted in evidence during the trial; that the items recovered from the appellant's motor vehicle were identified by PW1, PW2 and PW3, all of whom were at the scene, which linked the appellant to the offence. On the contradictions and inconsistencies in the evidence, counsel stated that they were minor and did not go to the substance of the prosecution's case; that the appellant was not framed, and there was nothing that demonstrated the existence of the alleged grudge. Concerning the failure to call relevant witnesses, it was submitted that there is no requirement in law for a particular number of witnesses to be called to prove a fact.

10. This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*,we are enjoined to consider only matters of law and not matters of fact. See *Joseph Njoroge vs Republic* [1982] KLR 388.Bearing this in mind, we ascertain the issues for consideration are;

    i. whether the charge sheet was defective;

    ii. whether there was interpretation;

    iii. whether independent witnesses should have been called to testify;

    iv. whether the prosecution's evidence was contradictory and inconsistent;

    v. whether the offence of trafficking cannabis was proved;

    vi. whether the prosecution failed to prepare an inventory;

    vii. whether a grudge existed between the prosecution witnesses and the appellant and whether he was framed;

    viii. whether the sentence was excessive, and whether the forfeiture of Kshs 33,300 and the Motor vehicle reg no. KCA 106C Toyota Fielder was lawful.

11. Beginning with the complaint that the charge sheet was defective. The appellant's case is that the charge sheet was defective for the reasons that the year the offence was committed was omitted from the particulars of the offence, and that section 4 (a) of the Act did not refer to cannabis sativa as a narcotic drug, and therefore the charge did not disclose any offence. We have reviewed the charge sheet, and the evidence of both the prosecution and the appellant. We find the year the offence was committed to have been indicated clearly and consistently throughout the charge sheet and the evidence. The omission of the year in the particulars of the offence did not occasion him any prejudice, and was curable under section 382 of the *Criminal Procedure Code.*

12 Regarding the assertion that the definition of section 4 (a) did not include cannabis sativa as a narcotic drug, section 4 (a) provides that;

> "Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be another narcotic drug or psychotropic substances shall be guilty of an offence..."

A narcotic drug is defined in the first schedule of the Act to include 'cannabis'. What was referred to in the charge sheet was cannabis sativa.

13. Under section 134 of the *Criminal Procedure Code*, the law makes it a requirement that the charge contain a statement of the specific offence charged together with such particulars as will inform the accused of the nature of the offence faced. The question that would arise is whether the inclusion of the word 'sativa' would have led the appellant into being misled or unable to understand the nature of the charge he faced with such inclusion.

14. The charge sheet stated that the appellant was charged with the offence of trafficking cannabis. The Government Chemist's report indicated that the plant material was cannabis. Essentially, were the charge sheet to have been amended to remove the word 'sativa', this would not have changed the nature of the offence. In the circumstances, we are satisfied that the inclusion of the word 'sativa' in the charge sheet did not prejudice the appellant or render the charge sheet as defective, and accordingly, the complaint is dismissed.

15. On the complaint that the evidence of PW1, PW2 and PW3 was not interpreted into a language the appellant understood, we have reviewed the record and it is true that the appellant indicated his choice of language interpretation as Kikuyu. The plea was as a consequence taken in Kikuyu.

16. During the proceedings the appellant was represented by counsel who actively participated throughout the proceedings. At no point did either the appellant or his counsel bring to the attention of the court that the language interpretation had ceased. The record also shows that in his sworn defence, the appellant appropriately responded to the various aspects of the evidence of PW1, PW2 and PW3. In the circumstances, as was the High Court, we too are satisfied that, no prejudice was occasioned to the appellant. On this account, this ground fails.

17. As to whether other independent witnesses should have testified, the record shows that PW1, PW2 and PW3 who were at the scene of arrest and recovery of the cannabis testified. They stated under oath that when they stopped the appellant and searched the motor vehicle, they found cannabis in the boot; that also present at the scene were angry and violent members of the public, which caused them to hurriedly proceed on to Kerugoya police station. The evidence does not disclose that any member of the public was identified so as to testify. Without such identification, other witnesses could not have been called. This ground is therefore not merited.

18. We now turn to the question of whether the offence against the appellant was proved. This would require an analysis of the evidence that was before the trial court.

19. The evidence of PW1 was that, on 31st July 2015 at around 6 a.m. accompanied by PW2 and PW3, acting on a tip-off that narcotic drugs were being trafficked at Kutus, they intercepted a motor vehicle registration No. KCA 106 C, a Toyota Fielder along the Kutus-Kagio Road; that they searched the motor vehicle and recovered 10 stones of cannabis. The appellant was the only occupant in the motor-vehicle. The witness stated that there was a hostile crowd at the scene which forced them to drive away to the Kerugoya police station. PW2 was ordered to drive the appellant's motor vehicle, while the appellant accompanied the other police officers in the police vehicle to Kerugoya; that no stops were made along the way. He further stated that at the Police Station, a search of the motor vehicle and the appellant was again conducted, where 10 stones of cannabis were recovered, together with Kshs. 33,300 in cash. An inventory was drawn up which the appellant refused to sign. Also recovered was a panga and a knife which are irrelevant for this case.

20. On cross-examination, he stated that the appellant resisted arrest when they tried to stop him, causing them to block his vehicle and order him to get out. No photographs or inventory were taken at the scene because of the presence of a hostile crowd. He stated that there was a police post 100 meters away from the scene of arrest, but they went to Kerugoya instead for safety reasons and due to the ease of preparation of the documentation; that it took about 15 to 20 minutes to reach the police station.

21. PW2 was stationed at CID Kerugoya Intelligence Department. He repeated the evidence of PW2, but added that he was directed to drive the appellant's motor vehicle and the appellant ordered to travel in the police motor-vehicle; that at the station, a further search was conducted and an inventory made

out which he signed. He denied that the appellant was driven into a coffee plantation; that at all times the police vehicle remained behind him. PW3 reiterated the evidence of PW1 and PW2.

22. In his defence, the appellant gave a sworn testimony and denied the offence. He stated that he is a farmer and had gone to the market to deliver kale. On his way back, he was stopped by police officers and ordered to surrender his vehicle and ignition key to them; that when he refused, the motor vehicle and the ignition key were forcefully taken away from him, and one of the police officers drove it off. He stated that no search was conducted at the scene and that there were no members of the public present; that he entered the police motor vehicle which diverted into a coffee plantation; that thereafter he was escorted to the CID office at around 9.00 a.m. where his fingerprints were taken; that once again, no search was conducted on the vehicle and he could not tell where it was parked; that he refused to sign the inventory because the cannabis was not his property; that the only items that were his were a knife, a panga, a telephone and money Kshs. 33,000 which he states was not proceeds of sale of cannabis.

23. It was his further evidence that on 5th July 2015, he was arrested and his motor-vehicle seized on similar allegations that he was transporting cannabis. He was later released. He claimed that the case was a fabrication and that after release of the motor-vehicle, a political statement was made by the MP Kirinyaga Central.

24. Section 2 of the Act defines trafficking as importation, exportation, manufacture, buying, sale, giving, supply, and storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect therefore.

25. The appellant was charged with the offence of trafficking of cannabis. When his vehicle was stopped and searched on the material day, cannabis was found in the boot. At the time of his arrest, he was found to have been transporting or conveying cannabis in his motor-vehicle, which in terms of the above definition constituted an act of trafficking.

26. The appellant was also found with cash of Kshs. 33,300, the source of which he did not provide any explanation. Having been found conveying cannabis, and because he was unable to explain how he had come by the cash, the only inference that could be drawn was that the cash was the proceeds of trafficking cannabis.

27. The above conclusions notwithstanding, the appellant has complained that there was nothing to prove that when he was stopped and his motor vehicle was searched, that he was found with 10 stones of cannabis, since no inventory or photographs were taken at the scene of arrest. The prosecution's reasons for not having done so was because of the presence of violent members of the public at Kutus centre, and the ease of processing the documents at Kerugoya police station.

28. In the case of *Leonard Odhiambo Ouma & another v Republic* [2011] eKLR this Court rendered itself thus;

> "The failure to compile an inventory as contended in ground 5, is in our view, a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."

29. And in the case of *Stephen Kimani Robe and others vs Republic* [2013] eKLR The High Court (Muchemi and Odunga, JJ.) stated that;

> "The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the

exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."

30. As such, notwithstanding that no inventory or photographs were taken at the scene of arrest at Kutus, this did not infer that there was no cannabis in the motor vehicle. This is because the three police officers at the scene confirmed under oath that cannabis was found in his motor vehicle, and this is what led to his arrest. But the issue does not end there. After being driven to the Kerugoya Police Station, the motor vehicle was again searched and 10 stones of cannabis were confirmed to have been in the motor vehicle's boot. An inventory was thereafter prepared, and signed by the police officers, which the appellant refused to sign. The discovery of cannabis at the scene leads to the inescapable conclusion that the appellant had committed the offence for which he was charged. This ground is dismissed.

31. The appellant further complained that one of the police officers commandeered his motor vehicle and drove it without him to Kerugoya Police Station, which was between 20 and 30 minutes away, which created an opportunity for the cannabis to be planted in the motor vehicle.

32. To begin with, section 72 (1) (b) of the NDPSCA provides for seizure and detention of a conveyance for purposes of evidence and states that;

> 1. Any police officer, or any other person authorized in writing by the Commissioner of Police for the purposes of this section, who has reasonable cause to suspect that any person is in possession of, or is removing, any narcotic drug or psychotropic substance in contravention of this Act may—
>
> (a)....
>
> (b) seize and detain for the purposes of proceedings under this Act any narcotic drug or psychotropic substance or any other thing (including any conveyance) which appears to be evidence of the commission of an offence under this Act, found in the course of the search; and..."

33. Essentially, the provision authorises a police officer to seize an illegal substance and the mode of conveyance where such substance has been found in the course of a search. Upon finding that the appellant and his vehicle were conveying an illegal substance, both the appellant and the motor vehicle were taken into custody. As such, there was nothing untoward about the appellant's arrest or the seizure of his of motor vehicle.

34. As concerns the allegation that he was taken into a coffee plantation which provided an opportunity for the cannabis to be planted, the circumstances of the case would render the assertion an afterthought and farfetched. The appellant did not at the outset make any claims of this nature after he was arrested or upon arrival at the police station. He did not provide any details or particulars of whether the vehicles took different routes to Kerugoya, or at what point, if at all, his vehicle disappeared from sight, or whether the time of arrival at the Police Station by the two vehicles differed. Nothing was supportive of this assertion. We would also discount the claim that a grudge existed between the police officers and the Member of Parliament, since it was not substantiated at all.

35. All told, as were the trial court and the High Court, we too are satisfied that the totality of the evidence proved that the appellant committed the offence to the required standard which rendered the conviction safe.

36. Finally, on the sentence, the appellant complains that it was excessive and that the motor vehicle and cash were illegally forfeited to the State. As we have expressed time without number, sentencing is an exercise of discretion of the trial court and this Court will hesitate to interfere with such exercise. See

I.P. Gitahi and another v Republic [2017] eKLR. As we have not been shown any error in the manner of sentence as imposed by the trial court and upheld by the High Court, we find the sentence to have been lawful. Similarly, we are satisfied that the learned judge rightfully upheld the forfeiture of cash of Kshs. 33,300 as proceeds of trafficking and the motor vehicle registration no. KCA 106 C, Toyota Fielder.

37. In view of the foregoing, the appeal is without merit and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 28 TH DAY OF APRIL, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR