REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 154 of 2005

PETER WARIOBA CHACHA …….....……. APPELLANT

AND

REPUBLIC …….....……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera J.) dated 12th April, 2005

in

H.C .CR.A. NO. 246 OF 2004

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JUDGMENT OF THE COURT

The appellant **Peter Warioba Chacha** was jointly charged with one **Ramadhan Abdalla Masingo** (*Ramadhan*) before Senior Resident Magistrate, Taveta, 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.

The particulars of the charge alleged that on 15/5/2004 at Taveta township the appellant and the co-accused jointly trafficked in narcotic drugs, namely, **cannabis sativa** (*bhang*) weighing 13¼ Kg and with a street value of Kshs.130,000 in contravention of the Act.

Ramadhan who was the first accused pleaded guilty to the offence. He was convicted and sentenced to a fine of Shs.300,000 and in addition to 10 years imprisonment. On appeal to the superior court, the sentence of a fine of Shs.300,000/= was set aside and substituted with a sentence of a fine of Shs.1,000,000/= and in default 12 months imprisonment in compliance with Provisions of **section 4** of the Act. The sentence of 10 years imprisonment was not however disturbed.

The appellant pleaded not guilty. At the trial the prosecution called three witnesses namely Cpl. Josephat Kinozi (*P.W.1);* PC George Ogolla (*P.W.2*) and Ramadhan (*P.W.3*) the appellant's co-accused.

P.W.1 and P.W.2 who are police officers said that they went to Taveta Town on the material date on

information and found the appellant and Ramadhan standing in the market area wearing matching shirts. There were two heavy boxes about 5 metres from them. They were taken to police station.

The boxes were opened and 13¼ Kg of bhang was found inside them. The appellant claimed that the boxes belonged to Ramadhan while the latter said that he was an employee of the appellant and that the boxes belonged to the appellant. Ramadhan testified at the trial that he and the appellant travelled from their home in **Himo, Tanzania** and that the appellant was carrying the two boxes but on arrival at Taveta, the appellant asked Ramadhan to load the two boxes in a bus which was traveling to Mombasa. The goods were however rejected. The appellant then asked Ramadhan to take the boxes to a woman at a certain kiosk and upon taking the goods there, police arrived.

The appellant gave sworn evidence at the trial that he found Ramadhan whom he knew before at Taveta bus stage and that Ramadhan had the two boxes. Both were traveling to Mombasa but the conductor tore their tickets and refused them to travel. Ramadhan kept the two boxes in a kiosk and as the appellant was talking to him, police officers arrived. He admitted in the cross-examination at the trial that he knew Ramadhan well; that they were together at the bus stage and that he is the one who had booked the two tickets.

The trial magistrate considered the evidence and found that the appellant was arrested in the company of Ramadhan; that the appellant knew Ramadhan very well before; that Ramadhan similarly knew the appellant very well; that the two were found in joint possession of the bhang, that both the appellant and Ramadhan were turned away by the bus conductor and Ramadhan was sent to keep the boxes in a kiosk by the appellant; that the accomplice evidence of Ramadhan was true and was corroborated by the evidence of the two police officers; that the evidence of the appellant and his witness Catherine Moraa was not credible and that the defence of the appellant could not stand.

The appellant was convicted and sentenced to 15 years imprisonment plus a fine of Shs. 1,000,000/= in default 5 years imprisonment. On appeal, the superior court subjected all evidence to a fresh exhaustive examination and re evaluation and concluded that the appellant and Ramadhan were jointly trafficking bhang from Tanzania to Kenya and dismissed the appeal against conviction. The superior court however allowed the appeal against sentence to make it at par with the sentence passed against Ramadhan.

There are 11 grounds of appeal. Most of those grounds deal with the credibility of the prosecution case. However, the evidence of Ramadhan raises some issues of law which appear in the memorandum of appeal. Grounds 1, 2, 3, 8 and 11 of the memorandum of appeal deal with the evidence of Ramadhan and question the credibility of his evidence and the validity of the finding of joint possession when Ramadhan had pleaded guilty and claimed that the two boxes belonged to him.

It is true that Ramadhan is an accomplice. However an accomplice is a competent witness and a conviction is not illegal if it proceeds upon the uncorroborated evidence of an accomplice (see **section 141 of the Evidence Act).** In this case the trial magistrate recognized that Ramadhan was an accomplice and warned himself of the status of such evidence. He quite properly found that by the time Ramadhan was giving evidence he had already been sentenced and probably had nothing to gain by testifying against the appellant. The Magistrate said in part:

"**I warn myself of the low evidentiary of the evidence (sic) given by a co-accused, an accomplice. However by the time of giving evidence A1 (Ramadhan) had already been sentence (sic). He thus probably had nothing to gain by testifying against his co-accused. His story that he was hired by A2 (Warioba) appeared credible. He explained vividly the circumstances under which he put the two boxes in the kiosk. This was after the bus crew grew suspicious of the contents of the two boxes."**

The trial magistrate concluded that the evidence of Ramadhan was credible and that it had been corroborated by the evidence of the two police officers and to some extent by the evidence of the appellant himself. Indeed, the evidence of the appellant shows that he was at the material time in the company of Ramadhan at Taveta bus stage up to the time the police arrested them and recovered the two

boxes. Even if the evidence of Ramadhan is excluded, the evidence of the two police officers considered together with the evidence of the appellant sufficiently proved that the two boxes were in custody and possession of the appellant.

The definition of the phrase "be in possession of" or "have in possession" in **section 4** of the Penal Code is wide enough to make the appellant a joint possessor of the two boxes in the circumstances of this case.

There are concurrent findings of material facts from which the appellant is deemed in law to have been in possession of the two boxes. There are no grounds in our view, for interfering with the concurrent findings of fact. In the result, we are satisfied that the appellant was properly convicted and that the appeal has no merit.

We accordingly dismiss the appeal.

Dated and delivered at Mombasa this 21st day of July 2006

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR