Gakinya v Republic (Criminal Appeal E018 of 2023)
[2024] KEHC 820 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 820 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E018 OF 2023

JN NJAGI, J

JANUARY 31, 2024

BETWEEN

KEVIN GAKINYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Christine Wekesa, SPM, in Marsabit SPM`s Court Criminal Case No. E040 of 2022 delivered on 13/7/2023)

JUDGMENT

1. The Appellant herein was convicted for the offence of trafficking in narcotic drugs contrary to section 4(a) as read with section 78 of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No.4 of 1994. The particulars of the offence were that on the 20th February, 2020 next to Mercy Primary School along Isiolo/Marsabit highway in Marsabit South Sub-County within Marsabit County, with another not before court were found trafficking drugs namely bhang to wit 13.45kgs of the street value of Ksh.403,500/= by transporting in a motor vehicle Reg. No. KCX 289 F make Toyota Wish.

2. The Appellant was sentenced to a fine of Ksh.1,210,500/= in default to serve imprisonment for a period of 2 years. He was aggrieved by the conviction and the sentence and lodged this appeal.

3. The grounds of appeal are, inter alia, that:

   (1) The learned trial magistrate erred in matters of law and fact by failing to note that the prosecution gave contradictory and paradoxical evidence, thus failed to resolve the same in favour of the appellant.

   (2) That may the veracity of the testimony tendered by prosecution witnesses be evaluated, scrutinized and be tested within the balance of justice and find that this was a fabrication.

(3) That the learned trial magistrate erred in matters of law and fact by failing to note that the charge sheet was defective.

(4) That the learned trial magistrate erred in matters of law and fact in failing to note that the defence tendered was water tight and eroded the prosecution case hence created doubt which would be settled in favour of the appellants.

(5) That the learned trial magistrate erred in both matters of law and fact by convicting and sentencing both appellant to serve a sentence of 2 years based on uncorroborated evidence.

(6) That the learned trial magistrate erred in both matters of law and fact by failing to note that the key witnesses were not called upon to testify.

(7) That the learned trial magistrate erred in law and fact by failing to take into the period spent in custody under section 333(2) of the Criminal Procedure Code.

Prosecution case

4. The case for the prosecution was that on the material day one PC John Ndung'u of Laisamis police station received a phone call from a colleague who was manning a road block on the Isiolo-Marsabit highway that they had intercepted a motor vehicle registration No.KCX 289F Toyota Wish which had declined to stop at the road block. PC Ndung'u informed a colleague at the station, Cpl Evans Amake PW1. They proceeded to the highway in a GKB 569Z. At the highway they saw a vehicle approaching from Marsabit direction heading towards Laisamis. PC Ndung'u flashed the police flash light for the vehicle to stop. The driver of the vehicle slowed down as if to stop but then sped off. However, there was a trailer on the road and the rear tyre of the vehicle hit the police vehicle on the front left tyre. The vehicle then stopped. The policemen checked the vehicle and found three occupants inside, among then the appellant. The driver of the vehicle introduced himself as Kennedy Munyao. The third occupant was a lady who introduced herself as Karimi Joy Mathenge. The police officers inspected the vehicle and found something protruding from the rear bumper. The vehicle was escorted to Laisamis police station for a thorough search to be conducted. The OCS and other officers joined them during the search. The front bumper was unscrewed. They found bundles of plant material that they suspected to be bhang wrapped in a black polythene bag. Other bundles of the same were found inside the driver`s door and rear door on the driver`s side and in the rear bumper. The bundles totaled to 19. An inventory of the recovered items was prepared. The three occupants of the vehicle were placed in custody.

5. The case was investigated by Sgt Hassan Abdi PW4 then of DCI Office, Marsabit. He weighed the plant material at 13.45 kg and prepared a weighing certificate. He charged the appellant and the driver of the vehicle with the offence. He prepared an exhibit memo and forwarded the exhibits to the government analyst. They were examined by a government analyst PW3 who found the plant material to be cannabis sativa, bhang. PW3 prepared a report to that end.

6. During his investigations, Sgt Hassan contacted C.I. Philip Langat PW5 who is a gazetted officer in terms of Section 86 of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No.4 of 1994 vide Kenya Gazette No. 9805 of 20/9/2017, to give the market value of 13.45 kg of cannabis sativa which he gave a value of Ksh.403,500/=. He prepared a certificate to that effect.

7. Later, while the case was ongoing, the appellant and his co-accused jumped bail. The appellant was later arrested and was charged afresh in Criminal case No.E040 of 2022. The driver of the vehicle was not traced and a warrant of arrest is still pending.

8. During the hearing of the case against the appellant, the government analyst PW3 produced her report as exhibit, P.Exh.2(a). She also produced the exhibit memo as exhibit, P.Exh. 2(b). Sgt Hassan PW4 produced the weighing certificate as exhibit, P.Exh.4. CI Langat produced the certificate of valuation as exhibit, P.Exh.5.

Defence Case

9. When placed to his defence, the appellant stated in a sworn statement that he is a police officer formerly stationed at Sololo police station but currently on interdiction. That Kennedy Munyao was a fellow police officer in Sololo.

10. That on the 19/2/2020, he called the said colleague. They spoke at length and Kennedy told him that he was to travel to Nairobi on the following day. He, the appellant, requested him to bring him 4 sportsman cigarettes.

11. That on the following day, 20/2/2020, Kennedy called him and asked him to go to the road to pick the cigarettes. He went to the road and found Kennedy in a small car. He had a passenger in the car. He realized that there was space in the car and asked Kennedy for a lift for him to travel to Isiolo to attend to some family issues. Kennedy agreed. He requested him to give him time to go and ask for permission from his in-charge. Kennedy gave him time. He went and sought for permission from his in-charge. He was granted the permission. He returned the gun to the armory. He went to his house and changed clothes. He went and joined Kennedy and his passenger in the car. They set off. The vehicle was stopped and searched at Turbi and KBC road blocks and was allowed to pass.

12. It was further evidence of the appellant that on reaching Margis road block, there were spikes on the road and the vehicle was pulled aside. The OCS Laisamis went to the place. Kennedy left in his vehicle. The OCS told him to go back but Kennedy drove on. He, the appellant, saw the police vehicle approaching with full lights on. But Kennedy did not stop. He hit the police vehicle as a result of which the bumpers came off. He saw some things inside the rear bumpers. The vehicle was taken to the police station. A thorough search was done and some things were removed from the bumper. He recorded a statement. He was assured that he would be a prosecution witness but he was later charged.

13. It was the defence of the appellant that he had no knowledge of the things found in the bumper. That it is the driver of the vehicle who should have given an explanation about the things.

Submissions

14. The appellant submitted that the trial magistrate failed to note that there were various contradictions in the prosecution case. That PW2 told the court that the exhibit weighed 3.45 kg but during cross-examination said that it weighed approximately 13 kg. That the government analyst said that the total bundles were 19 and later on in her evidence stated that they were 14.

15. The appellant submitted that the court should weigh the nature of the contradictions and the strength of the contradictory evidence against the entire evidence tendered as a whole before dismissing a case. It was submitted that the contradictions in this case were substantial and thus fatal to the case and made the conviction unsafe. The cases of Leonard Kipkemoi v Republic (2018) eKLR and Thoya Kitsao alias Katiba v Republic (2015) eKLR were cited on the manner to treat contradictions in a case.

16. It was submitted that the case was not proved beyond all reasonable doubt. That it was not proved that the appellant was the owner of the subject motor vehicle. That it was not proved as to who hired the vehicle from Prime Cars Limited.

17. The appellant submitted that the lady passenger was not called to testify yet she was a crucial witness in the case.

18. The appellant urged the court to find that his defence was truthful and therefore he should have benefited from the benefit of doubt.

19. The respondent on the other hand conceded to the appeal on the ground that the explanation given by the appellant for his presence in the vehicle was reasonable. That there were doubts in the case that should have been resolved in favour of the appellant. That the conviction was unsafe.

Analysis and Determination

20. This being a first appellate court in the matter, the duty of the court is as was set out in the case of Okeno vs. Republic [1972] EA 32 where the Court of Appeal stated as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

21. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond reasonable doubt. In the case of Miller v Ministry of Pensions, [1947] 2 All E R 372, Lord Denning stated the following regarding the degree of proof beyond reasonable doubt:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

22. The appellant herein was facing a charge of trafficking in narcotic drugs contrary to section 4(a) as read with section 78 of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No.4 of 1994. The evidence adduced against the appellant is that he was found in a vehicle where 13.45 kgs of cannabis sativa (bhang) was found hidden in the front and rear bumpers of the vehicle and in the enclosed parts of the doors of the vehicle. The accused did not deny that some plant material was found in the vehicle in the mentioned places. He admitted that. There is then no dispute that some plant material was found in the vehicle as testified by the prosecution witnesses, PW1 and PW2. The plant material was examined by a government analyst PW3 who found them to be cannabis sativa, commonly known as bhang. The prosecution did thereby prove that the plant material found in the motor vehicle was cannabis sativa.

23. Evidence was adduced before the trial court that the vehicle was at the time of recovery being driven by one Kennedy Munyao who subsequently jumped bail after he was charged. The appellant`s defence

was that he and the said Kennedy Munyao were police officers stationed in Sololo. That on the material day he had borrowed a lift in Kennedy`s vehicle and he had no knowledge how the cannabis came to be in the vehicle. The question then is whether the appellant had knowledge that the vehicle was transporting cannabis sativa or rather whether the appellant was found in possession of the bhang.

24. Section 4 of the Penal Code defines "possession" in the following terms:

> (a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;
>
> (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

25. The Black`s Law Dictionary 10th Edition defines the term "possession" to mean –

The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls."

26. The definition of possession connotes two elements –

(1) being in physical control of the items of the offence and or in joint control with another

(2) knowledge or intention of having the article, instruments, thing or items constituting the offence.

26. 1n the case of Jean Wanjala Songoi & Patrick Manyola v Republic (2014)eKLR, the court expounded the same as follows::

> " ...Possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, the aspect of the offence was not established beyond reasonable doubt against the appellants."

27. In Peter Mwangi Kariuki v Republic (2015)eKLR, Mativo J. held as follows on the subject:

In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it.

28. In Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR, where the Court of Appeal was constructing the provisions of Section 4 of the Penal Code held that the section encompasses both actual and constructive possession. The Court held that:

> In our view, under that provision, being in possession of the RDX does not require the appellants to be in actual, personal physical possession of it. So long as there is evidence on

record that they knowingly had the RDX at the golf course for their own use or that of any other person, that will constitute possession within the meaning of the Penal Code. Indeed in Martin Oduor Lengo & 2 Others v. Republic [2014] eKLR and Chrispine Kent Otieno v. Republic [2017] eKLR, this Court affirmed that possession under section 4 of the Penal Code encompasses both actual and constructive possession.

29. The appellant herein was charged with trafficking of cannabis sativa jointly with another person not before court. This brings in the doctrine of common intention as defined under section 21 of the Penal Code which provides as follows:

> " When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

30. It was the duty of the prosecution in the case against the appellant to prove that he was either in actual possession of the bhang or in constructive possession of the same. Constructive possession could only be proved if the prosecution adduced evidence on common intention to commit the offence with the driver of the vehicle.

31. The only reason the trial magistrate gave in convicting the appellant of the offence is that the appellant did not place evidence before the court to show that he had permission from his in-charge to be away from duty. That the appellant did not call his in-charge to prove so. That in the absence of such evidence, it was to be presumed that the appellant acted jointly with the driver of the motor vehicle in trafficking the bhang. The court consequently dismissed the appellant`s defence as an afterthought.

32. The issue on whether or not the appellant had permission from his station to be away from duty was never raised during the case for the prosecution. No witness was called by the prosecution to testify on whether or not the appellant had permission to be away from duty. Instead, it is the appellant who raised the issue in his defence when he stated that after the driver of the motor vehicle agreed to give him a lift he went to his in-charge to request for permission to be away which was granted. The trial court could thereby not make adverse findings on the issue when it was not raised by the prosecution and was thereby not an issue for determination.

33. I have reviewed the evidence adduced before the trial court. I find no iota of evidence to link the appellant with the bhang. The accused was not the owner of the motor vehicle which was found transporting the bhang. Neither was he the driver of the vehicle. It is the person who was found driving the motor vehicle, Kennedy Munyao, who was said to have hired it from Prime Cars Ltd. There was no evidence that the appellant had jointly hired the motor vehicle with the said Kennedy.

34. There having been no evidence to connect the appellant with the motor vehicle, there was then no evidence that he had knowledge of the presence of the bhang in the motor vehicle or that he was in physical control of the same. Consequently, there was no evidence that the appellant was either the actual or constructive owner of the bhang. More so, there was no evidence of common intention to suggest that he had committed the offence jointly with Kennedy Munyao. The appellant`s defence that he had only hiked a lift in the vehicle could be true. The trial magistrate in the case did not give a plausible reason for dismissing the appellant`s defence that he had only hiked a lift in the vehicle. In view of the fact that there was no evidence adduced by the prosecution tending to connect the appellant with the bhang, he should have been given an automatic acquittal.

35. The upshot is that this court finds that the appellant was wrongly convicted for the offence of trafficking narcotics. The prosecution rightly conceded to the appeal. I therefore allow the appeal, quash the conviction and set aside the sentence imposed on the appellant by the trial court. Consequently, I order that the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 31ST DAY OF JANUARY, 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellant appearing in person

Court Assistant – Jarso

14 days R/A.