



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.102 OF 2010

MELISA MARY LAWRENCE.....1ST APPELLANT

HASSAN SAID KOTE.....2ND APPELLANT

ALBERT G. DEYE.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Consolidated with Criminal Appeals No.104 of 2010 + 105 of 2010)

JUDGEMENT

The appellants **MELISA MARY LAWRENCE**(1st appellant) **HASSAN SAID KOTE** (2nd appellant) and **GILBERT GINANFE DEYE**(3rd appellant) were charged before HON. B.T.JADEN (SENIOR PRINCIPAL MAGISTRATE MALINDI) with the offence of trafficking in Narcotic Drugs contrary to section 4 (9) of the

Narcotic Drugs and Psychotropic substances Act No. 4 of 1994. The particulars stated that on the 18th of May 2009 at about 8.30Pm at MAWENI AREA, in MALINDI, they were jointly found trafficking in Narcotic Drugs to wit 80 gm of Cannabis and 8 tablets of ROHYPANOL(FLUNITRAZEPHAM) valued at Kshs.960 by storing, in contravention to the said Act.

All the appellants denied the charges and after due trial in which three prosecution witnesses testified, the appellants were each convicted and sentenced to a fine of Kshs.1,000,000 and in addition to life imprisonment.

Although plea had been taken before HON JADEN, she was transferred from this station, and replaced by HON. L.W.GITARI(Chief Magistrate) who took over the trial heard and determined the case. The evidence of Corporal **RICHARD OBONDO (PW 1)** was that on 18/05/09 at about 8.30Pm, he was with officers from **ANTI NARCOTIC UNIT (MALINDI)** and **MAARUFU VIGILANTE GROUP**, when they received a tip off that there were people dealing in drugs at MAWENI Estate, Malindi. They proceeded to the place and were shown a house which was within a compound fenced by plants and poles. The house had a corridor and on either side there were two rooms which were incomplete at the time. There were no people inside the house. Upon entering the **MAIN** house, they found two male adults and a female who were identified as the three appellants. After identifying themselves, the officers conducted a search in the main house and from a cupboard which was inside the room, they recovered a green plant material which were in form of seeds. The seeds were in a black polythene back inside a drawer within the compound. The polythene bag also contained 39 cigarettes – the cigarettes were rolled, and there was also a big roll wrapped in brown papers, and a short roll in khaki paper – the weight of the 39 rolls of cigarette was estimated at 80gm. They also recovered eight (8) tablets inside the same black polythene bag. The appellants were arrested and charged. On cross-examination he maintained that all the appellants were in one room within the house – all seated on chairs while talking. He did not know who among the three owned the said house. **PC JOHN KETER** who was with Pw 1, testified as Pw 3. Although his evidence was more elaborate, it was similar to that of Pw 1 and he confirmed that it Pw 1 who conducted the search and retrieved the recovered items from the polythene bag which was inside a cupboard – he also identified all those recovered items in court and that the three appellants were the persons found inside the house. Pw 3 prepared an exhibit memo and escorted the recovered items to the Mombasa Government Chemist for analysis. He produced all the recovered items in court as exhibit.

JOHN NJENGA(Pw 2) the Government Chemist based at Mombasa examined and analyzed the items submitted to him – her findings were that the 8Pm of loose plant material was cannabis. The greenish tablets contained a chemical known as **ROHYPNOL** which is included in the Narcotic Drugs and Psychotropic substances Control Act, the 39 rolls of cigarettes had plant material which was cannabis. The witness compiled his report which was produced as exhibit.

The 1st appellant gave sworn testimony in which she stated that she had left her house to go to the shops which was about two blocks away, when she saw about 20 people. They approached her at the shop and they questioned her. Then those who had entered the house announce “it is here” and

everyone proceeded to see the recovery. The group told her she was involved because she was found nearby and that she was at the wrong place. On cross-examination she denied being the owner of the house and demanded proof. She also stated on cross-examination that she lived with her father and brother.

The 2nd appellant in his unsworn testimony told the trial court that he worked in the house of **MR and MRS JOSEPH** at Maweni. He was within his employer's house carrying out his chores, and his employer's wife was also present, when police officers arrived accompanied by other people who identified themselves as Imams. They handcuffed his two bosses and without even asking whom he was, also handcuffed him and led him outside the house. They were taken to various places in MAWENI ESTATE, then finally taken to Malindi Police Station and charged for trafficking drugs – much to his surprise.

The 3rd appellant in this sworn testimony told the trial court that he stays in TARASA, within TANA DELTA, he had only come to Malindi on 16/05/09 to see his mother who lived in SANTA FE, MALINDI. On 18/05/09 while visiting his step brother at Ngala, he went out at about 8.20pm to go and buy credit for his phone. He did not find anyone at the nearby shop and while there, a group of people approached him and ordered him to open the gate and eventually he was arrested and led to the house where police and Imams conducted a search but did not recover anything. The compound had several rooms and one man said he had pulled a drawer and recovered something. Basically his defence was that he was framed up as he did not even live in Malindi but was merely visiting. On re-examination 3rd appellant said he had no relationship with 1 & 2 appellant and that 1st appellant was not his wife.

Dw 4 SAKAINE MULOWA told the Trial Magistrate she was the assistant chief of Golbato sub-location and 3rd appellant was one of her constituents. She stated that he lived in her sub location with his grandfather **TIMOTHY DECI**, but had travelled to Malindi to visit his mother.

In her judgement the Trial Magistrate found that Pw 1 evidence was not shaken even in cross-examination regarding recovery and presence of the three appellants in the room. She acknowledged that the ownership of the house was not established but held that this was immaterial as the information police had was that there were people inside that house, dealing in drugs and appellants were the only ones found inside that room where the drugs were recovered from.

As regards 2nd appellant's defence, the Trial Magistrate pointed out that although he claimed he was inside his employer's house, the employer was not named and his claim that he was arrested as 6.30pm was rejected in the light of what Pw 1 and Pw 2 said in evidence. She held that the evidence of Pw 1 was corroborated in all material particulars by the testimony of **Pw 3 PC JOHN KATEU** whom had no reason to doubt. Both Pw 1 and Pw 3 were described as truthful and reliable.

In rejecting their defences, the Trial Magistrate pointed out that whereas 1st and 3rd appellant claimed they had gone to the kiosk, Pw 1 and Pw 3 and there was no one at the kiosk and that indeed both 1st and 3rd appellants admitted in their defences that there was no one inside the kiosk and that this showed their defences about going to the kiosk cannot be true because they could not have gone to make purchases from a kiosk when there was no one selling there.

The Defence witness **SALOME MALOWA`S** evidence was rejected as having no probative value as she was not in Malindi during the incident and cannot therefore say with certainty what 3rd defendant was doing in Malindi, further that there was nothing to prove that she was an assistant chief as she claimed. The Trial Magistrate noted that there were no other people within the compound apart from the appellants and that the evidence was direct. The Trial Magistrate observed that appellants did not raise the issue as to whether the premises were a matrimonial home or a tenancy and their presence at the scene where the drugs were stored proved their involvement.

Appellants challenged the findings on grounds that;-

- (a) The charge was defective
- (b) The charge was not proved

- (c) The Trial Magistrate erred in holding that ownership of the premises from where the drugs were recovered was not contested.

- (d) It was not for the appellants to disprove the Prosecution case i.e shifting burden of proof

- (e) Their defences were dismissed without much regard

- (f) There were contradictions in prosecution case

At the hearing **MR MOUKO** appeared for respondents whilst 1st and 2nd respondent appeared in person. The 1st and 2nd appellants filed written submissions which it is appellant's submission that the evidence does not support the charge and is at variance with the contents of the charge sheet because although the charge sheet indicates that she had possession by way of storing, it is not clear whether the amount was solely intended for their own consumption. Further, that there was no evidence to prove that the premises from where the recovery was made was principally occupied by the first appellants. It is

their argument as that the police officer were shown a house but were not given the name of the owner nor did they investigate to know the real owner of the house reference is made to **LAMECK OBURE V R HCCR APP NO. 552 OF 1992 NRB**. 1st appellants claim that the claim by the prosecution witnesses that she was arrested inside the house from where the drugs were recovered was a deliberate scheme calculated to dishonestly impair her defence. They insist that the informer should have been presented as a prosecution witness so as to be subjected to cross-examination on whether the two appellants were owners of the house – reference is made to the decision in **PATRICK KIBUI MAINA AND OTHERS VER CR APP. NO.11 and 12 (NRB)** – a High Court decision which held that if an accused person was arrested on the strength of information and the informer was not put in the dock as a witness to be cross-examined then such evidence should be disregarded.

The 1st appellants argues that on the principle of precedence and consistency, this court should adopt the positions indicated in the above decision and be guided by decisions of their prediction. 1st appellant urged the court to consider the evidence of 2nd appellant who claimed he worked for **MR and MRS Joseph** and that he was arrested alongside the couple, yet 1st appellant says she is **NOT MRS JOSEPH**.

Secondly appellants state that the evidence did not establish that they had knowledge of the existence of the drugs inside the premises and she is just a victim of circumstances, and that the evidence tendered did not prove she was arrested inside the house – maintaining her defence that she was arrested at the nearby kiosk where she had gone to buy medicine for her sick child.

The 2nd appellant also raised the issue of the charge being defective saying section 137 (f) requires that each item be described in the charge sheet and that it was necessary to separate the charge so as to have each recovered item referred to on a different count. He also submits that what was submitted to the Government Chemist for analysis is different from what is stated in the charge sheet because whereas the charge sheet refers to 8gm of cannabis, the analyst's report refer to 80gm and that in admitting that kind of evidence and using it as the basis of his conviction, then his fundamental rights under Article 50 (A) of the Constitution of Kenya, was violated.

The 3rd appellant raised twelve grounds of appeal which his counsel, **MR MOUKO** argued at the same time. He submitted that the charges against the 3rd appellant were not supported by the evidence offered by prosecution witnesses. He argued that PW 1, 3 and 4 were not able to identify the occupants of the house, the owner or tenant, saying this was important because the drugs were not recovered in physical possession of the appellant. Further there was no evidence that appellants were the ones who stored the drugs inside the said house. He urged this court to consider 3rd accused version that he was found outside the house, at a kiosk and forced into the compound saying, there is a possibility that the version given by 3rd appellant was the correct one. **MR MOUKO'S** contention is that police made recovery and to prove that there were people involved, picked anyone within the proximity of the house, otherwise their recovery would have been in vain. In any event the police ought to have established who was a tenant or visitor among the people he found seated inside the house.

Almost relying on the decision of **GATHARA V R KLR (2005) VoL 2**, which held that for one to be convicted of an offence of this magnitude it must be shown that the individual had knowledge of what he/she was transporting, MR MOUKO submits that the evidence in the present case proves neither possession or trafficking.

The appeal was opposed both on sentence and conviction and **MR KEMO**(Counsel for the State) sought to distinguish the **GATHARA** case from the present one saying that decision dwelt on the strict rule of interpretation which the court said was outdated and came up with purposive interpretation. **MR KEMO** submitted that the witnesses were very firm in their testimonies regarding the recovery of drugs which were stored in the premises and which upon analysis were found to be narcotics within the meaning of the Act. Whilst acknowledging that appellants have no obligation to prove that a simple straightforward explanation from them would have sufficed regarding their presence inside the house at 8.30Pm, and the presence of the drugs therein instead of claiming to have been outside at a kiosk which did not have anyone selling at that hour. He wonders why police would frame up the appellants and points out that the Trial Magistrate considered the appellant`s defences and gave a good analysis then dismissed them. It is also pointed out, that, the peculiarity of the drugs is such that they will always be under storage and sold to people in a manner that would raise the least suspicion. However, **MR MOUKO** insists that there is nothing to prove that the people who were inside that house were selling drugs.

From the submissions, it is apparent that the recovery of the drugs from the said house is not contested. However all the appellants deny any association with the drugs, 1st and 3rd appellants claim they were not even inside that house by the time police arrival, whilst 2nd appellant says he was an employee of **JOSEPH** family.

Under section 2 of Act No. 4, trafficking includes storing by any person, of a narcotic drug on psychotropic substance represented or held out by such person to be a narcotic drug. I think, with the greatest of respect to **MR MOUKO**, the issue here is not whether the appellants were selling the drugs, it is whether they were involved in trafficking of the drug by storing them in the said house. Whether 1st and 3rd appellant were inside the house at the time is not the main issue – rather it is whether the evidence proves that the appellants occupied the premises or had control and access to the premises and they either were aware of the presence of the drugs inside the premises or were responsible for the drugs being inside the house.

The 1st appellants` grounds of appeal suggest that there was the “owner of the block who lived in that same block but was not called or arrested to give evidence in what was recovered in his block with his housemaid or tenants. Prosecution witness (Pw 1) was adamant that when they got into the premises, the appellants were inside the house and since they already had information about drugs dealing in that premises they carried out the search and made recoveries from the cupboard`s drawer. However at the end of his evidence in chief, Pw 1 stated;-

“We were not able to identify the occupant and who was not”

Would that statement dent the prosecution case regarding the presence of the appellants inside the said house and the recovery thereto" Could the appellants have been visitors – especially with regard to 2nd appellant who even got the area chief to confirm that he had just left her jurisdiction to visit a relative in Malindi"

Who were the regular occupants of the house, since Pw 2 answer on cross-examination by 2nd appellants is that he did not know who among the three appellants owned the house. The allegations that the premises were being used for drug related activities came from members of the anti-drugs campaign group known as **MARUFU**, none whom have testified in this court to at least confirm that the three appellants were the bona fide regular occupants of the house in question – and the police had no way of knowing who actually owned the house. Is there probability that if Marufu members had testified they would have clarified the position as to who was the owner occupant of the house" As far as the evidence goes – only the three appellants were found being in occupation of the premises – that is consistently refer to by all witnesses yet the question persists – could they have been mere occupants and not owners and therefore had no knowledge regarding what was inside the house" It is significant 3rd appellant confirm he was actually inside the room from where the drugs was recovered. Was it the duty of prosecution to prove who owned the premises, or was it just enough to demonstrate that appellants were found inside the premises and a reasonable inference be drawn that by virtue of being present in that house they were aware of the items in there" I have considered the case of **AHMED SALIM and ANOTHER V R – CR APPEAL NO. 38 of 1997** where drugs were found in the house which the appellants had visited. The owner of the house and another who were also arrested with the appellants but released and never called to testify and the court of appeal held that such failure was fatal and there was no evidence to raise any presumption of possession against the appellants. In the present instance the police officers confirmed to the trial court that they were unable to establish who was the owner of the premises or whether appellants were visitors or tenants – it was just their presence inside the said house that led them to conclude they were responsible for the contents of the house.

From the evidence there is nothing demonstrated either by interrogation of the appellants or their conduct to confirm that police established the reason for them being present inside the house. Suppose police carry out a swoop/raid inside a house and find visiting relatives, or persons living within the home – would that be sufficient reason to infer that they are responsible for whatever items are stored inside the house without first establishing what their status/relationship with the premises are" I think not.

As the police searched the premises, there is no evidence that any of the appellants joined or guided them through the house or even “assisted” in carrying out the search by perhaps giving access to the cupboard/drawer, either by opening them or availing keys,- nothing. From the evidence, my finding is that prosecution had not adequately discharged the burden of proving what the relationship or status of the appellants was visar the premises and the failure to call even one member of Marufu(who incidentally accompanied police in the search) is fatal – since they are not being referred to as police informers whose identity is protected – in any event if what police say is true about them being present

during the raid, then it means the appellants saw them and their identity could no longer be secret. Their evidence would therefore have assisted the trial court in determining whether the appellants were the individuals ordinarily in occupation and use of the premises and whether they were the ones involved in the storage – this failure was thus fatal and is resolved in favour of the appellants. The question as to whether there was someone selling in the nearby kiosk has no relevance to the recovery of the drugs and ownership of premises.

My finding is that on account of these observations, the conviction was unsafe and must be quashed – which I hereby do. The sentences are set aside and each appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 23rd day of August 2011

H A OMONDI

JUDGE



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