



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 184 OF 2021**

**AND**

**CRIMINAL APPEAL NO 185 OF 2021**

**LMAURA LEEJALE.....1<sup>ST</sup> APPELLANT**

**NAANTAWA LEJAALE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence in Isiolo Criminal Case No. E062 of 2021**

**by Hon. E. Ngigi PM on 1<sup>st</sup> December 2021)**

**JUDGMENT**

1. The appeals have been consolidated for hearing both having arisen from the same criminal matter. Appellants herein were charged with Trafficking in Narcotic Drugs Contrary to Section 4(a) of Narcotic Drugs and Psychotropic Substances Control Act NO. 4 of 1994. The particulars of the charge were that;

***On the 14<sup>th</sup> day of May 2021 at around 1930 hours at Archers Post Town in Samburu County within Rift Valley Region were jointly found trafficking in Narcotic Drugs Cannabis Sativa to wit approximately 2 Kgs worth Kshs. 40,000 which was not medically prepared.***

**Prosecution case**

2. The Appellants pleaded not guilty. At the trial, **PW2 PC Shadrack Cheruyot** testified that on 14<sup>th</sup> May, 2021, they went to Accused persons' house and finding them outside searched their house in their absence and from there recovered near the bed tiny substances in a blue basin approximately 1 & 1.5 kgs and another weighing 1.5 kg in another bucket after which Appellants were arrested and charged. **PW4 Njeri Njoro** who was in company of PW1 stated that Appellants were arrested from inside their house from where was recovered seeds in a blue basin approximately 1 & 1.5 kgs and another weighing 1.5 kg in blue bucket after which Appellants were arrested and charged. **PW3 PC Narsa Wanjiru** did not enter Appellants' house and did not know where the 2 basin and plant material were recovered from. It was her evidence that Appellants were arrested inside the house and that the bucket was recovered outside the house. PW5 PC Joseph Rukwaro received Appellants after their arrest and was also handed over bhang seedling in a bucket, a blue basin with cannabis leaves, rollers with bank notes, prize paper and a seal tape wrapper bag. The exhibits were forwarded to government chemist for analysis and Emmy Akheri Otieno (**PW1**) found that the plant material was cannabis as shown on produced the report marked **PEX 1a**.

**Defence Case**

3. 1<sup>st</sup> Appellant in his sworn defence testified on the date of his arrest, he arrived home at 07.40 pm and police stormed his house at 08.00 am and stated they had recovered bhang which he said he suspected was planted by an unmanned person that he had a grudge with.

4. In her sworn defence, 2<sup>nd</sup> Appellant testified that she did not witness any recovery and that police just stormed their house, beat them up and arrested them.

5. After a full trial, Appellants were convicted sentenced to 10 years' imprisonment each. Aggrieved by both the conviction and sentence, they filed this appeal raising 9 grounds which were later collapsed into 5 in their submissions as follows; -

- 1) ***THAT the learned trial magistrate erred in both matters of law and fact by convicting and sentencing the Appellants for petty offence.***
- 2) ***THAT the learned trial magistrate erred in both matters of law and fact by sentencing the appellant relying on contradicting and paradoxical evidence.***
- 3) ***THAT the sentencing magistrate didn't take into consideration children's rights hence contravened the rights of the children by sentencing both parents to a 10 years' imprisonment.***
- 4) ***THAT the sentencing magistrate failed to give the appellants an option of a fine.***
- 5) ***THAT the learned trial magistrate erred in both matters of law and fact by failing to take into consideration the plausible defence of the appellants.***

### **Submissions**

6. Appellants vide submissions dated 3<sup>rd</sup> March 2022 contend that the credibility of the arresting officer is questionable, contradicting and lacking in harmony to complete a chain safe to settle a conviction. They contend that the prosecution did not prove its case beyond any reasonable doubt, that their plausible defence poked holes on the prosecution case as they did not have a duty to prove their innocence. The Appellants argue that incarceration of both of them has caused undue suffering to their children. While arguing that the offence is petty, they urged the court to review the sentence downwards or set them at liberty. Reliance was placed on they relied on **Dankera Ramkisham Pandya V R EACA [1957], Okech Okale V Rep 1964 EACA NO 179.**

7. The Respondent argues that Appellants' guilt on the charge of trafficking in narcotic drugs was proved to the required standard of proof, the sentence passed was legal and proper but conceded to a more lenient sentence to be meted out against them as first offenders. The state relied on **Gabriel Kamau Njoroge V Republic [1982-88]1 KAR 1134** and **Benard Kimani Gacheru V Republic [2002] eKLR.**

### **Analysis & Determination**

8. The duty of the first appellate court is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction bearing in mind that it neither heard nor saw the witnesses testify (**see Okeno v Republic [1972] EA 32.**)

9. I have considered the evidence on record, the grounds of appeal and submission for the Appellants and for the state and deduced the following issues for determination:

1. ***Whether there were material contradictions in the evidence adduced by the prosecution witnesses at trial.***
2. ***Whether sentence meted out was excessive***

10. Appellants argue that there were material contradictions of the prosecution witnesses being that it was not clear where the Appellants were at the time of the raid and arrest and where the exhibits placed before court were found. As some of the prosecution witnesses testified that both accused were outside while others testified that 1<sup>st</sup> Appellant was in the house and 2<sup>nd</sup> Appellant outside the house. I do agree with the trial court that these contradictions and inconsistencies do not make the prosecution case less plausible as it does not water down the fact that both Appellants were within the house compound during the arrest and raid and that the exhibits produced were retrieved and recovered from their house.

11. In the case of **Erick Onyango Ondeng' vs. R [2014] eKLR,** the Court held as follows:

***“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”***

12. I have looked at the testimony of the aforementioned prosecution witnesses and note that the contradictions are minor and not sufficient to impeach the testimonies of the prosecution witnesses. In my view the contradictions pointed out were not so material as to vitiate the conviction.

13. Concerning Sentence, Appellants contend that the offence committed was a petty offence, that they were not offered the option of a fine of sentence, they have children who depend on them and that 10 years was excessive.

14. Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act, sets out the penalty for trafficking as follows; -

#### ***4. Penalty for trafficking in narcotic drugs, etc.***

***Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a***

*narcotic drug or psychotropic substance shall be guilty of an offence and liable—*

*(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life”*

15. The penalties prescribed by the Act demonstrate that the offence Appellants were convicted of is not minor as they would want the court to believe. I have considered the case of **Caroline Auma Majabu v Republic [2014] eKLR**, where the Court of Appeal stated that the sentence provided for trafficking is the maximum intended for drug barons and serious drug dealers with drugs worth thousands if not millions of shillings, and not small timers such as the Appellant herein.

16. I associate myself with the holding of the court that while we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders.

17. The State is agreeable for a more lenient sentence. Being first offenders and both of them having left their children unattended and one being in custody with the 2<sup>nd</sup> Appellant, I find in their favour to reduce the 10-year sentence.

18. It is therefore hereby ordered that the 10-year sentence imposed on both Appellants is set aside and substituted with the period already served

**DELIVERED AT MERU THIS 31<sup>st</sup> DAY OF MARCH 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

<b>Court Assistant</b>	<b>- Kinoti</b>
<b>1<sup>st</sup> Appellant</b>	<b>- Present</b>
<b>2<sup>nd</sup> Appellant</b>	<b>- Present</b>
<b>For the State</b>	<b>- Ms. Mwaniki</b>