REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 31 OF 2017

DENNIS MUINDE MUIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of the Senior Resident

Magistrate's Court at Kajiado dated 11/8/2017)

JUDGEMENT

DENNIS MUINDE MUIA, the appellant in this appeal through M/s Kitheka & Co. Advocates has appealed against both conviction and sentence emanating from Criminal Case No. 1628 of 2015 at the Magistrate's Court at Loitokitok. The appellant was sentenced to seven years imprisonment and in addition to pay a fine of Ksh.930,000 in default to serve one year imprisonment.

The brief background of the case and the evidence from the Magistrate Court the appellant and two others not before court were charged with the offence of trafficking in narcotic drugs contrary to Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars constituting the offence were that on the 4th /9/2015 along Namanga Mashuru Road in Loitokitok District, within Kajiado County the appellant jointly with others already convicted and sentenced were found trafficking 31kgs of narcotic drugs namely bhang with a street value of Ksh.310,000 in motor vehicle reg. No. KAK 681L Nissan Saloon EX.

During the indictment and arraignment before court they all denied the charge necessitating the state to prove the case against them beyond reasonable doubt. The prosecution case was based in the testimony of seven witnesses whose brief evidence is summarized as follows:

On 4/9/2015 PW1 Joseph Kimani attached to KWS Amboseli stated before court that he was informed by PW2 – Sgt Job Sandiyo also of KWS that motor vehicle registration number KAK 681L has been spotted stuck 500 metres from their gate. In the explanation by PW2 he had arrested the driver but the other two occupants were on the run. According to PW1 he provided assistant as one of the first responders to go after the two suspects on a motorcycle where he managed to effect arrest. The appellant and his accomplices under arrest of PW1 and pw2 were taken to KWS camp including their vehicle registration KAK 681L. It was at KWS camp the appellant and the two suspects were forced to open the boot of the vehicle to confirm indeed whether they were carrying beans as alleged. The boot car was eventually opened and the two witnesses were confronted with three sacks of material they suspected to be bhang. The appellant and his group remained under custody of PW1 and PW2 as the incident was reported to the police.

PW3 Detective Thomas Mongare testified as the OCS of Loitokitok police station on the role he played at the scene of crime. PW3 further told the court below that he took over possession of the scene, the suspects and the respective motor vehicle detailed by PW1 and PW2. It was at the scene PW3 testified that an inventory of the items recovered was undertaken including two sacks of bhang and a black polythene paper bag also with bhang. The inventory prepared according to PW3 was done and signed in the presence of the appellant, his accomplices, Cpl Chacha who testified as PW5, and one Kitur who was not summoned as a witness.

Additionally PW3 testified that the suspected material recovered as bhang was weighed and measured 31Kgs in the presence of the appellant and his two co-accused persons. The inventory was admitted in evidence as exhibit 3, the motor vehicle exhibit 2 and the 31Kgs as exhibit 1 to support the charge against the appellant and his two colleagues.

In the evidence of PW5 Cpl Simon Chacha, the samples of the suspected recovered bhang were obtained from the sacks, polythene bag and were conveyed to the government chemist for analysis. The report from the government analyst as stated by PW6 Mechau Melimo confirmed the narcotic substances to be bhang. The analyst report was admitted in evidence as exhibit 6.

The crime scene was documented by PW7 Virginia Wanjiku by way of a CD received from Victor Baraza. The photographs developed and

processed from the CD were admitted in evidence as exhibit 7 together with the report on explanatory notes.

PW4 Michael Mutua testified as the owner of motor vehicle registration KAK 681L. PW4 further testified and confirmed that the vehicle on the 4/9/2015 was under the physical control and benefit of the appellant who worked as his driver. According to PW4 the usual location and operation of the vehicle as a taxi is within Machakos. He stated that no consent was sought by the appellant to drive away the vehicle from the jurisdiction of Machakos to Loitokitok. In his evidence to the trial court PW4 had to learn of the incident through the police who required him to record a statement.

The appellant put on his defence denied the charge of trafficking in narcotic drugs. His defence was to the effect that he had been hired by one David Kilonzo to pick a sick person at Namanga. The appellant further testified that in the course of the journey he stopped for refreshment at a nearby market at Amboseli. On return he found his vehicle surrounded by KWS officers alleging that he was trafficking in ivory. He said that the case was a fabrication against him as regards trafficking in bhang. This is the entire evidence the trial magistrate considered in convicting and sentencing the appellant to an aggregate sentence of 8 years and in addition a fine of Ksh.930,000.

The appellant through M/s Kitheka Advocate appeals and raises eight grounds of error that will require review by this court:

(1) That the learned trial magistrate erred in law and in fact in convicting the appellant for the offence charged when there was no sufficient evidence to prove the charges.

(2) That the learned trial magistrate erred in both law and fact in convicting the appellant when the crucial ingredients of the offence were never established and the prosecution did not discharge their duty and prove the case beyond the required standard.

(3) That the learned trial magistrate erred in both law and fact in convicting the appellant when the weight of the evidence does not support the conviction.

(4) That the learned trial magistrate erred in both law and fact in convicting the appellant whilst the crucial element of downplaying the role of a taxi driver as a transporter of persons with goods.

(5) That the learned trial magistrate erred in both law and fact in convicting the appellant on the face of material contradiction and inconsistency of the evidence by the prosecution.

(6) That the learned trial magistrate erred in law and in fact in convicting the appellant without considering extenuating circumstances of the case.

(7) That the learned trial magistrate erred in both law and fact in convicting the appellant whilst relying on his own conjectures and arrived at the wrong decision.

(8) That the sentence of the court against the appellant is manfestively excessive considering all the circumstances of the case.

I have reviewed the eight grounds and without demeaning the manner in which the appellant has chosen to approach his appeal to me it raises two major issues for consideration:

(1) Whether the trial court's decision finding Dennis Muinde Muia, the appellant guilty beyond reasonable doubt was an error in both fact and law and against the manifest weight of the evidence.

(2) Secondly, whether the trial magistrate complied with the provisions of section 74A and section 86 (1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

SUBMISSIONS ON APPEAL:

Ms. Kitheka learned counsel for the appellant submitted that the offence of trafficking in narcotics was not proved beyond reasonable doubt to warrant a conviction and sentence against the appellant. Learned counsel further argued and submitted that the key prosecution witnesses failed to adhere to the mandatory procedures set out more specifically section 74A and 86 of the Act.

The gist of the appellant counsel was to the effect that the OCS PW3 was not a proper officer as provided for under section 86 (2) of the Act. According to learned counsel PW3 did not have or tender qualifications or credentials. That this being mandatory provisions, the error should be resolved in favour of the appellant. Learned counsel further argued that PW3 and his colleagues from Loitokitok police station were not gazette in accordance with section 74A of the Act. In support of the submissions learned counsel cited the following authorities:

(a) Patrick Odoyo Jabuya v Republic [2014] eKLR

(b) Beatrice Atieno Apollo v Republic [2016] eKLR

(c) Hamayan Khan v Republic [2001] eKLR.

In his part learned counsel invited this court to set aside the conviction and sentence against the appellant.

Mr. Akula, senior prosecution counsel opposed the appeal on both conviction and sentence. According to the senior prosecution counsel the case against the appellant was based on watertight and overwhelming evidence by the prosecution. Learned counsel for the respondent further submitted that there is no error committed by the trial magistrate in respect of application of section 74A and 86 of the Narcotic Drugs and Psychotropic Substances Act. He urged this court to affirm the judgement of the lower court as the appellant has failed to identify an error requiring the intervention of this court.

ANALYSIS AND RESOLUTION:

On first appeal, the powers and mandate is well spelt out in the cases of ***Njoroge v Republic [1987] KLR 99, Okeno v Republic [1972] EA 32***. The general principle of law is that the appellate court in reviewing the evidence on record, weighs all reasonable inferences and determines by drawing its own conclusions whether the trial magistrate lost his/her way in the judgement that occasioned a manifest miscarriage of justice; that will force the appellate court reverse the conviction and sentence. It is this task I proceed to undertake under the jurisdiction in ***Okeno*** and ***Njoroge case***.

The first re-evaluation is on the issue whether the prosecution proved the charge against the appellant beyond reasonable doubt touching on all essential elements of the crime. The appellant was convicted and sentenced of the offence of drug trafficking in violation of section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act which states that ***"any person who traffics 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."***

The concept of trafficking in; section 2 - the definition "**trafficking**" means **"the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof, but does not include –**

> **(a) The importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefore under this Act in accordance with the licence;**
>
> **(b) The manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefore under this Act in accordance with the licence; or**
>
> **(c) The selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, or any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medial practitioner or veterinary surgeon or dentist or by any other qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or**
>
> **(d) The selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist."**

It is plain from this definition the offence requires proof of possession and the intention to traffic.

I see the *mensrea* for the offence of possession for the sole purpose of trafficking to be circumstantially manifested in the knowledge of the nature of the substance in possession and the offender knowing it to be a controlled substance or narcotic drug. Secondly, the quality of the substance seized in my view could also add to the weight of the evidence that the controlled substance or narcotic was in possession of the accused for the purpose of trafficking. From the reading of section 2 the term extends to include tools and means of transportation used in committing the offence on any of the specified elements. The working of this section and its definition has found its way in the decisions by the various superior courts within our jurisdiction.

In the case of ***Maldine Akoth Barasa & Another v Republic [2007] eKLR 193 of 2005*** the Court of Appeal dealt with the interpretation of what constitutes the offence of trafficking in narcotic and observed as follows:

> **"It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking."**

It is quite clear to me that section 2, as read together with section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act and the principle in ***Maldine case*** the prosecution must satisfy the trial in two areas:

> **(1) In the first scenario the nature of trafficking as specified under section 2 must be stated when particularizing the details of the offence.**
>
> **(2) Secondly the prosecution must resolve whether any of the conduct of the accused as charged was for the purpose of trafficking.**

These issues are to be determined by way of evidence relevant to each particular indictment. What are the undisputed facts as established by the trial court? According to the evidence adduced by the prosecution from PW1 and PW2 both of them attached to KWS Amboseli stated in

court on how they arrested the accused persons and seized the exhibits. It is on record that on 4/9/2015 PW2 Job Sandiyo while in duty he saw motor vehicle reg. KAK 681L stuck about 500 metres from the gate. He sought assistance from PW1 – Joseph Kimani in proceeding to the exact scene of the vehicle.

PW2 had already arrived earlier that PW1 and managed to apprehend the driver (the appellant) in this case. When PW1 arrived he moved in and went after the other co-accused who wanted to run away and also made the arrest. PW1 and PW2 informed the OCS PW3 – CIP Thomas Mongare of Loitokitok police station. The car was searched in the presence of the appellant and his accomplices (co-accused) the police officers under the instruction of PW3 and also in company of PW1, PW2, PW5 – Cpl Chacha, who investigated the case took 2 sacks and a polythene bag from the car as exhibits.

The following are the significant exhibits:

- 2 sacks containing luggage suspected to be bhang.

- One paper bag also with the same materials of suspected bhang like the other two sacks.

- A motor vehicle registration KAK 681L

According to the evidence of PW5 an exhibit memo was prepared comprising samples taken from the seized sacks and paper bag and forwarded to the government analyst to ascertain whether indeed it was controlled substance or narcotic drug. The samples of exhibits were received by the analyst PW6 – Mechau Melimo. In his testimony the analysis of the exhibits were found to be cannabis (generally referred to as bhang under the first schedule of the Narcotic Drugs and Psychotropic Substances Control Act 1994.

It also emerged from the evidence of PW4 Michael Mutua that he was the registered owner of motor vehicle registration KAK 681L. He also confirmed to the court that the appellant was his employee with the sole duty of operating the vehicle as a taxi. In his general agreement with the appellant the vehicle area of operation was to be within Machakos town in Machakos County.

In his defence the appellant admitted being hired by a customer by the name Kilonzo to ferry a sick person from Namanga. He also admitted that he was arrested by KWS officers; though he did not specifically refer the location being Loitokitok. The appellant denied any participation or knowledge of the offence involving trafficking in bhang.

I have reviewed the evidence in its totality visa viz the complaints raised in the memorandum of appeal. The gist of the prosecution evidence confirms as follows:

The appellant was a driver of motor vehicle reg. KAK 681L owned and registered in the name of PW4 – Michael Mutua. The vehicle is licensed to operate as a taxi within Machakos town as per instructions and licence granted to PW4. It is not in dispute that the appellant was arrested with the vehicle on 4/9/2015 at Loitokitok KWS area. The appellant was in company of two other men. The search conducted recovered 2 sacks and a polythene bag confirmed by PW6 to be bhang (cannabis). The prosecution therefore proved that the appellant was found in possession of controlled substance bhang for the purpose of trafficking.

By section 2 trafficking is defined to include conveyance, sell, supplying, exportation, delivery etc. the appellant terms of employment was to operate taxi business within Machakos town. He did not have the consent or authority from the owner to drive out of the locality of Machakos town. The appellant defence was a total lie as it relates the itinerary of his assignment to pick a patient from Namanga. This court takes judicial notice that Namanga area and Loitokitok Sub-County are miles apart. The KWS Amboseli where the arrest took place is located in Loitokitok and not Namanga. The defence never called the hirer as a witness during the trial proceedings. The claim therefore remained unsubstantiated to controvert the prosecution case as to the proximity to the scene and opportunity by the appellant to commit the alleged offence.

The law is well settled on the definition of common intention. Pursuant to section 21 of the Penal Code it defines common intention as arising:

> **"When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a 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."**

It is instructive as to proof and manifestation of common intention to refer to the principle in the case of ***Republic v Tabulayenka S/O Kirya [1943] EACA 51:***

***"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the unlawful act**" emphasis mine*. That was the case at the trial court. The charge involved three persons charged jointly with the offence of trafficking 31Kgs of bhang.

Though the trial magistrate did not particularly use the word common intention I am of the view that the criminal acts by the three accused person, including the appellant were done in furtherance of the common intention of all. It is evident from the record to complete liability against the appellant that he committed an offence of trafficking, there was a common intention and he participated in conveying, or delivering the cannabis sativa. In this case the criminal act on the part of the appellant encompasses hiring out the vehicle reg. KAK 681L and making arrangements to take delivery of the 3 loads of luggage to Loitokitok.

As demonstrated by PW4 the appellant violated the existence of a term of employment not to move the vehicle out of Machakos town. In this regard it cannot be presumed that the appellant never knew the contents of the luggage being conveyed in his vehicle. the principal offender must have made arrangements for the collection and loading of the stuck of cannabis sativa into the respective bags.

I therefore on review of the evidence reject the contention by the appellant on his explanation he was arrested and charged with the offence. The prosecution has shown both in the court of below and this high court that in aggregate acts the appellant committed the offence contrary to section 4(a) of the Narcotic Act (Supra).

The appellant had a rebuttable presumption under section 119 of the Evidence Act. He did not discharge that burden to controvert the prosecution case on the following:

That the narcotic drug or controlled substances recovered from the boot of his vehicle was not under his custody or control. Secondly, that the presumption made by the prosecution for him to have known the nature of the narcotic drug or controlled substance. Thirdly, that in company of the other co-accused they acted in concert with full knowledge and consent from each one of them how to execute the common enterprise.

I am satisfied that the learned trial magistrate never erred or misdirected himself as to prove of the elements of the offence of trafficking as indicated in the charge sheet. It is constitutional that the appellant was arrested before having delivered the consignment to the expected destination.

The second ground raised in this appeal touches on the application of section 74A and section 86 of the Act. In order to understand the nature of the complaint as raised by the appellant let me restate the provisions of the statute. Section 74A provides for the procedure upon seizure of narcotic drugs. The legislature specified that:

Section 74A ***"(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred as to as "the authorized officer") shall, in the presence of where practicable –***

> ***(a) The person intended to be charged in relation to the drugs (in this section referred to as "the accused person");***
>
> ***(b) A designated analyst;***
>
> ***(c) The advocate (if any) representing the accused person; and***
>
> ***(d) The analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analyzing and identifying the same.***

(2) After analysis and identification of the sample or sample taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.

(3) Upon receipt of the designated analyst's certificates and the samples analysed in accordance with the foregoing subsections the authorized officers shall, where the drug is found to be a narcotic drug or psychotropic substance within the meaning of this Act, arrange with a magistrate for the immediate destruction by such means as shall be deemed to be appropriate of the whole amount seized (less the sample or samples taken as evidence at any subsequent trial or any contemplated trial particularly where the accused person's identity is not yet known or the accused person is outside the jurisdiction of Kenya t the time of taking such samples).

(4) The destruction of drugs and psychotropic substances ordered under subsection (3) shall be carried out by the authorized officers in the presence of the magistrate and the accused person, where practicable, and his advocate (if any) and thereafter the magistrate shall sign a certificate in the prescribed form relating to such destruction.

(5) The production in court by either one of the authorized officers at the trial of an accused person of the sample or samples together with the designated analysts' certificates and the magistrate's certificate of destruction shall be conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of this destruction in accordance with the provisions of this section."

The major concern as deduced from the submissions of Mr. Kitheka, learned counsel for the appellant was non-compliance with the mandatory provisions on seizure of the narcotic drug, or controlled substance to be weighed in the presence of the accused, or his counsel and extraction of the sample from the whole to be taken to the analyst for purposes of identification. The provision provides that the weighing and seizure officer should be authorized in writing by either the Commissioner of Police and the Director of Medical Services or a police or a medical officer for purpose of this Act. In support of this ground learned counsel placed reliance on the case of ***Patrick Odoyo Jabuya v Republic [2014] eKLR.***

Based on the decision of this authority learned counsel argued and submitted that the OCS PW3 was neither an authorized officer qualified to weigh and take samples for analysis as contemplated by section 74A. That omission according to learned counsel was fatal to the prosecution case to be resolved in favour of the appellant.

In the present case, on a far flung sub-county of Loitokitok, KWS officers PW1 and PW2 in the first instance arrested the appellant on suspicion of having committed an offence relating with wildlife. A further interrogation and search revealed that the appellant and his co-suspects were in possession of either a narcotic drug or controlled substances. PW1 and PW2 testified that they called in the police whose function under section 24 involves interalia ***"investigation of crimes and apprehension of offenders."*** That is how the OCS from Loitokitok police station who testified as PW3 C.IP Thomas Omwenga responded and travelled to the scene.

In the evidence before the trial court PW3 who was accompanied by the investigating officer PW5 Cpl Chacha re-arrested the suspects, who included the appellant and recovered exhibits. The OCS PW3 weighed the two sacks and polythene bag containing the stashed material weighed it in the presence of the appellant and his two colleagues. On average PW3 indicates that the weight of the exhibits was 31Kgs. As further stated by PW3's testimony the inventory was duly signed and also counter signed by the appellant. The inventory dated 4/9/2015 was admitted in evidence as exhibit 3.

Since the enactment of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 section 74A and 86 have been the most litigated sections more so as to their proper interpretation and application in our criminal justice system. I think it is not in dispute that section 74A above contains a restriction procedure on weighing, seizure, destruction and extraction of samples for purposes of analysis to identify the drug or controlled substance.

The question is whether the conditions or procedure set out render non-compliance of the provisions fatal in each particular case. The Court of Appeal weighed in and delved into the matter as can be seen in the cases of ***Moses Banda Daniel v Republic Cr. Appeal No. 6 of 2015 eKLR – 2015***. The court observed interalia that ***"after the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any, appointed by the accused person and the designated analyst.***

The use, in the section, of phrases like where practicable, and if any convey the reading that the procedure is not mandatory but directory and the use of the word shall must be so interpreted.

A procedure, provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure."

In addition the court put in pointing the interpretation in context made reference to **the Hansard Record of 6/12/2000** containing the motion which brought about the amendment under section 74A which reads as follows as moved by **Wako AG** as he then was thus:

> **"We have noticed many instances, where narcotic drugs and psychotropic substances are found and then persons are charged in court, then we discover that part of or substantial portion of the exhibits have somehow disappeared and that of course destroys evidence. There would be great temptation on those officers who are involved to interfere with exhibits particularly if what has been hauled in by the police is big. This is because of the money that it may attract which can lead to its disappearance from custody. Therefore we are saying that we should remove the temptations for these substances disappearing from custody by enacting a law which will in the course of investigations avoid such occurrence."**

As reiterated by the Court of Appeal in the case of ***Joshua Atula & Another v Republic [2016] eKLR –***

> ***"The objective of section 74A was meant to deal with instances where the exhibits seized disappeared or tempered with before conclusion of a trial. However, in the instant case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before court. The 2200 stones were availed as exhibit and the applicant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances."***

In my judgement upon evaluation of the evidence the appellant's complaint on section 74A is a non-starter for the following reasons:

The amount, and nature of the controlled substances seized from the car boot being driven by the appellant was clearly indicated in the charge sheet. There was sufficient evidence to prove that PW3 seized the controlled substances from PW1 and PW2 who effected the initial arrest of the appellant.

Regarding the minimum threshold for an offence of this nature which occurred in a geographical area in a rural urban set up of Kenya PW3 complied with section 74A and the due process of the law. This he did by weighing the seized narcotic drug/controlled substance in the presence of the applicant, the investigating officer PW5, PW1 and PW2 from KWS attachment. There was no complaint raised by the appellant or dispute as to the weight of the seized narcotic drug by PW1, PW2, PW3 and PW5.

It is from the quantities seized PW3 took out the samples which were handed over toPW5 to prepare an exhibit memo for analysis at the government chemist. The analyst who testified as PW6 carried out the forensic test of the samples and confirmed that the material was cannabis sativa under the first schedule of the Act on Narcotic Drugs and Psychotropic Substances Control Act 1994.

The learned trial magistrate who presided over the trial received and admitted the evidence on the 31Kgs of cannabis sativa with other respective packaging intact. There was no dispute raised by the appellant as to the quality being at variance with the one he counter signed on 4/9/2015 when PW3 weighed the consignment and prepared the inventory.

I am unable to accept the appellant's learned counsel submissions that there was a violation or non-compliance with section 74A in the dispensation of justice are the attributes of a right to a fair hearing under section 50 of the Constitution. The learned trial magistrate listened, and heard the case from its commencement to the delivery of final judgement. The appellant was given an opportunity to cross-examine the

seven witnesses summoned by the state to prove the elements of the offence.

From the facts of this case I am of the conceded opinion that the appellant had constructive knowledge of the offence. ***Black's Law Dictionary 1004 10th Edition 2014*** defines the phrase as follows ***"knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."***

Thus when the appellant set out to drive his motor vehicle from Machakos County to Loitokitok Sub-County must have been aware of the circumstances and existence of the bhang inside the vehicle as an element of the offence. There is a high probability that the appellant made inquiry with a conscious purpose before commencing the journey for Loitokitok.

The prosecution proved that the appellant was aware when he loaded the bhang into his vehicle it was for trafficking on behalf of the owners whom he also carried as passengers. When the bhang was recovered he was arrested with his co-conspirators and nothing on record to show that he was an innocent carried for hire.

In lodging this appeal the appellant has not demonstrated that the circumstances as pertaining to the provisions under section 74A that he was unfairly prejudiced at the expense of the state or on the other hand there was a failure of justice rooted in the case. It's in comprehensible for this court to interpret section 74A in a restrictive manner so as to render it inoperative and quash the proceedings of the lower court. I will therefore agree with the cited cases by the Court of Appeal of ***Moses Banda*** and ***Joshua Atula (Supra)*** on a purposeful interpretation of section 74A and find no merit in the memorandum of appeal on this ground.

The other objection by the appellant was in respect with section 86 (1) of the Act. In the submissions by learned counsel for the appellant the value of the bhang being trafficked was not established in accordance with section 86. Learned counsel further contended that the learned trial magistrate erred in admitting the evidence of PW3 when in essence he did not present the credentials that he was a proper officer for purposes of section 86.

Section 86 **"(1) where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.**

> **(2) In this section *"proper officer"* means the officer authorized by the Minister by notification in the gazette for the purposes of this section."**

The task of this court in this regard is to determine whether the trial court was availed sufficient evidence to discharge the issue of the market value of the drugs. From the record PW3 C.IP Mongare never alluded to the issue on the street value indicated in the charge sheet. There was no certificate issue as to the value of 31Kgs of bhang seized from the appellant. One will expect PW3 to have provided background information in respect to the element of the price. This is critical because the trial court used the value in the charge sheet to impose a fine of Ksh.930,000 against the appellant in compliance with section 4(a) of the Act.

In this case I am of the view that there was insufficient evidence from which the court applied the provisions of section 4(a) to impose the alternative sentence of a fine or in default 1 year imprisonment. This ground of appeal therefore succeeds in favour of the applicant save as stated above.

This case on all the four corners was established beyond reasonable doubt. I affirm the judgement of the lower court both on conviction and sentence save that the sentence on a fine of Ksh.930,000 in default one (1) year imprisonment is hereby set aside. The appellant sentence of seven (7) years remains confirmed to be served until revised or overturned by another superior court.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 22/1/2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Appellant present

Mr. Mirieri for Mr. Kitheka for the appellant

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant