



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 51 OF 2017

BETWEEN

FREDRICK OTIENO ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 180 of 2016 at Senior Resident Magistrate's Court at Tamu, Hon. P.K.Rugut, SRM dated 13th September 2017)

JUDGMENT

1. The appellant, **FREDRICK OTIENO ODHIAMBO**, with his co-accused were charged with the offence of trafficking in narcotic drugs contrary to **section 3(2)** as read with **section 4(a)** of the *Narcotics Drugs and Psychotropic Substances Control Act, 1994* ("the Act"). The particulars of the charge were that on 3rd June 2016 along Awasi-Chemelil Road in Muhoroni District within Kisumu County with another person not before the court, he was found trafficking narcotic drugs (bhang) to wit 5 ¼ sacks and 2688 sticks with a street value of Kshs. 1,000,000/- which was not medically prepared. He pleaded not guilty and after a full trial he was convicted and sentenced to 5 years' imprisonment.

2. At the hearing of the appeal, the appellant contended that he was only contesting the sentence. He asked the court to be lenient to him and consider giving him a non-custodial sentence. Counsel for the respondent conceded that the charge facing the appellant was defective but that it did not prejudice the appellant as the evidence against him was overwhelming.

3. I will deal with the issue of the defective charge first before I consider the sentence. **Section 2** of the Act defines "Trafficking" as follows-

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.

4. The Court of Appeal considered the meaning and implication of the word "trafficking" in the framing of charges under the Act in *Madline Akoth Barasa & Another v Republic KSM CA Criminal Appeal No.193 of 2005 [2007]eKLR* where it held 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 substance. 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. In this case neither the charge sheet nor the evidence discloses the dealing with the bhang which constituted trafficking. The learned trial magistrate did not even deal with that aspect of the case.

5. In the present appeal, the charge sheet used the general word trafficking and conflated **section 3(2)** of the Act which deals with possession and **section 4** which deal with trafficking. The prosecution ought to have charged the appellant with either possession or trafficking. From the facts outlined the charge, he was accused of trafficking and in line with the decision I have cited, the charge ought to have set out the specific form of trafficking contemplated under **section 2** of the Act. I however note that as the Court of Appeal stated in the *Madline Barasa Case*, the court, may, if the appeal is not allowed on any other ground, invoke its powers under **section 361(4)** of the *Criminal Procedure Code* to convict the appellant of a lesser but cognate offence by substituting the conviction for trafficking with that of possession and sentence the appellant accordingly.

6. As the charge was defective, I reduce the charge to one of possession of being in possession of *cannabis sativa* contrary to **section 3(1)** as read with **section 3(2)(a)** of the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994* and convict the appellant accordingly. The maximum sentence prescribed under **section 3(2)(1)(a)** is a maximum of 20 years' imprisonment.

7. In the sentencing notes the trial magistrate considered that the appellant was a first offender but since the offence was trafficking, the court imposed a sentence of 5 years' imprisonment. Having regard to the earlier sentence and the reduced charge and noting the amount of bhang found in the appellant's possession, I reduce it to 3 years' imprisonment.

8. The appeal is allowed on terms that the conviction and sentence are set quashed and substituted with a conviction for the possession of *cannabis sativa* contrary to **section 3(1)** as read with **section 3(2)(a)** of the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*. The appellant is sentenced to 3 years' imprisonment running from the date of conviction before the trial court.

DATED and DELIVERED at KISUMU this 28th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Barasa, Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.