



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**NYERI HIGH COURT CRIMINAL APPEAL NO. 88 OF 2013**

**CHARLES ODHIAMBO AKOMO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(An appeal from the judgment and conviction in original Karatina PM Criminal 19 of 2013 delivered on 11/7/2013 by D N Musyoka Acting Principal Magistrate)**

**JUDGMENT**

The appellant **Charles Odhiambo Akomo** was charged with the offence of trafficking in Narcotic drugs contrary to section 4(a) of the Narcotic and Psychotropic Substances Control Act cap 245 laws of Kenya. The particulars are that on the 3<sup>rd</sup> day of January, 2013 at 5.30pm along Karatina – Nyeri road at Karatina Town Mathuri East District within Nyeri County was found trafficking cannabis sativa using motor vehicle Reg No. **KBR 773S** make Nissan X-trail to wit 8 kilograms which was not in medical preparation.

The prosecution called three witnesses. **PW2 Abdi Kitui Wanakae** testified that he is in the business of car hire and was owner of motor vehicle Reg No. KBR 775S Nissan X-trail. On 1/1/2013 he hired the vehicle out to Juma Ochieng who said he wanted to take his wife to Kisii for 2 days. He paid him Ksh. 8000 and was to return the vehicle on 3/1/2013. Juma was in the company of the appellant at time of hiring the vehicle. Juma did not return vehicle as agreed and on checking with a car-track company, he was informed the vehicle was in Kavehria. He reported to flying squad police. PW1 Sgt. Thomas Muthui received information that the motor vehicle was at Karatina near the Shadlonia. The accused colleague went there. They found the vehicle which was stationing a person inside. The person was the accused. They interrogated him and on checking found it contained cannabis sativa in a sack. They arrested accused and towed the motor vehicle to the police station. Juma who had hired the motor vehicle was not arrested. PW3 Corporal James Mwangi gave similar evidence as Pw2 except that he stated they found appellant leaning on the vehicle.

The appellant gave sworn evidence stating that he was a hawker at Karatina and on the material day he was resting when he was arrested by police officers and taken to the police station. Based on this evidence the trial magistrate found the appellant guilty and convicted him and sentenced him to pay a fine of one million in default serve 20 years imprisonment.

The appellant filed this appeal stating as the grounds that the charge was defective; that the trial magistrate erred in convicting him on contradictory prosecution evidence; that essential prosecution witnesses were not called; with no proper explanation; and that the trial magistrate erred in rejecting his defence. The appellant filed written submissions. He submitted that the charge sheet is defective in so far as it does not disclose the mode of trafficking which is a mandatory ingredient in the offence of

trafficking. He referred this court to the court of appeal decision in **Madline Akoth Baraza and another – VS – Republic** (2007) KCR. Secondly the appellant submitted that the evidence of the prosecution was riddled with inconsistencies and contradictions. He makes reference to the evidence of PW1 and PW3 as the police officers as to where the appellant was found in relation to the vehicle, PW1 stating he was inside the vehicle and PW3 stating he was leaning on the vehicle. He submits that in view of the contradictions the court should not have believed the prosecution witnesses. He referred this court to the decision in **Dinkerai Kan Krishan Pandya – VS – Republic 1957 E.A 338** to support his contention that the court should not rely on the evidence.

Lastly the appellant submitted that the prosecution did not c.....witnesses and that the trial magistrate did not consider his defence.

M/s Chebet for the Respondent submitted that it is not true that the charge sheet is defective as the same has stated that the mode of tracking was by a motor vehicle KBR 773S. Counsel submitted on the alleged inconsistency in the prosecution evidence as to where the appellant was found, he termed them minor inconsistencies but the evidence of both witnesses placed the appellant at the scene of crime and that the prosecution only called witnesses who were necessary for its case as no number of witnesses are needed to prove a case.

The first ground advanced by the appellant was that there were contradicting in the prosecution evidence in respect of where he was arrested. PW2 Abdi Kitui in his evidence testified that

**When Juma came to hire my vehicle he was with the accused person in court (identified) Juma is the one who signed for the vehicle as the accused herein watched. The same accused called me to try and help him when he was arrested and when he called he said he was at Karatina Law Courts.**

This is what the witness maintained in both cross-examination and re-examination. PW1 Sergeant Thomas Muthui stated in his evidence

**I went there and found the vehicle stagnant and parked and there was a passenger inside and on asking him he said the owner had gone to Karatina town to look for a mechanic. Accused was in the vehicle that is Charles Odhiambo. Inside the vehicle we found the sack we suspected to containing cannabis sativa.**

PW3 Corporal James Mwangi stated;

**“We went to the Karatina Statium and we found a vehicle and a person leaning on the motor vehicle Reg. No. KBR 773S Make X-trail. We went to the vehicle and arrested the accused who was leaning on the vehicle and on asking the person about the vehicle he told me the vehicle had a mechanical problem and Juma who was with him had gone to look for a mechanic”**

The appellant submits that there are contradictory statements and the court should have rejected the evidence. I do not think so. Though there is discrepancy on where exactly the appellant was found in relation to the vehicle, there is evidence of PW2 the owner of the motor vehicle that appellant was with Juma in Nairobi when Juma hired the vehicle; three days later the vehicle is towed in Karatina and the appellant was at, in or near it. He explained to police that Juma had gone to look for a mechanic and when he was arrested he called the owner of the motor vehicle to seek for help. All these evidence in my view place the appellant at the scene of crime and establishes connection and relationship with the vehicle which contained the cannabis sativa. I find the discrepancies minor which do not affect the overall prosecution evidence ..

..... pg8

Using a motor vehicle Reg No. KBR 773S Nissan X-trail. The particulars in the charge sheet satisfies both the conduct which is conveying and the mode which are essential ingredients of the offence of

trafficking Narcotics. I therefore do not find that the charge sheet as drafted is defective as the appellant intends.

The appellant was charged with the offence of trafficking Narcotic drugs C/section 4 (a) of the Act. Trafficking is defined in section 2 as

**“trafficking” means the importation or 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 psychotropic substance”**

The appellant submits that the charge sheet as drawn above as it does not state the conduct ..... trafficking. In ..... the C.A stated

**“ it is evident from the definition of trafficking that the word is used as a term of art embracing various dealings in Narcotic drug and psychotropic substance in our view or 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 the present appeal the charge sheet indicated that the trafficking was along Karatina Nyeri road and the using motor vehicle Re No. KBR 773S and therefore satisfies the essential ingredients of the offence of trafficking in Narcotics. I do not therefore find that the charge sheet is defective as submitted by the appellant.

In the result, I am satisfied that the conviction of the appellant on the offence of trafficking narcotic was précised on sound evidence and uphold the conviction.

On sentence the appellant was fined 1 million shillings in default 20 years imprisonment. The penalty for trafficking Narcotics as provided under section 4(a)

“In respect of any Narcotic drug section

**4 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 and liable.**

- a. in respect of any Narcotic drug or psychotropic substance to a fine of one million or three times the value of the Narcotic drug or Psychotropic substance whichever is greater and in addition to imprisonment for life.**

The penalty for trafficking Narcotic does not make the shilling 1 million fine mandatory. The provision is clear that the person found guilty will be liable to that penalty just the same way the life imprisonment is not mandatory. In sentencing under this provision, the factors to be taken into account in sentencing applies. These will include factors such as if the accused is a first offender or repeat offender, the quantity of the Narcotics as trafficked; the mode of trafficking and the personal circumstances of the accused. In the present appeal I note that the quantity which was being trafficked was 8kg of cannabis sativa. The accused was a first offender a factor which should have been taken into consideration by the trial magistrate.

However the C.A in Mcoline Akoth Barasa & another – VS – Republic (2007) EKR stated;

***“It is clear that the offence of trafficking in Narcotic drugs or psychotropic substance carries a composite penalty of sentence of a fine and imprisonment. If the offence of trafficking is proved and the trial magistrate convicts an accused person for that offence then the trial magistrate has to impose the composite sentence”.***

I therefore set aside the sentence of 1 million shillings in default 20 years imprisonment and substitute with a fine of shs.200,000/= and imprisonment term of 5 years. The imprisonment term to run from the date the appellant was sentenced on 11/7/2013. It is so ordered.

Dated at Nyeri this 31<sup>st</sup> day of March, 2016.

**S RIECHI**

**JUDGE**

**31/3/2016**

Before – S N RIECHI Judge

Njue for state

Catherine – C/clerk

**Court** – judgment read over and delivered in open court in presence of appellant and Njue for state this 31<sup>st</sup> March, 2016

**S RIECHI**

**JUDGE**