



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL APPEAL NO. 98 OF 2015**

**SIPROSA ANYANGO LUMUMBA .....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The appellant was charged before the SPM's court Narok with two counts, namely:

Count 1

***“Trafficking in narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (control) Act”.***

The particulars of the first count were that:

***“ On 8<sup>th</sup> July, 2011 at Suswa road block along Narok-Mai Mahiu road in Narok North District of the rift valley province, trafficked in 12 kgs of cannabis with a market value of kshs 12,000/= by transporting it in a motor vehicle registration number KBM 279V Scania Bus in contravention of the said Act”.***

2. The second count was Being in possession of an alcoholic drink in contravention of section 27 (1) (b) of the Alcoholic Drink Control Act No. 4 of 2010. The particulars to the charge stated that on the 8<sup>th</sup> July, 2011 at Suswa road block along Narok-Mai Mahiu road, the appellant was found in possession of 25 litres of changaa in the motor vehicle registration number KBM 279 V Scania bus, in contravention of the Alcoholic drinks Control Act.
3. The appellant denied the charges and the trial commenced. At the close of the prosecution case, she was placed on her defence on the first count but acquitted on the second count for want of evidence. She was, at the close of the trial, convicted on the first count and sentenced to pay a fine of kshs 1 million in default to serve 3 years imprisonment and in addition sentenced to 3 years imprisonment.
4. The appellant has now appealed to this court. Grounds 1, 2 and 4 are challenging the evidence of the key prosecutions witnesses, namely PW1 and PW5, grounds 3 and 5 attack the adequacy of the prosecution evidence and raise the complaint that the trial court disregarded the appellant's defence respectively. The final ground is that the sentence was excessive.
5. The appellants written and oral submissions through her advocate Mr Onduso reiterated the grounds of appeal. For her part, Miss Waweru, representing the DPP conceded the appeal on

- grounds, that actual possession of the narcotics was not proved against the appellant and that the sentence was harsh.
6. The duty of the first appellate court as stated in ***Okeno versus Republic [1973] EA322*** is to evaluate the trial evidence afresh and to draw its own conclusions. The appellate court will not interfere with findings of the trial court based on the credibility of witnesses unless the same are clearly wrong and no reasonable tribunal could have made them. **[See *Oyier versus Republic*]**
  7. In brief, the prosecution evidence in the lower court was that the appellant purchased a ticket from the conductor of a bus travelling KBM 279 V, from Homa bay to Nairobi, one **Boniface Mbugua Nyambura (PW1)**. She had luggage which she kept at the rear of the bus while she took a seat at the front. At the start of the trip there were only four passengers. At Kisii PW1 ordered the appellant to seat next to her luggage which had been kept between seats at the rear of the bus. She obliged and sat at the rear of the bus. When the bus reached Suswa police road block, it was stopped by police officers, including **Cpl. Joseph Kipruto (PW5)**.
  8. PW5 told the court that the Appellant sat in the second last row of the bus and held yellow package on her lap. He asked her to open it and noted it contained a jerry can of chang'aa. Between her legs were 4 more jerry cans of chang'aa similarly packed. A black and navy blue suit case identified by PW1 as part of the appellant's luggage sat on the overhead bus carrier close to her seat.
  9. Upon opening it, PW5 found 70 stones of plant material later confirmed by the government analyst **Simon Ndubi Atebe (PW3)** as cannabis. The recovered contraband and the bus were photographed and the cannabis was weighed. It was found to weigh 12 kgs. The appellant was subsequently charged.
  10. The appellant gave a sworn defence statement. She testified that she was travelling from HomaBay where she lives to Nairobi on a personal errand on the day of arrest. That the bus was full and she sat next to two passengers.
  11. At Suswa, the bus was stopped and all passengers ordered out. That police found a suit case in the inner carriage of the bus. The same contained the drugs. Police said she was the owner, an allegation which she denied. She said in court that on the journey she only carried her hand bag. She claimed that she had been framed up.
  12. Upon my own evaluation of the evidence, I do agree with the appellant's submissions that the key prosecution witnesses were **PW1** and **PW5**, in light of their stated roles in the alleged detection of the offence. However, the appellant in her submissions did not highlight the specific contradictions in the evidence of the two witnesses. For my part I could not find any notable contradiction. Even if these were pointed out, not every contradiction is material.
  13. In the case of ***Erick Onyango Ondeng vs. Republic [2014] eKLR*** the court of Appeal stated that not every contradiction can warrant rejection of evidence. The court quoted a portion from the judgment in the Ugandan case of ***Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA, 6*** as follows:

***“with regard to contradictions in the prosecutions case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate un truthfulness or if they do not affect the main substance of the prosecution's case.”***

14. The foregoing disposes of ground 1 of the appeal. Regarding grounds 2,3 and 4 no direct submission was made beyond the assertions, accepted by the DPP, that (actual) possession was not proved. It is true that the trial court accepted the evidence by PW1 and PW5 and used it as the basis of the conviction. There is no legal requirement for the corroboration of evidence such as adduced by PW1 and PW5, indeed section 143 of the Evidence Act provides:

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

15. Although the issue of possession was not raised directly in the grounds of appeal, it is relevant, though not an ingredient of the offence charged. The appellant was charged with the offence of

- trafficking in the cannabis by means of transporting the same. The total evidence of PW1 and PW5 was that the appellant had the suitcase containing the cannabis upon boarding the bus and declared it as her luggage and that the suitcase was retrieved by PW5 from the interior carrier thereof above the seat she occupied. This was not a case where physical or actual possession by the appellant at time of arrest required proof.
16. In my considered view, the trial court correctly addressed its mind to the evidence that linked the appellant with the illicit substance and the ultimate question whether she trafficked the same. Ground 4 is based on a mis-apprehension of the evidence of **PW5**. He did not testify that the appellant held all the 25 jerry cans of changaa on her lap. Rather, that she held one container of five litres of changaa while four similar containers were on the floor between her legs.
17. In his judgment, the trial magistrate considered the appellant's defence and concluded:
- “ I do not find that it was the turn of event that all passengers were just ordered off the bus before the exhibit was recovered. As PW1 and PW5 showed in their cross-exam the arresting officer went over to where the accused was seated and found her with the said contra band. There is no room for planting of exhibits on her (sic).***
18. The appellant's defence was that she was framed up and was therefore considered and dismissed. During cross examination of PW1, PW5 and the driver PW3, the defense did not raise the issue that all passengers were forced off the bus during the search, or that there were two passengers seated next to the appellant. In my own view the trial magistrate was entitled to rely on the evidence of PW1 and PW5 and to dismiss the appellant's defence as he did. Grounds 2 to 5 have no merit therefore.
19. Regarding the final ground of appeal, it was that the sentence was excessive. In court counsel submitted that the appellant was not accorded a chance to mitigate. This complaint is not borne out by the record of proceedings that shows that mitigation was conducted by counsel on 14/7/14 after the delivery of the judgment. Was the sentence excessive? I do not think so.
20. Firstly sentencing is a matter of exercise of discretion by the trial court and the appellate court would only interfere where it is shown that the court disregarded a relevant and/or factor took into account an irrelevant factor or that the discretion was exercised in a manner that is plainly wrong.
21. In the cases of ***(Diego versus Republic [1985] eKLR 621*** and ***Dismas versus Republic [1984] eKLR 643*** the Court of Appeal stated that the appellate court should not interfere with the sentencing discretion of the trial court except in cases where it was apparent that the court had acted on some wrong principle and/or imposed a sentence which is manifestly inadequate or manifestly excessive.
22. In sentencing the appellant, the trial court in this case did not explicitly state what the material considerations were. However the appellant was charged with a serious offence and by citing the authority in ***Gabriel Ojiambo Nambesi versus republic [2013] eKLR*** the court was clearly alive to the fact.
23. In my own view the appellant's circumstances deserved the second limb of the sentence of three years imprisonment. She was found trafficking 12 kg of cannabis. However, on account of the provisions of Section 28 of the Penal Code the sentence in the 1<sup>st</sup> limb appears irregular. I will therefore set it aside and impose a sentence of kshs 100,000/= in default to serve 12 months imprisonment.
24. The default sentence will obviously run consecutively with the imprisonment period in the 2<sup>nd</sup> limb if the fine is not paid. Therefore, this appeal fails in respect of conviction and succeeds in part on sentence. The conviction is upheld and the corrected sentence is a fine of shs 100,000/= in default 12 months imprisonment and 3 years imprisonment effective from the date of sentencing (17/7/14).

**Delivered and signed at Narok this 30<sup>th</sup> day of March, 2016.**

In the presence of the appellant, Mr Onduso for her, Miss Waweru for the office of the DPP.

Court Assistant Baraza

**C. W. MEOLI**

**JUDGE**