REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.17 OF 2015

SOFIA DUKE MARSA .....APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(From the original conviction and sentence in Criminal Case No.162 of 2014 of the Principal Magistrate's Court at Marsabit by Boaz M.Ombewa – Ag. Principal Magistrate)

JUDGMENT

The appellant, **SOFIA DUKE MARSA ,** was Charged with an offence of trafficking narcotic drugs contrary to section 4 (a) of the **Narcotic Drugs and Psychotropic Substances Control Act, 1994.**

The particulars of the offence are that on 11th March 2014 at Marsabit township in Marsabit County, the appellant, was found trafficking 119 rolls of cannabis valued at Kshs. 2 380 by selling in contravention of the said Act.

The appellant was convicted of the offence and sentenced to serve ten years imprisonment. She now appeals against both conviction and sentence.

Eight grounds of appeal were raised for the appellant by the firm of **M/S Mohamed and Lithome, Advocates.** The appeal was argued by **M/S Thibaru.** The grounds are as follows:

1. That the learned trial magistrate erred in law and in facts in convicting the accused without sufficient evidence that the 119 rolls of cannabis allegedly recovered by police officers belonged to her.

2.That the learned trial magistrate erred in law and in facts by disregarding **PW1's** testimony that no bhang was recovered from the accused after conducting body search on her.

3.That the learned magistrate erred in law and in facts by failing to observe and adhere to the statutory requirement that the accused was entitled to have a sample of the bhang taken and analyzed at her own cost by an analyst chosen by her for certainty.

4.That the learned magistrate erred in law and in facts by not ensuring that a police officer served the accused with a notice of her entitlement to have a sample of the alleged bhang taken and analyzed at her own cost.

5. That the learned magistrate erred in law and in fact by failing to ascertain the specific place where the bhang was recovered in view of the contention that recovery did not take place in her kiosk.

6. That the learned magistrate erred in law and in facts by not addressing his mind to the possibility that anybody could push the said bhang through the weak iron sheets walls of the premises from outside in view of **PW2's** testimony that it was possible to pick the rolls of bhang from outside the house.

7. That the learned magistrate erred in law and in facts by not addressing his mind to the fact the alleged recovery of bhang took place at the back of the kiosk where many customers including the prosecution witnesses used as they took coffee and chewed miraa.

8. That the learned magistrate erred in law and in facts by not addressing his mind to the fact in a business there is a buyer and a seller and that the arresting officers ought to have arrested buyers as well, if at all the accused was selling bhang as alleged in the particulars of the offence.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

The facts of the case were briefly as follows:

Police officers received information that a woman who operated a coffee and **"miraa"**(khat) kiosk was also selling bhang. The information was that the kiosk was opposite Baslum Super market. They were given the suspect's name. When they went to the kiosk, a search yielded 119 rolls cannabis. The appellant was arrested and charged, tried, convicted and sentenced. Hence, this appeal.

In her defence the appellant contended that she does not sell bhang. She said the recovery was in a different kiosk other than hers.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

In addressing the grounds raised by the appellant, I will use a two pronged approach. Some grounds address the issue of sufficiency of evidence while the other set address the lack of compliance with the legal requirements.

It was contended for the appellant that rule 16 **Narcotic and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations,2006** was not adhered to. The regulation provides as follows:

> **1. Where-**

(a) a person is or is intended to be charged with an offence in relation to a seized substance

(b) -

(c) -

(d) -

that person shall, when the ultimately arrested and be charged, be entitled to have a sample or samples provide a free representation of the nature of the substance taken and analysed, at his own cost by an analyst chosen by him if there is a sufficient quantity of the seized substance remaining in the custody of the seizures Registrar to enable the sample or samples to be analysed.

(2) A Police officer shall make all reasonable attempts to serve on each person referred to in paragraph (1) notice of his entitlement under paragraph (1) to have a sample or samples of the seized substance taken and analysed at that person's own cost.

What emerges from this regulation is that it is mandatory, once one has been charged to be informed in writing of his right to have a sample of the seized substance and to have it analysed by an analyst of choice and at own cost. This onus is placed upon the police to ensure the person charged is informed of his right and supplied with a sample. The rationale for it, is to ensure no mischief is attributed to the police.

In the instant case this was not complied with and it is fatal to the prosecution case. It is immaterial whether the appellant raised it at the trial court or not.

When **PW2** testified that it was possible to pick the rolls of bhang from outside the house, this opened a chasm that the prosecution needed to bridge before any conviction can be founded on the evidence of recovery in view of the defence raised by the appellant. If it was possible to pick the rolls from outside the house it was equally possible for any other person keen in framing the appellant to place them there and make a report of their presence to the police. In view of this evidence it was not safe to convict the appellant.

Since the conviction was not safe, I will not belabour the issue of sentencing. I however agree with the decision of the court of appeal at Malindi in **Kabibi Kalume Katsui vs Republic Cr.App. No. 90 of 2014** on how to approach sentencing in drugs related matters where only a street value is given.

From the foregoing I find the Appeal merited. I quash the conviction, set aside the sentence and set the appellant free unless if otherwise lawfully held. The money exhibit of Kshs. 4245/= if not already released to the appellant to be released to her.

Orders accordingly.

Dated at Marsabit this 23rd day of March, 2016

KIARIE WAWERU KIARIE

JUDGE