REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 65 OF 2015

BEATRICE ATIENO APOLLO ……..…….…....… APPELLANT

=VERSUS=

REPUBLIC ……..……..……..… RESPONDENT

(An appeal from the original conviction and sentence of life imprisonment for the offence of trafficking in Narcotic drugs contrary to section 4 (a) of the Narcotic drugs and psychotropic substances control Act No. 4 of 1994 by Hon. S.K. GACHERU (PM) at Mombasa Law Courts on 5.08.2013)

JUDGMENT

1. The Appellant was sentenced to life imprisonment for the offence of trafficking in Narcotic drugs contrary to section 4 (a) of the Narcotic drugs and psychotropic substances control substances control Act No. 4 of 1994.

2. The particulars of the charge were that on the 30th day July 2011 at Bangladesh area in Changamwe District within the Coast Province, the Appellant trafficked in Narcotic drugs by storing 22 Kgs of cannabis with a market value of kshs. 44,000/= in contravention of the said Act.

3. A summary of the prosecution evidence was that on 30/07/2011, PW1 arrested the Appellant in a house at Bangladesh and recovered 18 rolls of dry plant material which was in a black polythene paper inside the house.

PW1 found the appellant cooking. She introduced herself and said she was a saloonist. PW1 also said she recovered 310 rolls of dry plant material which was in a maroon suitcase. The plant material recovered from the Appellant's house weighed 22 Kgs. PW1 who had received a tip off from an informer was with PW2 and PW3 during the arrest.

PW4, a government analyst based at Mombasa received a sample of the plant material which he analyzed and found it to be cannabis sativa. He produced the report in court.

4. The Appellant said in her defence that she was arrested in her house while drunk. She said nothing was recovered from her house.

5. The trial Magistrate found the Appellant guilty as charged and sentenced her to life imprisonment plus a fine of Kshs. 1 million. The Appellant has appealed against the conviction and sentence on the following grounds:-

i. That the trial Magistrate erred in law and fact in finding that the prosecution proved the case beyond reasonable doubt.

ii. That the trial Magistrate erred in law and fact in reaching a finding that the accused trafficked in the said Narcotics by basing his reasons on belief, assumptions or presumptions without any evidence to back those beliefs upon.

iii. That the trial court erred in law and fact in reaching a finding that the Appellant trafficked in the said Narcotic drugs without evidence of selling, conveying or customers and thereby unlawfully and wrongly convicting the Appellant.

iv. That the trial court erred in law and facts by failing to note that no evidence of value or weight of the said Narcotic drugs was ever adduced during trial as no proper officer testified as to the value of the drugs, its quantity and thereby the court wrongly arrived at the conviction and sentence as it did.

v. That the trial court erred in law and in fact in failing to hold that lawful procedures under section 74A of the Narcotic drugs and psychotropic substances control Act were not followed.

vi. That the trial Magistrate grossly erred in law by sentencing the Appellant to life imprisonment and in addition to pay Kenya shillings one million (Kshs. 1,000,000/=) contrary to the law.

vii. That the trial court erred in fact and in law to when it failed to resolve the manifest inconsistencies in the evidence on record in favor of the appellant.

vii. That the learned trial Magistrate erred in law in failing to find that the Appellant had been tortured to sign search inventories and other documents in an obvious case of setting up the case against the Appellant and all these allegations were raised early on during trial.

ix. That the trial Magistrate erred in law in failing to form an inquiry into the allegations of torture early on before proceeding with the trial and thereby treated such a serious issue in the most casual and callous manner indicating a form of bias against the Appellant during trial.

x. That the learned trial Magistrate erred in law and fact in failing to find that the conduct of the Appellant during the alleged sting operation, arrest and trial did not portray a guilty mind.

xi. That the learned trial Magistrate erred in law in failing to objectively analyze the Appellant's defence vis-à-vis the evidence by the prosecution witness, which if he did he would have arrived at a different conclusion.

xii. That the trial court erred in law in failing to note that the investigating officer failed to record a statement from the Appellant either under caution before being charged or otherwise and which if he did, he would have not charged the Appellant herein.

6. The Appellant who was represented by Mr. Nabwana Advocate submitted as follows:-

i. That the sentence of a fine of 1 million shillings plus life imprisonment is illegal as one cannot be given a fine in lieu of life imprisonment.

ii. That the Appellant is a single mother and she has been in custody for a long time. He relied on the case of MOHAMED FAMAU BAKARI Vs REPUBLIC (CR. APPEAL No. 64 OF 2015) where the court of Appeal substituted a life sentence with 10 years imprisonment and a fine of 1 million shillings to Kshs. 10,000/=.

iii. That the prosecution did not prove its case to the required standard and that they relied on assumptions since there was no evidence that the Appellant sold drugs to anyone.

iv. That there was no proof of the value of the plant material as required in section 86 of the Narcotic drugs and psychotropic substances (Control) Act which requires that a certificate be issued. The Appellant relied in the case of REPUBLIC Vs ELIZABETH NJERI NJUGUNA (2004) eKLR were the High Court said as follows:-

"Section 86 of Act 4 of 1994 provides that in a case where a fine is to be determined by the market value of any Narcotic drug, a certificate under the hand of the proper officer shall be accepted by the court as prima facie evidence of the value".

v. The Appellant also submitted through his Advocate that there was inconsistency in the evidence of PW1 and PW3 as the place the plant material was recovered. PW1 said 18 rolls were in a black polythene paper and 310 rolls in a maroon suitcase while PW3 said the plant material was in a black polythene inside a maroon suitcase.

vi. He also submitted that the Appellant's behavior was not consistent with a guilty mind in the sense that she introduced herself and told the officer that she is a saloonist prior to the arrest.

vii. Finally, the Appellant's counsel submitted that the defence by the Appellant was not analyzed in that the Appellant did not have an Advocate during the trial and her evidence was not taken into account by the trial court.

7. The Respondent opposed the Appeal and submitted as follows:-

i. That the sentence imposed upon the Appellant is legal as it is the one provided for by the law.

ii. On the ground that there was no evidence of trafficking, the Respondent submitted that storing is also provided for in the Act.

iii. The Respondent conceded that there was no proof of the street value of the plant material.

iv. The Respondent submitted that the mere fact that the Appellant did not run away from the police officers is not a defence to the charge of trafficking and that there was evidence that the plant material was found in her house.

v. On the issue of inconsistency in the testimonies of PW1 and PW3, the Respondent submitted that it was PW1 who searched the Appellant's house and recovered the plant material.

vi. On the defence having been disregarded, the Respondent submitted that there is nowhere the Appellant said she was drunk or tortured to sign any paper.

8. This is the first appellate Court and I have a duty to re-evaluate the evidence on record while bearing in mind that the trial court had the opportunity to see and hear the witnesses. In the case of ***KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174*** the Court of Appeal stated thus;

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

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 findings and conclusions; 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.

9. I have re-evaluated the evidence on record taking into account that the trial court had the advantage of seeing the witnesses. My findings are as follows:-

i. I find that the prosecution did not produce prove of the street value of the bhang as required by section 86 of the Narcotic drugs and psychotropic substances control Act No. 4 of 1994. The Respondent conceded that the above section was not complied with.

In the case of GABRIEL OJIAMBO NABESI Vs REPUBLIC [2007] eKLR the Court of Appeal stated as follows:-

"***Section 4 (a)*** of the Act under which the appellants were charged and convicted provides that a person who trafficks in any 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 shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater and, in addition to imprisonment for life ….."

Section 86 of the Act provides for valuation of goods for penalty, thus:

"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 a proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by court as *prima facie* ***evidence of the value.***

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

(ii) The testimonies of PW1 and PW2 differs on the place in the house where the plant material was recovered. PW1 and PW2 said 18 rolls were in a black polythene paper on the table while 310 rolls were in a maroon suit case while PW3 said the bhang was inside a maroon bag which contained a polythene bag containing 18 rolls of bhang and the 310 rolls were under the suit case. (Pg. 10, 13 and 24 and 25 of the proceedings)

iii. In the circumstances I find that the conviction and sentence herein are not secure. I accordingly allow the Appeal and I quash the conviction and set aside the sentence of life imprisonment.

I further order that the Appellant be set free unless lawfully held for any other reason.

Dated and signed this 16th day of November 2016.

ASENATH ONGERI

JUDGE