REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 226 OF 2014

FEDMAN JAMES MSINGA................APPELLANT

VERSUS

REPUBLIC.......................................RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. T.A. Odera PM in Criminal Case No. 1059 of 2013 delivered on 30th June 2014 at the Principal Magistrate's Court at Mavoko)

JUDGMENT

Fedman James Msinga (hereinafter "the Appellant"), was convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994. The particulars of the offence were that on the 28th September 2013 at about 3.30 a.m along Mombasa-Nairobi Highway, Mlolongo township, Athi River District within Machakos County, jointly with others not before the Court, he was found jointly trafficking by conveying in a motor vehicle Reg. No. T874 AUS trailer No. T879 APE, a narcotic drug namely cannabis of 15 fifteen sacks, weighing 372 kilograms with a street value of Kshs 3,720,000/= in contravention of the said Act.

The Appellant was arraigned in the trial court on 30th September 2012, when he pleaded not guilty to the charge. He was tried, convicted of the offence, and fined Kshs.11,160, 000/= or ten (10) years imprisonment, and in addition to serve life imprisonment as provided by law.

The Appellant was aggrieved by the judgment of the trial magistrate, and preferred this appeal on in a Petition of Appeal and Grounds of Appeal he filed in court on 4th September 2014, as well as in Amended Grounds of Appeal dated 6th June 2016 he availed to the Court. The grounds of appeal are that the evidence of the prosecution was not beyond reasonable doubt; the Appellant was not in possession of the drugs neither did he traffic the same; the Government Analyst Report was admitted in evidence in violation of Article 50 (4) of the Constitution; and that his rights to a fair trial were violated as the prosecution omitted to call the author of the Government Analyst Report to give evidence.

The Appellant also availed written submissions during the hearing of his appeal, wherein he urged that it was necessary for the prosecution to prove whether the 15 bags the Court observed as containing dry green plant were narcotic drugs, and that while PW3 claimed to have forwarded some samples to the Government Analyst and received a report on the same, the Government Analyst who was referred to as a Mr. Anyona never testified. Further, that PW3 who produced the said report as an exhibit was in law not entitled to produce such an expert report as he was not the author of the same, and therefore that section 77(3) of the Evidence Act was violated.

It was also contended that the mistake is not curable under section of 382 of the Criminal Procedure

Code, and reliance was placed on the decision in **Daniel Makakhia Ogutu vs Republic** and Article 50 (4) of the Constitution for the argument that the evidence violated his right to a fair trial as provided in Article 25(c) of the Constitution

Mr. Anthony Kimani, the learned prosecution Counsel, filed submissions dated 3rd August 2016 in opposition to the appeal. It was submitted therein that Article 50(4) of the Constitution only excluded evidence that was illegally obtained, and no illegality was indicated in the procedures taken by PW3 and PW4. Further that the Appellant was not prejudiced as he had a defence counsel during the entire trial, who had the opportunity to cross-examine the witnesses, and who did not raise any objection to the production of the government analyst report by PW3. Lastly, it was urged that under section 77(1) of the Evidence Act, it is not mandatory that a report be produced by its maker, and that section 77(2) of the Act allows the Court to make a presumption of the genuineness of the signature and authority of the person signing such a document.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that they raise two issues. These are firstly, whether the Appellant's right to a fair trial were violated , and if not, secondly whether the conviction of the Appellant for the offence of trafficking in narcotic drugs was based on sufficient and satisfactory evidence.

The first issue is raised in the ground argued by the Appellant that the trial magistrate allowed the Government Chemist's report to be admitted by PW3, which was contrary to section 77(1) of the Evidence Act and Article 50(4) of the Constitution. Section 77 of the Evidence Act provides as follows:

> **"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> **(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."**

The section therefore authorises the production and use of a Government Analyst report in a criminal trial, and there is a presumption as to the validity and authenticity of such reports, and if the court is in doubt it then summons the government analyst to examined on the subject matter thereof. My understanding of the above the provisions is that in the absence of any challenge to the contents of a government analyst report, the presumption of authenticity stands. The trial court is however, *suo motto* or by request of the accused person, given discretion to call for the maker of such document to appear in court and be cross examined on the form and content of the report or document.

In the present appeal the Appellant had legal representation during the trial in the subordinate court, and his legal counsel did not object to the production of the Government Analyst's Report. Secondly, the appellant's legal counsel cross examined the witness PW3 upon his production of the government analyst' report, and did not ask that the maker be called for further questioning. I am therefore satisfied that the failure to call the Government Analyst did not prejudice the Appellant, nor were his rights to a fair trial under Article 25(c) of the Constitution violated by the production of the government analyst report as an exhibit.

The analysis and findings in the foregoing by the same dint also dispose of the Appellant's arguments that the production of the Government Analyst's report amounted to production of illegally obtained evidence contrary to Article 50(4) of the Constitution. The said Article provides as follows:

> **"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."**

On the second issue, the Appellant was charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994 which provides as follows;

> **"Any person who trafficks 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 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; or**
>
> **(b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years..**

Section 2 of the Act defines a "narcotic drug" as any substance specified in the First Schedule or anything that contains any substance specified in that Schedule; and "psychotropic substance" as any substance specified in the Second Schedule or anything that contains any substance specified in that Schedule. I have perused Schedule I of the said Act and Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp) are among the narcotic drugs listed therein, and the report by the government analyst dated 19th November 2013 produced by PW3 as the Prosecutions Exhibit 19 did indicate that after examining the plant material samples received from PW3 and PW4, the same were found to be Cannabis, which falls under the First Schedule.

I have also perused the record of the trial court, and I am of the opinion that the evidence adduced sustained a charge of trafficking of a narcotic drug contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. "Trafficking" is defined in section 2 of the Narcotic Drugs and Psychotropic Substances Control Act to mean:

> **"the importation, exportation, sale, 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…"**

The Court of Appeal addressed the establishment of the element of "trafficking" of a narcotic drug in the case of **Madline Akoth Barasa and Gabriel Ojiambo Nambesi –vs- Republic C.R. Appeal No. 193 of 2005** 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 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 disclosed the dealing with the bhang which constituted trafficking."**

The prosecution called four witnesses during the trial. PW1 who was Shem Odhiambo Ajoi from the

Export Trading Company, who confirmed that they had hired the lorry in which the narcotic drugs were found, but that the said lorry was to carry maize they had bought in Tanzania and not cannabis, and he produced documentation showing importation of the maize.

PW2 was Police Constable David Ongeri who testified that on 27th September 2013 he was on patrol with other officers at Mlolongo, when they found a trailer parked beside the road and people offloading bags from the lorry. When they stopped to check, the people ran away and two cars parked in front of the lorry were also driven away, and they then found some bags containing cannabis on the ground and others in the lorry together with maize. He testified that there were 15 bags in total in the lorry which he identified as T874AUS and the trailer as T879 APE. Further, that they found the Appellant who was the driver of the lorry in the said lorry on the steering wheel, and proceeded to arrest him.

PW3 was Senior Sergeant Mugo the deputy officer-in-charge of CID at Mlolongo Police station, who testified that he was instructed by the officer-in- charge, Inspector Mureithi, to weigh and search the 15 bags of cannabis, and that he found the 15 bags to weigh 372 kilogrammes. He also testified that he took samples and prepared an exhibit memo for forwarding the samples to the government analyst. Further, that he received the report of the government analyst that confirmed the samples were cannabis sativa. He produced the cannabis sativa , the lorry, weighing certificate, importation documents of the maize in the lorry, travel documentation of the said lorry, the exhibit memo, the government analyst report and other documents as exhibits. PW3's evidence was corroborated by that of Inspector Mureithi who was PW4.

The Appellant in his defence claimed that he did not traffic any bhang, and that it was his turnboy who packed the cannabis sativa in the vehicle. Further, that the said turnboy was arrested and later released.

It is thus my finding that evidence was brought that showed that there was cannabis that was either found in, or being offloaded from the motor vehicle Reg. No. T874 AUS trailer No. T879 APE, and documentation was produced to show that the said motor vehicle was used to import maize together with the cannabis sativa from Tanzania. The said 15 bags of cannabis sativa and the lorry are recorded as having been seen by the trial magistrate, and were produced as exhibits as well as their photographs. In addition, the Appellant did not dispute that he was the driver of the said motor vehicle, and his only point of dispute is that he is not the one who packed the cannabis sativa .

The establishment of how or who caused the cannabis to be loaded into the said motor vehicle is not an element of the charge of trafficking in narcotic drugs, and the relevant elements of trafficking which were established by the evidence adduced in the trial court are that the said cannabis sativa was imported, conveyed and eventually delivered in Mlolongo. Further, the Appellant as the driver of the said motor vehicle was one of the persons involved in the importation, conveyance and delivery of the narcotic drug. The charge of trafficking in a narcotic drug was therefore sufficiently proved.

For the above reasons I accordingly uphold and affirm the conviction of the Appellant for the charge of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994, and the sentence imposed upon the Appellant of a fine of Kshs.11,160, 000/= or ten (10) years imprisonment, and in addition life imprisonment. This Appeal is accordingly dismissed.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF NOVEMBER 2016.

P. NYAMWEYA

JUDGE