

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.33 OF 2014

(CONSOLIDATED WITH CRA NO.34 OF 2014)

(Appeal from original conviction and sentence by Hon. Y. A. Shikanda in Malindi CM Cr. No.580 of 2013)

REPUBLIC **PROSECUTOR**

VRS

JANET AWOUR OCHIENG **1ST APPELLANT**

MAUREEN ACHIENG ODHIAMBO **2ND APPELLANT**

JUDGMENT

The appellants were charged with the offence of tracking in narcotic drug contrary to section 4 (a) of the Narcotic Drugs and Psychotropic substances Control Act No.4 of 1994. The particulars were that the two accused were found tracking *cannabis sativa* on the 16/9/2013 at Kijipwa area along Mombasa-Malindi road. Janet Awour Ochieng was found with 101 long rolls weighing 3.01 kg with a street value of Ksh.30,300/=. Maurine Achieng Odhiambo was found with 148 long rolls of the drug weighing 4.12 kg with a street value of ksh.44,400/-.

The appellants were convicted and sentenced to serve 20 years imprisonment and to pay a fine of ksh.1 million each. The grounds of appeal are similar. It is argued that the trial court relied on the evidence of alleged seizure of the drugs contrary to the law, that there was no search certificate, that the case was not proved to the required standard, that their constitutional rights under Article 50 were violated and that their defences were not considered. Mr. Nyongesa, State counsel, opposed the appeals. Counsel submitted that the case was proved beyond reasonable doubt as the appellants were passengers in the vehicle where the drugs were found. The conductor identified their luggage and the drugs were recovered. The sentence is lawful.

Four witnesses testified before the trial court. PW1, **Abdalla Hemed Said** was a conductor in motor vehicle number KBT 930 F, Tawakal Coach that was plying the Mombasa Lamu road. On the 16/9/2013, they were on their way to Lamu and upon reaching Kisauni Msikitini Stage, the two appellants boarded the vehicle with their luggage. The vehicle has a capacity of 35 passengers and they only had 20. Each of the appellant was given a seat and their luggage marked. The company has a policy of inspecting passengers' luggage. He tried to inspect the luggage but the appellants resisted saying they were carrying their clothes. Upon reaching Kijipwa, he informed the driver and forcefully checked the luggage. He discovered the drugs and they called Malindi Police. They went up to the police station and the drugs were recovered. He had labeled the luggage and it is the appellants' luggage that had the drugs.

PW2, **Paul Amollo Airo alias Kassim** was the driver of the vehicle. He was informed by PW1 about the presence of the drugs and he took the vehicle to Malindi Police Station. They went with the two appellants to the police offices together with the luggage. PW3 **George Opello Ogutu** works with the Government Chemist. He analyzed the drugs and found it to be cannabis. PW4 **PC Veronica Waithera** was based at the Malindi anti-narcotics drug unit. The report was made on 16/9/2013 at about 5.00 p.m when PW1 and PW2 went with the appellants to her office. She investigated the matter and charged the appellants.

The appellants were put on their defences. In her sworn defence Janet Awour testified that she is from Migori and is a farmer. She denied having been found with the drugs. She was heading to Hindi in Lamu to look for her missing child. The bag that had the drugs was not hers. Maureen Achieng also gave sworn evidence. She testified that she saw the 1st appellant at the stage and they both boarded the vehicle. She then saw PW1 assaulting the 1st appellant. PW1 tied her with a rope and assaulted her. She was heading to Witu and it was her first time to go there. She was taken to the police station.

The main issue for consideration is whether the evidence on record proved the prosecution case beyond reasonable doubt. From the evidence of PW1, he saw the appellants on 16/9/2013 board the vehicle. He is the one who gave the appellants seats in the bus and labelled their luggage. PW1 arrested the appellants when they were taken to the police station. She got the drugs in their luggage and took them to the Government Chemist. PW3 confirmed the drugs to be *cannabis sativa* (bhang). The defence evidence was to the effect that the appellants did not carry the drugs. The defence evidence did not raise any doubt on the prosecution case. I do find that the prosecution did prove its case beyond reasonable doubt.

The appellants informed the court that they are remorseful and pleaded for leniency. The 1st appellant has children who depend on her. Social inquiry reports were filed and they were favourable to the appellants. They have now served one year imprisonment. The sentence under section 4 (a) of the Narcotic Drugs and Psychotropic Act is not mandatory. The drugs were worth ksh.77,700/=. It is clear that the appellants were trafficking in the drugs. They have been in custody from September 2013. They have already served one year prison sentence. I do find that the sentence is excessive. The sentence is set aside and replaced with one year imprisonment from the date of conviction. Since the appellants have already served one year imprisonment, they shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 25th day of June, 2015.

SAID J. CHITEMBWE

JUDGE