



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRA NO.113 OF 2011**

*(Appeal originating from the conviction and sentence by Hon. L. W. Gitari in Malindi CM Cr. No.215 of 2011)*

**EMMANUEL NGOA BEKESHE ..... APPELLANT**

**VRS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

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 No.4 of 1994. The particulars of the offence were that the appellant, on 12/4/2011 at Dabaso Village in Gede Location within Kilifi County was found trafficking 2.3 kgs of cannabis by storing in contravention of the said Act.

The appellant was convicted and sentenced to serve life imprisonment and pay a fine of One Million Kenya Shillings. The grounds of appeal are that the charge sheet was incurably defective, that the trial court did not understand the meaning of the offence of trafficking, that the prosecution did not prove its case and that the appellant's defence was erroneously rejected yet it raised doubt on the prosecution case.

The appellant relied on his written submissions. He submitted that the value of the drugs was not indicated. This is contrary to the section of the law the charge was made which requires a certificate from an officer giving the market value of the drugs. It is further submitted that the offence of trafficking in drugs was not proved. The Act defines the offence of trafficking under section 2. The evidence did not prove that the appellant was dealing in trafficking of drugs. The proper section ought to have been 5 (2) of the same Act which deals with handling of drugs.

The appellant further submitted that no photographs of the place where the drugs were recovered was produced. The recovery was allegedly made in a house but scene of crime officers were not called. Finally, the appellant contends that his defence was quite strong and raised doubt on the prosecution case.

Miss Mathangani, prosecuting counsel urged the court to allow her file written submissions. No submissions were filed.

The record of the trial court shows that four witnesses testified for the prosecution. **PW1, Moshuo Shaban** was with PW2 and PW3. On 12/4/2011 at about 12.15 p.m they went to a house at Timboni area in Watamu. PW3 entered the house and was talking to someone. PW1 and PW2 moved in and found PW3 talking to the appellant. PW1 searched the house and recovered six rolls of cannabis in a yellow

bag. He knew the appellant by appearance. PW1 is a member of Watamu Community Policing. They arrested the appellant.

**PW2, Omar Mohamed** was with PW1. They went to the house and recovered the six rolls of cannabis. **PW3, Acting Inspector Barnabas Ng'eno** was based at Watamu Police Station. On 12/4/2011 at about 12.15 p.m he went to Timboni area to check on drug traffickers. He entered one house and found the appellant holding a paper bag. The appellant told him it contained trash. He suspected the appellant. PW1 and PW2 joined him. They searched the house and recovered the six rolls of cannabis. He prepared an exhibit memo and sent the recovered items to the Government Chemist for analysis. The appellant was arrested and charged with the offence.

**PW4, George Lawrence Oguda** is a Government Analyst working with the Government Chemist in Mombasa. He received the recovered items on 21/4/2011 and analysed the six bundles of dry plant. He found the material to be cannabis.

In his unsworn defence, the appellant testified that on 12/4/2011 he went to the house of a person who owed him money. He did not find him. While there three people emerged. He saw PW1 and PW2 whom he knew. He quarreled with PW2 as he claimed that the appellant was moving around with PW2's wife. He was arrested and later charged with the offence.

The main issue for determination by the court is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1, PW2 and PW3 is that they went to timboni on the material day and arrested the appellant. They recovered six rolls of some substance that was found to be cannabis by PW4. The defence evidence is that the house where the drugs were allegedly recovered did not belong to the appellant. It is also contended that the charge sheet was defective as the value of the drugs was not indicated.

From the evidence on record, it is clear that the appellant was the only person in the house where the drugs were recovered. The defence evidence that, the appellant had gone to recover his debt does not raise any doubt on the prosecution case. The prosecution did prove its case that the appellant was trafficking in drugs. The quantity was weighed and found to be 2.3 kgs and is enough to prove a case of trafficking drugs. The conviction is safe.

With regard to sentence, section 4 of the Narcotic Drugs and Psychotropic Substance (Control) Act No.4 of 1994 provides for penalty ranges up to a fine of one million shillings (ksh.1,000,000/-) and life imprisonment. The fine is computed at three times the market value of the drugs recovered or one million whichever is greater and in addition life imprisonment. The section does not state that life imprisonment is the minimum sentence. I do find that sentence herein to be excessive.

The charge sheet did not indicate the value of the drugs. However, that cannot be a ground for acquittal. The fact remains that the appellant was found trafficking drugs. The offence was committed on 12<sup>th</sup> April, 2011. the appellant has served over four years imprisonment from the time he was convicted on 10/10/2011. I do find that punishment to be sufficient.

In the end, the appeal on conviction is disallowed. The sentence is hereby set aside and replaced with the period already served.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of October, 2015.**

**SAID J. CHITEMBWE**

**JUDGE**