REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.98 OF 2012

BETWEEN

JOSPHINE NYASIOBOKE.......................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence by A.P. Ndege,

SRM dated 2nd April 2012 in Kehancha Criminal case No.545 of 2011).

JUDGMENT

1. The appellant herein Josephine Nyasioboke was the first accused in Kehancha Senior Resident Magistrate Criminal Case No.545 of 2011. She was jointly charged with Paul Chacha Magaiwa with one count of trafficking in Narcotic Drugs contrary to **section 4** of the **Narcotic and Psychotropic Substances Control Act No.4 of 1994**. The particulars of the offence were that on 10th day of November 2011 at Nyamekoma area within Kuria West District in Migori County the appellant and her co-accused were jointly found trafficking narcotic drugs to wit 113 Kg of Bhang in the form of broom with street value of Kshs.153000/= in a car registration No. KBM 295 Y Toyota Probox white in colour in contravention of the said Act.

2. The appellant together with her co-accused who did not appeal pleaded not guilty to the charge. During the trial that ensued, the prosecution called 4 (four) witnesses: Otieno John Ogutu (PW1), Number 70916 PC Peter Nyaga (PW2), Number 77837 Cpl Albashir Oloo (PW3) and Number 65331 PC Festus Musembi (PW4).

3. The facts and the evidence that emerge from the testimonies of the 4 prosecution witnesses are as follows: On the 10th November 2011 at about 1.00 p.m., PW1 was driving motor vehicle Registration Number KBM 295 Y, a Toyota Probox from Migori to Isebania. After passing a roadblock at an unnamed point along the route PW1 met someone he knew who asked him whether he (PW1) could avail his car for hire by some people.

4. After some discussion, PW1 agreed to the request by his fellow driver. PW1 then dropped the passengers who were in the car at the stage before proceeding to the road block with one Gati. PW1 then picked up the person who wanted to hire his car and then drove to the Kehancha junction where a lady who had a small child and a bag together with a man were standing. PW1 was told to pick the lady, the

child, the bag and the man. He did so and started driving towards Migori, while in the meantime he asked for proper directions for the destination they were going.

5. At Nyabohanse, PW1 was informed by the man who had made arrangements for the car hire that the people who were now in the car were the same ones who had wanted to hire his vehicle. After Kwa Makara, PW1 was directed to a certain home which belonged to a lady. He was informed there was some luggage to be picked from that home. At the home, PW1 was asked to open the boot into which his colleague and another man put two sacks. On looking closely at the sacks, PW1 realized that they contained cannabis. On realizing the trick that had been played on him, PW1 got into the car and drove it at high speed towards Isebania police station after he had locked the car using the central locking system. As the car was being driven towards the police station, the lady tried to open it but in vain. She was taken to the police station. The bag the lady had was inspected and found to contain cannabis.

6. PW2, Number 70916 Peter Nyaga stated that on 10th November 2011, he was on patrol duties together with one PC Chirchir when they were asked to rush to a homestead in the Kwa Makara area. On arrival at the house, PW2 saw a man at the door moving three and a half sacks out of the house. The man was arrested and the three and a half sacks recovered. The sacks which contained cannabis were weighed and found to be 113 Kg. PW2 also learnt that another suspect, a lady had also been arrested in possession of a suit case which had cannabis. PW2 identified all the three and half sacks of cannabis and the brown bag which belonged to the lady. All these exhibits were produced in court as **P. Exhibit 4A, B** and **C, 3** and I respectively.

7. During cross examination PW2 stated that when he and PC Chirchir went to the homestead at Kwa Makara, the appellant was not there because she had already been taken to the police station. PW2 also stated that the appellant was well aware of the cannabis contained in the three and a half sacks of cannabis the two men had at the home near Kwa Makara.

8. PW3 stated that while on official duties in the field at about 4.00 p.m. on 10th November 2011, he learnt of the arrest of the appellant and another suspect from PW4. PW3 took possession of the exhibits as he also commenced investigations. According to PW3, the three and half sacks of cannabis together with the cannabis found in the suitcase the appellant had in the car weighed a total of 113 Kgs, all estimated to be worth Kshs.153000/=. Thereafter PW3 prepared an exhibit memo form and took a sample from the recovered cannabis. The sample was later taken to the Government Chemist in Kisumu for analysis. The report of the analysis dated 16th January 2012, being reference No.GCK/33/2012 DOO together with suitcase and the three and half sacks of cannabis and the exhibit form were produced as **Exhibits**.

9. PW4 told the court that on 10th November 2011 at about 2.00 p.m., while he was on duty at Isebania police station, PW1 drove into the police station with the appellant in the vehicle. After PW1 explained what had led him to drive into the police station, and after interrogating the appellant, PW4 searched the brown suit case belonging to the appellant and found a consignment of cannabis in it. The appellant was then arrested as PW4 asked PW2 and colleagues to go to the home of Paul Chacha Magaiwa, the second accused in the lower court, and arrest him and to take possession of the three and half sacks of cannabis. Pw4 identified the appellant's suit case **– P. Exhibit 1 –** which was in court.

10. During cross examination, PW4 confirmed that when he searched the appellant's suit case, he did not find any clothes in it.

11. At the close of the prosecution case, the appellant and her co-accused were put on their defence. She stated in her unsworn statement that on the material day, she was travelling to Mabera. She was accompanied by a child. That there were other passengers in the vehicle. On reaching Mabera, other passengers alighted and it was then that the driver of the motor vehicle drove to Isebania police station. She also stated that the suitcase was in the boot. She denied knowing her co-accused Paul Chacha Magaiwa.

12. After carefully analyzing the evidence that was placed before him, the learned trial magistrate was

persuaded that the prosecution had proved its case against the appellant and her co-accused beyond any reasonable doubt. The learned trial court also considered the respective defences of the appellant and her co-accused and rejected the same as being mere denials. The learned trial court also found that the offence of trafficking had been proved since transporting is one of the modes of trafficking under **section 2** of the **Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994**. The appellant and her co-accused were found guilty as charged and sentenced to serve 5 years imprisonment and in addition to pay a fine of Kshs.1,000,000/= in default to serve a further 12 months imprisonment.

13. The appellant was aggrieved by the entire judgment of the learned trial magistrate. She filed appeal against both conviction and sentence. The appellant initially filed the appeal in person on 13th April 2012. On the 5th October 2012, M/s Anyona Mbunde & Co. Advocates filed a Supplementary Petition of Appeal with the following 7 grounds of appeal:-

1. The learned trial magistrate erred in law and facts in convicting the appellant without sufficient evidence on record.

2.The learned trial magistrate erred in law and fact in convicting the appellant on relying on suspicion only.

3. The learned magistrate erred in law and facts in sentencing the appellant on a defective charge.

4. The learned trial magistrate erred in law and facts in convicting and sentencing the appellant on evidence riddled with contradiction.

5. The learned trial magistrate erred in law in convicting and sentencing the appellant without minding that the appellant was a mere passenger in the motor vehicle in question.

6. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant maliciously in a concealed evidence not sufficient to prove the case beyond reasonable doubt.

7. That the sentence imposed of 5 years and payment of Kshs.1,000,000/= fine in default to serve 12 months imprisonment is manifestly excessive.

14. The appellant prays that the appeal be allowed, the conviction quashed and the sentence of 5 years imprisonment and fine of Kshs.1,000,000/= be set aside so that she can be set at liberty.

15. This being a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to coming to its own conclusions in the matter. It is important to note however, that this court has no opportunity of seeing and hearing witnesses who testified during the trial. That advantage is enjoyed solely by the trial court. This being the case this court has to exercise caution in deciding whether or not to interfere with the findings made and conclusions reached by the trial court. See generally **Mwangi –vs- Republic [2004] 2 KLR 28**, **Pandya –vs- R[1957] EA 336**, **Ruwala –vs- R[1957] EA 570**, **Kinyanjui –vs- Republic [2004] 2 KLR 322** and **Okeno –vs- Republic [1972] EA 32**.

16. I have now carefully analyzed, reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the judgment of the learned trial magistrate. I have also taken cognizance of the submissions made during the hearing of the appeal. The relevant provisions of the law and authorities have also been considered.

17. After analyzing all the above the issues that arise for determination are: **(a)** whether the prosecution proved its case beyond any reasonable doubt against the appellant, including proof of the market value of the alleged cannabis recovered from the appellant and **(b)** whether the charge against the appellant was defective.

18. Counsel for the appellant Mr. Anyona in his submissions vehemently contended that the charge sheet charging the appellant was defective. To determine whether or not this was the case, the said charge

sheet was framed as follows:-

> *"STATEMENT OF OFFENCE*
>
> *TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4 (1)*
>
> *OF THE NARCOTIC AND PSYCHOTROPHIC SUBSTANCES CONTROL ACT NO. 4 OF 1994.*
>
> *PARTICULARS OF OFFENCE*
>
> *JOSEPHINE NYASIOBOKA 2) PAUL CHACHA MAGAIWA*
>
> *On the 10th day of November 2011 at Nyamekona area within Kuria West District in Migori County were jointly found trafficking narcotic drugs to wit 113 Kgs of bhang in form of brooms with street value of Kshs.153,000/= in Car Registration Number KBM 295 Y Toyota Probox white in colour in contravention of the said Act."*

19.According to **section 2** of the **Act "Trafficking"** means:-

> **"The importation, exportation, manufacture, buying, sale, supplying, storing, administering, conveyance, delivery or distribution by any person of any Narcotic drug or Psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance ….."**

20. The trial court while considering the ingredients of the offence of "trafficking" stated:-

> **"… that the 2nd accused person was found with the same cannabis that the 1st accused person had hired the same motor vehicle to carry is sufficient to connect the 2nd accused person and therefore to the entire consignment of the cannabis …. transporting is one of the modes of trafficking under section 2 of the Narcotic Drugs and Psychotropic substances (Control) Act. It is therefore an offence under section 4(1) of the same Act."**

21. In **<u>Madline Akoth Barasa & another –vs- Republic Criminal Appeal 193 of 2005</u>** Tunoi, O'Kubasu and Githinji JJA held:-

> **"The element for 'transportation' used by the learned judge of the superior court was not specifically relied on by the prosecution. In any case, the word 'transportation' is not used in the definition of trafficking. In the circumstances, we are not satisfied that the offence of trafficking was proved."**

22. Similar sentiments were expressed in **<u>Wanjiku –vs- Republic [2002] 1 KLR 825</u>**. In that case Mr. Justice Onyancha stated at pp 829-930 that **"it is therefore logical and indeed sensible that a charge of trafficking should clearly specify the exact kind of trafficking to enable not only the prosecution to know what evidence to lead to prove the charge but even more important to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing. The purpose of this is both obvious and fundamental. It is that the accused has a full right to know the charge he is facing to enable him to fully prepare his defence. Failure to specify which one or more of the specific trafficking is charged is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. It is also possible that failure to specify the actual act as aforesaid may as well possibly lead or mislead the trial court to convict the accused on the more serious charge of trafficking as defined under section 4 of the Act instead of rightly convicting on a cognate offence under section 5 or 6 of the Act, with the dire consequences in terms of the type of sentence that is likely under section 4 of the Act. It is my view therefore that the charge as drawn in the lower court was erroneous in so far as it failed to specify the activity or act**

as defined under the relevant Act that the prosecution embarked (upon proving] and the accused purported to defend. It cannot be easily argued that the trial did not therefore embarrass and/or prejudice the appellant.

23. Applying the above persuasive findings to the instant case and according to the evidence of PW1, is that his taxi was hired by the appellant, the 2nd accused and Pw1's colleague to the home of the second accused in the lower court and acting on instructions from the appellant whom he was left in the car with, PW1 opened the car boot as the 2nd accused and his colleague went to the house and proceeded to load in PW1's car 2 sacks. PW1 on examining the sacks saw that they contained cannabis sativa. He then locked his car using the central locking system and drove straight to Isebania police station. On arriving at the police station, the appellant also had a bag (brown in colour) which upon inspection by PW4 contained another smaller black and green bag stuffed with cannabis wrapped with collotype 4.

24.PW2 acting on a tip off by PW4, arrived at the home of the second accused who had loaded the 2 sacks of cannabis into PW1's car and managed to arrest the 2nd accused together with $3^1/_2$ sacks of cannabis. They arrested him. The $3^1/_2$ sacks of cannabis which when weighed were found to be 113 Kgs in weight.

25. Although the trial court found the appellant guilty of the offence of trafficking by transportation as indicated above, the word transportation does not appear under **section 2** of the Act and in as much as the appellant and the 2nd accused were jointly in possession of the cannabis sativa trafficking was not proved beyond reasonable doubt.

26. However I have no doubt in my mind that the prosecution proved the offence of possession of cannabis sativa contrary to **section 3 (1)** as read with **section 3(2) (a)** of the **Act**, which in my view, is a minor and cognate offence to the offence of trafficking. Under the provisions of **section 179 (1)** of the **Criminal Procedure Code,** the trial magistrate could have convicted the appellant for the offence of possession, although she was not charged with that offence.

27. By virtue of **section 354 (3) (d)** of the **Criminal Procedure Code**, this court has the jurisdiction and the power to substitute a conviction from trafficking to that of possession and pass a sentence as may be warranted in law for the offence of possession.

28. Secondly on the issue of the fine imposed upon the appellant, I find that the same was illegal because the market value of the narcotics the appellant was caught with was not precisely determined.

29. Section 4 (a) of the **Act** under which the appellant was charged and convicted provides that a person who trafficks in any narcotic drug or psychotropic substances **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 substances whichever is greater and in addition to imprisonment for life ….”*

30. 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, 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.”**

31. According to the evidence of PW3 in examination in chief he stated that:-

"I estimated the street value to be Kshs.153,000/="

32. PW3 was clearly not an officer authorized by the Minister by notification in the Gazette for purposes of **section 86 (2).** It is therefore clear that the fine of Kshs.1 million meted out against the appellant by the trial court was illegal and cannot stand.

33. For the foregoing reasons, I allow the appeal to the extent that I quash the conviction for the offence of trafficking in narcotic drugs and set aside the sentence thereon. However, since the prosecution has proved that the appellant indeed was in possession of cannabis, I find her guilty of the offence of possession of cannabis contrary to **section 3 (1)** as read with **section 3 (2) (a)** of the **Act** for which the appellant shall continue to serve the sentence of 5 years imprisonment imposed upon her by the trial court. R/A to Court of Appeal explained.

34. Orders accordingly.

Dated and delivered at Kisii this 23rd day of January, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for the Appellant

Miss Cheruiyot for the Respondent

Mr. Bibu - Court Clerk