REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 72 OF 2011

(From the original conviction and sentence in criminal case no. 370 of 2009 of the Senior Resident Magistrate's Court at Lamu before Hon. A. R. Kithinji – SRM)

ATHMAN MUSUNGU BOFU .....……..……..…… APPELLANT

VERSUS

REPUBLIC.....….....….....…RESPONDENT

JUDGMENT

The appellant was charged with Trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act (The Act) in that on 23rd June, 2009 at Lamu area, Lamu District of coast Province he was found trafficking in narcotic drugs by conveying 50 big rolls of cannabis sativa (bhang) which was not in a medical preparation, valued at Kshs 15,000/- in contravention of the Act. He denied the charge.

Upon a full trial before the Senior Resident Magistrate's Court Lamu, he was found guilty, convicted and sentenced to pay a fine of Shs. 300,000/- or in default serve five years imprisonment.

Dissatisfied with the decision of the Lower Court he filed an appeal through his advocates Okuthe & Company. The petition of appeal raises four grounds as follows;

Grounds 1-3 attack the evidence related to the identification of the drug and its value while the fourth ground attacks the sentence. While arguing the appeal, the appellant new Mr. Gicharu raised other grounds not contained in these original grounds. These include:

1. The authority and procedure adopted by the persons (PW 1, and 2) who seized the drug and made the arrest (S. 6, 7, and 74 of the Act)
2. Whether the charge of trafficking had been proved.

The State's response through Mr. Nyongesa was that the actual seizure and arrest was made by a police officer 9PW3) and that the nature of the drug was confirmed by the Government Chemist upon analysis.

Conceding that the value of the drug was not established as required by Section 86 of the Act, the State counsel urged the court to substitute the conviction with the lesser charge of possession contrary to Section 3(1) of the Act, in accordance with Section 179(2) of the Criminal Procedure Code.

As the first appellate court is obligated to re-evaluate the evidence adduced in the trial in order to draw its

own inferences. While so doing, the court bears in mind that the trial court had the advantage of hearing and seeing the witnesses testify. (See **Republic v Okeno 1973 EA)** The appellate court will not ordinarily interfere with findings of fact made by the Lower Court based on the credibility of witnesses unless the findings are unreasonable.

The prosecution called three witnesses, among them Kenya Wildlife Services Warden (KWS) No. 9326 Katabi Kaloki (PW1) Senior Warden KWS Ahmed Heri (PW3), both stationed at the Lamu KWS station in the material period. Their testimony was that the appellant was a KWS driver based at the said station. Reports had filtered in associating the appellant with handling narcotic drugs. On 23rd June, 2009 the appellant reported to work while toting a bag. On arrival he was summoned by PW1 and PW3 into their office. He was ordered to open the bag. Inside the bag were assorted clothes including his rain coat. Fifty rolls of suspected cannabis were found concealed in the rain coat. Pw3 called the OCPD who sent Police Constables Wycliffe Nada Saba (PW2) and Justus Mainga to the KWS offices. They took over the exhibits and arrested the appellant. PW2 kept the exhibit sand eventually prepared the exhibit memo form before forwarding the fifty rolls to the Government Chemist.

On 3rd July, 2009 a report was prepared by the Government chemist on 6thJuly, 2009.

The report confirmed the material submitted to be "cannabis sativa (bhang)"

In his defence the appellant gave a sworn statement to the effect that he worked with KWS in the material period

On 23rd June, 2010 (must be an error on record) he returned to work from leave. He kept his bag in the radio room. PW1 called him and instructed him to see PW3 with the bag. He did as instructed. PW3 then sent him out to buy cards and he left the bag behind. Upon returning he found the bag open. There was a green bag containing bhang which he knew nothing about. He was arrested.

There is no dispute that the appellant was summoned to the offices of PW1 and PW3 when he arrived at work in the material day carrying a red bag. That fifty rolls of bhangi in a plastic bag were recovered. The sticking point was whether the said bhangi was recovered from the appellant's bag.

Both PW1 and PW3 gave consistent evidence of the recovery of the offending substance in the presence of the appellant. PW1 denied the appellant's suggestion in cross-examination that the appellant was sent to an errand after being called into his superior's office. He said he had no grudge with the appellant and that the appellant himself opened the bag. PW3 also said in his evidence in chief that the appellant himself opened the bag. With this witness the appellant questioned his authority to make an arrest but he did not suggest to him in cross-examination that he sent him out of the office only to return and find his bag opened. From these appellant's defence PW3 in the person who sent him out for an errand. The trial magistrate believed PW1 and PW3 as witnesses of truth. He stated:

"Pw1 and PW3 struck me to be very honest. Indeed in cross-examination accused said he had no grudge with him (PW1). There is no way they could plant the fifty rolls on him. In fact they had a lot to lose in terms of reputation by the arrest of the accused." (sic)

The latter perhaps refers to the reputation of KWS. Reviewing the evidence myself, I cannot find any reason to fault the finding of the trial magistrate. He was also entitled to disbelieve the appellant's denials.

Regarding grounds 1 and 2 of the Petition of appeal, PW2 and 4 gave unchallenged evidence of the recovery and analysis of the drug respectively. It is true that the First Schedule of the act refers to cannabis rather than cannabis sativa. The Schedule however must be read together with the definition of cannabis and narcotic drug in the interpretation of Section of the Act. The appellant was charged with trafficking of a narcotic drug which is defined as "Any substance specified in the First Schedule or anything that contains any substance specified in that Schedule:"

Cannabis is defined as the "flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted, by whatever name they may be designated.

The government chemist report states that the material analysed was cannabis sativa (bhang) included in the Narcotic Drugs and Psychotropic Substances Act. The appellant did not challenge this evidence during the trial. Indeed he admitted in his defence that indeed there was bhangi retrieved by PW1 and PW3 on the material date, only distancing himself from it. Grounds 1 and 2 therefore cannot stand. PW1 and PW3 were members of disciplined forces with authority over the appellant. They did not seize the drug or arrest the appellant as envisaged under Section 74 and 74A of the Act. They called in PW2 as soon as they saw the offensive drug. Section 72 of the Act presupposes the power to stop search seize and detain persons suspected of offences under the Act.

In this case PW1 and pW3 did not stop and search the appellant. He was in their residence and their subordinate in the KWS force. It would be an unreasonable interpretation of Section 72 to hold that the officers should have taken no action against a suspect subordinate to them who while within their premises had suspected offensive matter because they are not authorized by the Commissioner of Police.

The scenario would have been different if these person had gone outside their premises purporting to stop members of public or vehicles and to search them.

It is true however, that the drug in this case was not weighed as required under Section 74A of the Act and which provides inter alia for a life sentence in addition to a minimum fine of Shs. 1,000,000/-.

However, in my considered view the trial magistrate failed to address his mind to the precise question whether trafficking as defined in the Act had been proved. Trafficking is defined as:

The evidence tendered at the trial relates to possession in my considered view. I agree with the State that the proven facts establish a lesser offence under Section 3(1) as read with the Subsection 2(a) of the Act. The court of Appeal in **Adline Akoth Barasa v R [2007] eKLR** dealing with similar circumstances reduced the charge to one (1) Possession contrary to Section 3 as read with Section 3(2) (a) of the Act. The trial court ought to have proceeded in that manner. For a conviction under Section 3(1) as read with Section 3(2) (a) of the Act it is not crucial by virtue of Section 86 of the Act that the value of the drug was not proved and neither is a charge defective for failing to give the value of the drug. (see **Madline** case). The sentence under Section 3(2)(a) is based not on the value of the drug but the consideration in 3(2) (a):

"in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years" and in spite of the absence of the drug value a fine could still be imposed by the trial court."

In the case of **Ali Mohamed v R Cr. App. No.61 of 2000** the Court of Appeal stated:

Hence the failure to produce a value certificate though unexplained in this instant case will have no bearing on the charges or the sentence. But clearly the drug quantity was so large it would not be for personal use – 5 rolls. Neither was such pleaded.

Pursuant to Section 354(3) (a) (ii) of the Criminal Procedure Code I would quash the conviction herein and substitute therefore a conviction for the offence of Possession of a Narcotic Drug contrary to Section 3(1) as read with Section 3(2)(a) of the Act. The sentence of Kshs. 300,000/- in default five (5) years imprisonment is set aside. I substitute therefore a sentence of five years imprisonment to run from the date of sentence. It is so ordered.

Delivered and signed at Malindi this **28th** day of **March, 2014** in the presence of

Court clerk – Samwel

C. W. Meoli

JUDGE