REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 138 OF 2011

(From the original conviction and sentence in criminal case no. 226 of 2010 of the Senior Resident Magistrate's Court at Lamu before Hon. A. R. Kithinji – SRM)

FEISWAL SHEE FANKUPI .....……..……..…… APPELLANT

VERSUS

REPUBLIC.....….....….....…RESPONDENT

JUDGMENT

1. The appellant was charged with Trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act (the Act). In that on the 20th day of May, 2010 at Langoni area in Lamu District, within Coast province was found trafficking drugs by conveying 553 big rolls of cannabis sativa with street value of Kshs. 165,900/-, which was not in any form of medical preparation.

2. He denied the charge. Following a full trial before the learned SRM Lamu. He was found guilty and convicted and sentenced to pay a fine of shs. 1,000,000/- or in default serve ten years imprisonment. He has appealed to this court against the conviction and sentence. His grounds of appeal filed on 23rd December 2011 principally attack the qualiity of evidence upon which the conviction was based. The appellant also takes issue with the charge sheet which he states was defective. In his submissions Mr. Muranje for the appellant argued these grounds as raised but emphasizing that the failure to prove the value of the drug rendered the entire charge unproven as the value is an ingredient thereof. He argued that the ingredient of the method of trafficking and purpose of the drug required proof by the prosecution. The State, represented by Ms. Mathangani reiterated the evidence in the Lower Court and contended that the appeal had no merit.

3. The first appellate court is obligated to re-evaluate the evidence of the trial and to draw its own conclusions (see **Okeno v R [1973] EA 322**. Through its four witnesses the prosecution delivered the following case. AP CPL Japheth Ndego (PW1) and APC Harrison Musau (PW2) with other police officers were patrolling Langoni area of Lamu town on 20th May, 2010 when they met the appellant riding a donkey. On the donkey was also loaded a bag. Suspicious, the officers stopped the appellant and searched the bag. In the bag were 553 rolls of plant material which they suspected to be cannabis.

4. They arrested and ordered the appellant to accompany them to Lamu Police Station where they handed over to Cpl. Simon Mureithi (PW3). He took possession of the suspected drugs and upon

preparation of the exhibit memo form forwarded the substance to the Government Chemist, Mombasa. George Lawrence Ogunda (PW4) of the said office analysed the substance and confirmed it to be cannabis sativa and prepared his report.

5. When placed on his defence, the appellant gave a brief sworn defence to the effect that on the date of his arrest he was from Kashmir and passed near the police canteen. He was stopped by police who quashed him about a man who had alleged escaped before police showed him the drug which they alleged was his. It was "planted" on him.

6. The evidence of the arrest is consistent and the contradictions alleged by the appellant were not demonstrated during the appeal. Despite this evidence, the appellant did not suggest to the police officers PW1-PW3 at the trial that he was stopped and questioned concerning an escaped suspect or that the drugs were "planted" on him. From their evidence, the officers were on routine patrol when they bumped into the appellant. PW1 did not know him and it was not suggested that PW2 did. The Lower Court was entitled to dismiss the appellant's defence as an afterthought.

7. The record shows that the 553 rolls were tendered as exhibits in court. The issue of the quantity was not contested at all and it is too late now for the appellant to assert that the rolls were not counted in court. It is true however, that only the street value of the drug was stated in the charge sheet.

8. Proof of value of the drug is relevant for sentencing purposes. In the case of **Mohamed Ali v R Cr. Appeal No. 61 of 2010** where a similar issue was raised on appeal the Court of Appeal stated:

"Where as here, an accused is charged under Section 31 aforesaid, the prosecution is obligated to state, in the particulars of the offence, the value of the drug or substance found on the accused, and thereafter to call evidence at his trial to establish not only such value but also the purpose or reason for possessing the drug or substance. In an appropriate case, the mission to do so may fatally affect the conviction entered as the penal provision does not seem to vest in the court any discretion of deciding without evidence whether the accused's case falls under the first or second limb of the provision. The court must proceed on the basis of the evidence before it to determine whether in the peculiar circumstances of the case the drug was for personal consumption or for any other purpose in order to decide whether to mete out the sentence under the first or second limb of the section".

9. In the more recent case of **Adline Akoth Barasa & Anor v R [2007]e KLR** the Court of Appeal left no doubt as to the proper application of 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, a 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"

In my humble understanding of that judgment the value of the drug is important to a charge where the sentence or fine "is to be determined by the market value of any narcotic drug but failure to state the value of the drug in respect of a charge of trafficking does not invalidate the charge and a sentence as required by the law can be imposed".

10. The court was however emphatic that particulars of trafficking ought to include the mode of dealing with the substance. The court observed concerning the definition of trafficking in the Act

"….the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking … [and] should at the trial prove by evidence the conduct of the

accused person which constitutes trafficking…"

The circumstances in which the appellant was arrested were that he was riding the donkey upon which the drugs were loaded. I cannot think of a more classic case of trafficking by conveyance but this detail was not stated in the charge particulars as required. It is equally unthinkable that the 553 rolls were intended for his personal use and not trafficking as suggested on the appeal. The quantity and circumstances of the arrest displace that suggestion. (See **Mohamed Ali** case).

11. The court observed in the **Mohamed Ali** case that since the appellant therein denied possession of the drug he could not offer any explanation as to the purpose for which he had the drug. That is also true of this case as the appellant denied having the drugs when arrested. However, since the mode of trafficking had not been stated in the charge sheet, I am of the view that it may be safer to quash the conviction for trafficking and to substitute therefore a conviction for the offence of possession contrary to Section 3(1) as read with Subsection (2) (a) of the Act. In this case the appellant was handed down a minimum fine of Shs. 1,000,000/- or 10 (ten) years imprisonment. The sentence was illegal under Section 4(a) of the Act (see **(Chukwu v R [1020] eKLR).** The original sentence is set aside and substituted with a fine in the sum of Shs. 600,000/- (six Hundred Thousand) or in default to serve ten (10) years imprisonment from the date of sentence.

Dated and signed at Malindi this **28th** day of **March, 2014**

C. W. Meoli

JUDGE