



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NOS.233'A' AND 232 OF 2011**

**BETWEEN**

**SAMMY OMBOKE ..... 1<sup>st</sup> APPELLANT**

**TOM OKUMU OGUTU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the conviction and sentence in Kehancha SRM's criminal case***

***No.60 of 2011by Hon. J.R. Ndururi, SRM dated and delivered on 6<sup>th</sup> October, 2011)***

**JUDGMENT**

**Introduction**

1. The appeal herein being Criminal Appeal No.233'A' of 2011 was consolidated with Criminal Appeal No.232 of 2011 and all proceedings taken on file for Criminal Appeal No.233'A' of 2011 since both the appellants were charged together, tried together and convicted together.
2. The two appellants were charged in the lower court with the offence of trafficking in narcotic drugs contrary to **Section 4 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994**. The particulars of the offence were that Tom Okumu Oguta (the 2<sup>nd</sup> appellant) and Sammy Omboke (the 1<sup>st</sup> appellant) were on the 3<sup>rd</sup> day of January 2011 at Nyabohanse Komomwamu road within Kuria District of the Nyanza Province jointly found transporting 2071 stones of Cannabis (bhang) with a street value of Kshs.410,000/= using motor vehicle Reg. No. KBJ 487 B in contravention of the provisions of the said Act.

**The Prosecution case**

3. During the trial, the prosecution called three witnesses. Cpl Daniel Otieno Okatch (PW1) and Cpl John Pele (PW3) both of Maberu D.O.'s Office told the court that on 3<sup>rd</sup> February 2011 at about 6.00 a.m. they and other police officers were on patrol, when they received a tip-off and were informed that a motor vehicle registration number KBJ 487 B was approaching and was suspected to be carrying contraband goods. They intercepted the vehicle in which they found the two accused persons. Thereafter they took the vehicle to Maberu D.O.'s office where they carried out a search which revealed that in the vehicle were 2071 stones of what they suspected to be cannabis. They then telephoned the OCS Isebania police station and later PW2, PC Stanley Korir, collected the said cannabis, impounded the said motor vehicle and arrested the appellants herein.

4. PW2 PC Stanley Korir then of Isebania anti-narcotics unit told the court that on 3<sup>rd</sup> February 2011 at about 10.00 a.m. he received a telephone call from PW3 who informed him of the arrest of the two appellants. He went to Maberu D.O.'s office where he was shown a motor vehicle and 2071 stones of cannabis which he put in 10 sacks and ferried the same together with the said motor vehicle to Isebania police station. He then charged the appellants with the offence herein; prepared an exhibit memo form and took the same together with one of the sacks containing the stones of cannabis to the Government chemist at Kisumu where the cannabis was analyzed and a report issued to the effect that the same was cannabis. He also produced the ten sacks containing cannabis (**P. Exhibit 1**), the said motor vehicle (**P. Exhibit 2**), the exhibit memo form (**P. exhibit 3**), the one sack that he treated as sample (**P. Exhibit 4**) and the report from the Government Chemist (**P. Exhibit 5**).

#### The Defence case

5. In their defence, the two appellants gave unsworn testimony and denied having committed the offence herein. They both told the court that they were heading to Isebania from Komomwamu where they had gone to look for their business partner one Mwitia Nyamohanga and that the cannabis was not found in the vehicle they were using.

#### Judgment of the Trial Court

6. The learned trial magistrate carefully considered the evidence on record and found that there was no dispute that the accused persons were found in the said vehicle and that the same was being driven along Komomwamu-Nyabohansa road. He also found that the report from the Government Chemist (**P. Exhibit 5**) was categorical that the contents of the sack that PW3 treated as a sample (**P. Exhibit 4**) were cannabis included under the **Narcotic Drugs and Psychotropic Substances (Control) Act**. The learned trial magistrate was satisfied that the two appellants were found in the subject motor vehicle together with the 2071 stones of bhang.
7. The learned trial magistrate found that the prosecution had proved its case against the appellants to the required standard which is beyond reasonable doubt and he found each of the appellants guilty as charged and went ahead to convict them accordingly under **Section 215** of the **Criminal Procedure Code**. Before sentencing the appellants, the learned trial magistrate considered the fact that they were both first offenders and also considered the mitigation by each appellant before sentencing each of them to serve seven (7) years in prison.

#### The Appeal

8. Being aggrieved and dissatisfied with the trial court's judgment on both conviction and sentence, the appellants filed their respective petitions of appeal. The two appeals were consolidated by an order of this court made on 16<sup>th</sup> October 2013.

#### The Submissions

9. When the appeal came up for hearing on the 6<sup>th</sup> November 2013, the 1<sup>st</sup> appellant Sammy Omboke made oral submissions on his own behalf.
10. He submitted that the mode of trafficking was not disclosed in the charge sheet which to him was contrary to **Section 134** of the **Criminal Procedure Code**. That the charge as set out did not lay out the acts of trafficking in drugs as set out in **Section 2 of Act No.4 of 1994**. He cited **High Court Criminal Appeal No.256 of 2010 at Kisii** in which the court at page 13 found that the charge sheet did not explicitly say in what manner the appellant was trafficking in drugs as required by **Section 2 of Act No.4 of 1994**, and **Section 134** of the **Criminal Procedure Code**.
11. He also submitted that in his case the prosecution used the language "**were jointly found trafficking in ....**" and went ahead to amend the charge sheet on the grounds that "**means of transport were not indicated.**" He relied on various other authorities which this court has noted and he emphasized that this court should rely on the case of **Madline Akoth Barasa and another**

-vs- Republic – Cr. Appeal No.193 of 2005, Nairobi, (unreported).

12. On the issue of the alleged 2071 stones of bhang, he argued that the word “stones” this was a collective noun and the issue is whether the word stone is defined under **Section 2** of the **Act No.4 of 1994**. He also submitted that **Section 2** of the **Act No. 4** defines cannabis and it also defines the cannabis plant and that according to the Act several names are used to define the cannabis plant. That in the instant case reference to stones of bhang does not indicate that stones can be used as a collective noun for bhang. He also submitted that the term stone used in the charge sheet is obsolete and amorphous thus rendering the charge sheet defective.
13. He further submitted that the prosecution did not summon the Government Chemist to testify on the document produced. He referred this court to the daily nation of the 22<sup>nd</sup> February 2012. This court does not accept the said evidence.
14. On the issue of photographic evidence produced by PW3, the 1<sup>st</sup> appellant submitted that this witness was stood down after he (the 1<sup>st</sup> appellant) raised the issue of whether the witness took any photographs. That the court of its own motion adjourned for 15 days to give the prosecution time for the witness to produce the photographs spoken of by PW3 after he (1<sup>st</sup> appellant) challenged the prosecution. He submitted that in any event to produce the photos, the prosecution had to meet the requirements of **Section 78** of the **Evidence Act** which they failed to meet and that the judgment of the trial magistrate is silent on the issue of photographs.
15. The 1<sup>st</sup> appellant submitted that such evidence should be refused because it violates **Article 50 (4)** of the **Constitution** and any doubt from such evidence should be applied to his benefit as an accused person.
16. On the issue of notice to show cause why the motor vehicle used could not be forfeited to State, the 1<sup>st</sup> appellant submitted that the notice was erroneous and did not meet the requirements of **Article 47 (2)** of the **Constitution** and that it was a violation of the right to protection of property under **Article 40**. He contended that the proceedings before the trial court do not show that the notice was made in writing as required under **Article 260** of the **Constitution**.
17. On the evidence of PW2 No.46201 PC Stanley Korir, the 1<sup>st</sup> appellant submitted that his evidence was inconsistent with his statement.
18. He urged the court in reconsidering and evaluating the evidence afresh to find and hold that burden of proof in criminal cases rests with the prosecution and that the prosecution did not discharge that burden. He prayed that the appeal be allowed, conviction quashed and sentence set aside.
19. The 2<sup>nd</sup> appellant relied on his written submissions on record and submitted that he did not commit the offence and that on the 3<sup>rd</sup> day of January, 2011 he was not in Kuria West. He submitted that the evidence of PW1 and PW2 was contradictory.
20. Mr. Majale for the State opposed the appeal. On the charge sheet he submitted that the alleged failure to state mode of trafficking was not true because the particulars on the said charge sheet say the appellants were found transporting the stones. Further, that the prosecutor in the court below applied to have the charge sheet amended so as to include the means of transportation which application was not objected to by the appellants and the court proceeded to allow the same. The amended charge was read to each appellant and they pleaded not guilty to the same.
21. Secondly that it was the testimony of PW1 that inside the vehicle were packages which they suspected to be cannabis and it was on this basis that PW1 and PW2 forwarded samples of those stones to the Government Chemist for analysis. That PW2 had testified that he received a report (**P. Exhibit 5**) from the Government chemist which indicated that the stones taken in for analysis were cannabis. Further that the production of **P. Exhibit 5** was not objected to by either appellant.
22. Thirdly on the issue of photographic evidence it was Mr. Majale’s submissions that from a reading of the judgment of the trial court, the trial magistrate did not make any reference to the photographs which meant that the photographs adduced were not a basis for the conviction of the appellants.
23. Fourthly, regarding forfeiture of the motor vehicle, Mr. Majale submitted that the trial court made an order on 6<sup>th</sup> October, 2011 to the effect that the owner of motor vehicle registration No. KBJ 487B was given 30 days to show cause why the said motor vehicle should not be forfeited to the state as provided by law. On the 28<sup>th</sup> November, 2011 when the court was sitting the owner of the motor vehicle was absent and the court went ahead to order forfeiture and sale by public auction

- after 30 days.
24. On the evidence as a whole Mr. Majale submitted that there was consistency in the evidence of the 3 prosecution witnesses which evidence proved beyond any reasonable doubt that the appellants were indeed trafficking in bhang using the subject motor vehicle. On the appellant's defence, Mr. Majale submitted that both gave unsworn evidence and did not dispute that they were arrested in the subject motor vehicle nor that the said motor vehicle was being driven along Komomwamu road within Kuria District on the material date.
  25. Further that the report by the Government Chemist (**P.Exhibit 5**) corroborated the fact that the stones which were presented to him for analysis were indeed cannabis and the fact that the 2 appellants were transporting cannabis was therefore, not in doubt.
  26. He submitted that the prosecution put up cogent evidence to that effect which evidence convinced the trial court to convict and sentence the 2 appellants. He urged the court to dismiss the appeal and to uphold the conviction and sentence.

#### Duty of this Court

27. This appeal is before me as a first appeal. In this regard, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. I am also expected to consider and weigh the judgment of the learned trial magistrate with a view to establishing whether the findings of the learned trial magistrate were well founded.
28. I have indeed carefully reconsidered and evaluated the evidence afresh and have also carefully considered and weighed the judgment of the learned trial court as is required of me. See **Okeno - vs- Republic [1973] EA 32.**

#### The Issues and Findings

29. The appellants were charged with trafficking of narcotic drugs contrary to **Section 4(1)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act No.4 Of 1994**. **Section 4(1)** of the Act provides us follows:-

**“4(1) Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance 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 substance whichever is greater and in addition to imprisonment for life.”**

30. It was the 1<sup>st</sup> appellant's submission that the mode of trafficking was not indicated in the charge sheet which was contrary to **Section 134** of the **Criminal Procedure Code**. On this issue Mr. Majale for the state submitted that this was not true because the particulars in the charge sheet say the appellants were found transporting the stones and that the charge sheet was amended so as to include the means of transportation and this the appellants did not object to and the trial court allowed the said amendment on which fresh plea was taken.
31. On this issue, I find that the charge sheet was duly amended to include the mode of trafficking so that it cannot be said that by the close of the prosecution case, the charge sheet did not contain the mode of trafficking. It therefore follows that on this ground the appeal must fail. I have considered the findings in Criminal Appeal No. 256 of 2010 and do find that in the said criminal appeal the appellant was caught as he was running away but in the instant case the appellants were caught right inside motor vehicle Registration No. KBJ 487B. The facts in this case are therefore distinguishable from the facts in **Kisii CRA No.256 of 2010** which was decided by myself.
32. I will not go into the details of the definition of cannabis but I am convinced by the report produced by the Government chemist being P.Exhibit 5 that he analyzed the substance presented to him for analysis and came to the conclusion that the said substance was actually cannabis. I will also not dwell on the photographic evidence because the learned trial magistrate did not make any reference to the said photographs in his judgment. The other evidence that was placed before

- the trial court is what informed the learned trial magistrate's finding of guilt, and I am satisfied that the finding of guilty was well anchored in evidence.
- 33.As regards sentence, the appellants submitted that imprisonment for 7 years was excessive in the circumstances. **Section 4 (1)** of the **Act** (supra) provides for a fine of Kshs.One Million or three times the market value of the narcotic drug or psychotropic substance whichever is greater and in addition to life imprisonment.
- 34.In the instant case, the learned trial magistrate sentenced each appellant to 7 years imprisonment without the fine. This sentence was therefore irregular. As the street value of Kshs.410,000/= was not proved by expert evidence, the minimum fine of Kshs. One Million should have been imposed by the trial court upon conviction. The appellants should also have been sentenced to imprisonment for life.
- 35.Accordingly, I set aside the sentence of 7 years imprisonment and in lieu thereof, I fine each appellant Kshs.One Million and in addition the appellants shall each serve life imprisonment in jail.
- 36.In effect the appeal herein is dismissed on both conviction and sentence. R/A within 14 days.

**Dated and delivered at Kisii this 24<sup>th</sup> day of July, 2014.**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Both appearing in person for Appellants

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk