



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 416 of 2010

*(From Original Conviction and Sentence in Criminal Case No. 1243 of 2010 of the
Chief Magistrate's Court at Mombasa – L. Mutende (SPM))*

1. CHRISTOPHER KABUYE.....1ST APPELLANT

2. SAUMU KABUYE.....2ND APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

The two Appellants were convicted and sentenced to a fine of Kshs. 1,104,000/- each or one year imprisonment in default. In addition each was sentenced to 24 years imprisonment for 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 are that on the 16th day of April 2010 at Mariakani – Kilifi County, with others not before Court trafficked in Narcotic Drugs, by transporting 184 kilogrammes of Cannabis Sativa with a market value of Kshs. 368,000/- in a motor vehicle registration number KAH 682B/UAD 115Q Mercedes Benz which was being driven by the 1st Appellant. They had received information that it had been diverted from the main road onto a feeder road and that it was carrying cannabis sativa.

Upon searching the lorry tanker they did not find bhang nor did they find it in any of the Appellants but at some distance in the bush they recovered some twelve bags containing that was later found to be Cannabis Sativa.

The main issue which was before the trial Court for determination was whether it was established beyond reasonable doubt that it is the Accused/Appellants who were found in possession of the Cannabis Sativa and whether they were transporting it/trafficking in it.

The learned trial Magistrate (as she was then) correctly pointed out that the evidence the prosecution was relying on was circumstantial and cited the authority of **Kariuki Karanja –Vs- R 1986 KLR 190-**

“That in order for circumstantial evidence to sustain a conviction it must point irresistibly to the Accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that

inference is on the prosecution.”

Applying that test it was incumbent upon the trial Magistrate to find exactly where the 12 bags of Cannabis Sativa were recovered in relation to where the Appellants were found. Being aware of this fact she visited the scene on 29th June 2010. At the scene PW1 told the Court at page 15 line 11-

“This is where we intercepted the vehicle. It is some approximately 100 metres away from the main Nairobi – Mombasa High way.”

At line 29 of the same page 15 he proceeds to tell the Court-

“This is the area where we found five sacks beside the road. 4 of the bags were approximately 30 metres inside the parcel of land.”

Upon cross-examination the witness told the Court that the bags were approximately 500 metres away from where they intercepted the trailer.

PW2 also told the Court that they intercepted the lorry at a distance of approximately 500 metres from where they eventually found the exhibits.

Both Accused persons denied the charges of trafficking with the 1st Appellant stating that he was found off the road after his vehicle went out of gas. The 2nd Appellant did explain that she was called by phone by her husband after he was arrested.

The presence of the 2nd Appellant in the lorry is not clear. She was not a turnboy. She claimed to be a Tanzanian. The lorry trailer was from Kampala.

The prosecution has not shown how the second Appellant was connected with the truck alleged to have been transporting the Cannabis Sativa.

Having carefully analyzed the evidence adduced before the lower Court I find that no drugs were found on the Appellants themselves or in the lorry in which they were found. The 12 sacks of Cannabis Sativa were found more than half a kilometer from where they were intercepted. There was no evidence to show that it belonged to them. There is every possibility that anybody else could have dropped it there. There is nothing to suggest that it was only the two Appellants who had the opportunity to drop the exhibits where they were found. They were found in the bush, in an inhabited area.

The exhibits were not found in their house or in their shamba so as to remotely claim that they exercised control and dominion over them.

I find the conviction of the two Appellants husband and wife was not safe. The conviction is quashed and sentence set aside. They are set at liberty unless otherwise lawfully held.

Dated and delivered at Mombasa this 22nd day of May, 2013.

**M. MUYA
JUDGE**

Dated and delivered in open court in the presence of:-

Mr. Jami for State

Mr. Magolo - Counsel for the Appellants

Court clerk – Mr. Musundi