



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 206& 207 of 2012

1. THOMAS ONYANGO OPONDO1ST APPELLANT

2. JOHN KIPROTICH KWAMBAI2ND APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

The two Appellants were convicted and sentenced to a fine of Kshs. 1 million in default one year imprisonment and in addition to a term of 15 years each for the offence of trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotics Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The particulars of the charge are that-

“On the 4th day of November 2010 at Mariakani Township in Kilifi District within the Coast Province, jointly, with others not before the Court, trafficked in Narcotic Drugs by transporting eight sacks of Cannabis Sativa weighing 224kgs with a market value of Kshs. 448,000/- in a motor vehicle Registration number KAX 043G Toyota Corolla White in colour in contravention of the said Act.”

I have perused the record of proceedings and nowhere is it shown that the monetary value of the exhibits was ascertained. The charge reads and indicates a value of Kshs. 448,000/-. It's not shown where that value was taken from.

In HCCRA No. 467 of 2010 Emmanuel Kwaku Ababio –Vs- Republic Ojwang, J was of the view which I ascribe to that-

“The penal scheme prescribed under section 4(a) of the said Act is predicated on the value of the Narcotic Drugs recovered, without reliable evidence of the price – assessor for the drug recovered is vital element in the prescribed penalty cannot be dispensed for the criminal law, by its standard principle and procedure, lays the onus of proof on the prosecution.”

This present appeal is in all fours with the one my brother Judge was confronted with.

Secondly, on the issue of the exhibits, it is conceded by the State that the evidence of PW1 and PW4 was in variance and contradictory in that PW1 had told the trial Court that he had sampled the exhibits and took them to the Government Chemist for analysis.

The Government Analyst did produce a report showing the substances to be Cannabis Sativa. But the

samples were not produced in Court. That omission is said to be fatal to the prosecution case.

I am in agreement with the States concession in that no proper link was established between the eight sacks of plant material and the samples that were allegedly taken for examination and analysis. That omission was fatal to the prosecution case. I find the appeal has merit. The conviction of the two Appellants is quashed and the sentence set aside.

They are set at liberty unless otherwise lawfully held.

Judgement read and delivered in open Court this 20th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

State Counsel - absent

Mr. Magolo counsel for the Appellant - present

Court clerk – Mr. Musundi