



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 350 of 2010

JOYCE WAMBUI APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was convicted and sentenced to ten years imprisonment and in addition to a fine of Kshs. 1 million in default one year imprisonment for the offence of trafficking in Narcotics Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994.

The particulars are that on the 11th day of May 2009 at Mariakani Weighbridge along Mombasa Nairobi Highway in Kaloleni, Kilifi County, trafficked in Narcotic Drugs by transporting 382 rolls of Cannabis with a value of Kshs. 22,920/- in a motor vehicle registration No. KBE 003V Chania Shuttle Bus in contravention of the said Act.

A bus registration number KBE 003V belonging to Chania Company left Nairobi for Mombasa on 11th May 2008. On board were 38 passengers including the Accused/Appellant who was seated at seat No. 1A.

As fate would have it upon reaching Mariakani Weighbridge it was stopped by Anti-Narcotics officers PC Joseph Wainaina PW3, PC Tom Omondi (PW4), Pc Donata Kaari (PW5). A search was conducted on the passengers in the presence of the bus driver Stephen Kironji (PW1) and the bus conductor Harun Ngungi Njuguna (PW2). All the witnesses testified that the Accused was found with a bag racksack placed on her lap and a suitcase under her seat. Police had ordered each passenger to come out of the bus while carrying her/his luggage.

Upon search the suitcase was found to contain 382 rolls of bhang. Sniffer dogs were used by the officers to identify the suitcase that contained the cannabis sativa. The Government Analyst was called to the police station and he removed samples from 4 rolls of cannabis. PW5 prepared an inventory and a sampling Certificate. Later a report was prepared by the Government Chemist who confirmed that the plant material contained cannabis sativa. Photographs of the bus which was the conveyor were taken and later produced as exhibits.

The main grounds are three in number, the first one being that the conviction was against the weight of the evidence adduced. Secondly that the sentence was excessively harsh in that she was sentenced to ten years imprisonment and in addition fined Kshs. 1 million or serve one year imprisonment.

The other issue is that of a Nolle prosequi which was entered in Criminal Case No. 1625 of 2009 whereby the Accused was charged with the same offence on 14th December 2009 and she was discharged. The Accused does not seem to have been given the chance to reply to the application before the Court gave its final orders.

It is the contention of Counsel for the Appellants that the prosecution powers were not responsibly exercised and he has cited the authority of **Abdul Swamad Said –Vs- R. Cr. Revision Case No. 110 of 2010** a decision by Ojwang, J as then was.

The other ground is that of the meaning of trafficking by way of ‘transporting’. It’s Counsels contention that the word “**transporting**” does not appear anywhere in the definition of trafficking in the act.

The appeal is opposed and the State has filed what it calls a Notice for enhancement of sentence.

On the issue of Nolle prosequi Mr. Jami for the State submits that the Nolle was not questioned at the stage of the instant case which was Criminal Case No. 1625 of 2009 which was withdrawn and the Accused later charged in Criminal Case No. 4034 of 2009 which is subject matter of this appeal. During the hearing and determination of Criminal Case No. 4034 of 2009 the issue of Nolle in Criminal Case No. 1625 of 2009 was not brought up for consideration.

In the issue of definition of trafficking the learned State Counsel submits that the term “conveying” is included in the definition of trafficking. That convey connotes movement from one point to another. Other definitions similar to transporting are said to include distribution, supplying.

On the issue of sentencing, it is submitted that the correct sentence should be life imprisonment and that the issue of fine is without a default clause.

On the main ground of the weight of the evidence before the trial Magistrate. A perusal of the judgment by the learned trial Magistrate shows that she carefully analyzed the evidence presented to her by the prosecution and the defence mounted by the Accused who was represented by Counsel. PW1, PW2, PW3 and PW4 all stated to have seen the Accused with the bags which when searched were found to contain the cannabis sativa. The trial Magistrate who had the opportunity to appraise their demeanour found no reason to disbelief them. I find no reason to fault her analysis and evaluation.

The Accused is charged with the offence of trafficking in Narcotic Drugs.

Trafficking is defined in Section 2 of the Act to mean-

“The importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a Narcotic Drug or Psychotropic substance or any substance represented or held out by such person to be a Narcotic Drug or Psychotropic Substance or making of any offer in respect thereof.”

The charge sheet reads “**Transportation**” which to my mind is synonymous with conveying, delivering or distribution which all mean moving something from one place to another.

On the issue of the Nolle prosequi. The Accused is shown to have been arraigned in Court on 12th May 2009 in Criminal Case No. 1625 of 2009 and on 14th December 2009 a Nolle was entered and the Accused was discharged. The Nolle was not questioned at the stage it was being entered. Subsequently, two days later on 16th December 2009 she was charged again in Court with the same offence and she pleaded not guilty and the case later proceeded to hearing and final determination. At no stage did she raise the issue of her having been charged earlier on the same offence inspite of her being represented by Counsel.

It is only after conviction and during the appellate process does she now question the discharge in

Criminal Case No. 1625 of 2009 which is a different one from 4034 of 2009 which is the subject of this appeal. I find it's too late in the day for her to claim that she was prejudiced in another case which is not the subject of this appeal.

Section 4 of the Narcotic Drugs and Psychotropic Substances Act provides for penalty for trafficking thus-

“Any person who traffic in any Narcotic Drug or Psychotropic Substance shall be guilty of an offence and liable 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.”

It's instructive to note that there is no default clause after the fine. Mr. Magolo Counsel for the Appellant submits that as there is no default clause the Court should apply Section 28 of the Penal Code which provides-

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law, the following provisions shall apply ...”

A schedule thereafter is given.

To that extent, I am in agreement with Defence Counsel that the fine of Kshs. 1 million should include a default (imprisonment sentence) clause.

I do not think that the trial Magistrate erred in the sentence. Mr. Jami has filed a Notice of enhancement. It is not in the nature of an appeal or an application for review.

On my part I see or find no reason to enhance the sentence of ten years to life imprisonment. The necessary procedural machinery for that enhancement has not been followed.

The upshot of it is that I find no good reason to interfere with the conviction and the sentence. I consider them safe.

The appeal is hereby dismissed/disallowed.

Judgement read and delivered in open Court this 14th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

Mr. Dzumo for the State

Mr. Magolo Counsel for the Appellant - present

Court clerk – Mr. Musundi