



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.24 OF 2009**

**TERESIA WANJIKU.....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.55571 of 2007 by Hon Hon. J. G. King'ori, Senior Principal Magistrate, dated 24th October, 2012

**JUDGMENT**

The appellant was charged with the offence of **trafficking a Narcotic Drug** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994**.

The particulars of the offence are that on the 9th December, 2007 at Salгаа road block along the Eldoret-Nakuru Road in Nakuru District of the Rift Valley, trafficked in 34.5kgs of Cannabis Sativa with a street value of Kshs.34,500/= by transporting it in motor vehicle registration number KAY 250A Isuzu Bus in contravention of the said Act.

The appellant was convicted and sentenced to a fine of Kshs.1,000,000/= and an additional sentence of ten (10) years imprisonment.

Being aggrieved by the decision of the Honourable J. G. King'ori, Senior Principal Magistrate, the appellant preferred this appeal against conviction and sentence and listed nine (9) grounds of appeal on her petition of appeal. The grounds are summarized as listed hereunder:

- 1) that he pleaded not guilty to the charge;
- 2) he begged the court for a more lenient sentence that the sentence is harsh to him given that that his health is not stable
- 3) that she is widow with five children who depend on her
- 4) that she is a first offender and begs for forgiveness
- 5) that the honourable do accord her a non-custodial sentence so that she takes care of her children

At the hearing of the Appeal, the appellant chose to rely on her written submissions whereas Learned Prosecuting Counsel for the State made oral submissions.

After hearing the oral submissions of Counsel for the State and reading the written submissions, this court finds the following issues for determination:

- i) identification – appellant and substance.
- ii) sentence

This being the first appellate court, it is duty bound to re-assess and re-evaluate the evidence on record and arrive at an independent conclusion. Refer to **Okeno V. Republic** (1973) E.A. 32.

On the issue of identification, Counsel for the State submitted that P.W.1 Samuel Karanja who was the bus conductor narrated how the appellant boarded the bus at Kimilili and had in her possession a large carton and a maroon/black bag. When the bus was stopped at the road block by the police, P.W.1 testified that he was able to identify the owner of the luggage to the police.

The evidence of P.W.3 and P.W.4 who were police officers was that they took possession of the luggage and its contents and sent it to the Government Analyst one, Antony Otieno Oyoyo (P.W.5) who established that the substance was Cannabis Sativa and produced a report which was tendered into court and marked as “*P Exb.6*”.

Counsel for the State submitted that the trial magistrate considered the appellant's defence and disregarded it and urged the court not to interfere with the conviction and sentence stating that it was a fair sentence as the sentence provided for by the Act was a fine and life imprisonment. That the trial magistrate had exercised her discretion fairly by sentencing the appellant to ten (10) years.

The appellant in her written submissions does not challenge the conviction but submits that she is remorseful, requests for a pardon on sentence and to be given a second chance to live her life with her children.

This court has re-evaluated the evidence of P.W.1 on identification, that the appellant boarded the bus at 6.30a.m. and the bus conductor (P.W.1) was the one who issued her with a ticket upon payment of Kshs.500/=. P.W.1 was also the one who loaded the appellant's luggage onto the bus.

This court finds that the incident occurred during the day and that the witness, P.W.1 was able to observe the appellant and her luggage in conditions that were favourable. This court is satisfied that the appellant was positively identified together with her luggage.

As for the substance, this court is satisfied that P.W.5 was able to analyse and positively identified that the contents in the appellant's luggage was a narcotic substance.

On the issue of sentence, this court concurs with the submissions of Prosecuting Counsel for the State that the sentence imposed was at the discretion of the trial court. Counsel for the State submitted that the sentence imposed was fair, whereas the appellant submitted that it was harsh for a first offender.

This court states that an appellate court may interfere with the sentence imposed if it finds it to be harsh and excessive. Refer to **Wanjema V. Republic** (1971) E.A 493.

In the instant case, this court finds reason to interfere with the sentence imposed for the following reasons.

P.W.3 and P.W.4 testified to having taken possession of the appellant's luggage and after weighing the contents found it to weigh 34.5 kilogrammes and it is alleged on the charge sheet that the substance was valued at Kshs.34,500/=.

This court finds no evidence adduced by the prosecution to prove the market value of the narcotic substance. The Act stipulates that a certificate ought to be tendered into court as evidence to prove and

support the market value of the substance.

This court finds that in the absence of this crucial document the prosecution failed to prove the market value of the narcotic substance. The Act also stipulates that the fine is determined by the market value of the substance. Refer to **Section 86** of the **Act**.

This court finds that in the absence of proof of the market value of the substance and also in the absence of this crucial supporting certificate, the sentence imposed by the trial court has legal basis.

As it is not possible to establish the fine chargeable under **Section 4(a)** of the Act and also this court is alive to the fact that this kind of offence has become prevalent and offenders should not be easily let off the hook, this court will exercise the powers conferred upon it by **Section 354** of the **Criminal Procedure Code**.

This court hereby quashes the conviction on the charge of trafficking contrary to **Section 4(a)** of the **Narcotics and Psychotropic Substances (control) Act** and substitutes therefor with a conviction on an alternative charge of **handling a package containing a narcotic drug knowingly** contrary to **Section 5(2)** of the said **Act**.

As for sentence, the same is hereby set aside and substituted with a fine of Kshs.100,000/= and imprisonment for a term of five (5) years effective from the 9th June, 2009.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 21st day of June, 2013.**

**A. MSHILA**

**JUDGE**