



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 3 OF 2011

1. **MOSHERO MBARIA**
2. **STEPHEN MELITA ACCUSED**

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Sd. Kaberia SRM delivered on 16/12/2010 in Kajiado Senior Resident Magistrate Criminal Case No. 592 of 2010)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

The 1st Appellant, **Moshero Pirias Mbaria** and the second Appellant, **Stephen Melita** were charged with offence of trafficking in a narcotic drug contrary to **section 4 (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4/1994**.

The particulars of the offence were that on the 15th day of April 2010 at about 11.23 a.m. at **Risa Amboseli National Park** in **Loitokitok District** within the **Rift Valley Province**, jointly trafficked in 112 kgs (one hundred and twelve kilograms) of Cannabis with a market value of Kshs.112,000/= by transporting it in a motor vehicle registration number **KBE 326B Nissan Sunny** ex saloon in contravention of the said **Act**.

The Appellants pleaded not guilty. The case proceeded to a full trial.

The prosecution case was that on the 15th day of April 2010 at about 7.00 a.m., **Kenya Wildlife Services (KWS)** officers, **Ranger Samuel Kihara (PW1)** and **Sgt. Daniel Yiangere (PW3)** were at the **Amboseli National Park** when they received a tip off from members of public that a motor vehicle was being driven outside the park boundary in **Risa area**. The KWS Officers proceeded to the said area and laid an ambush as vehicles that use the road in question do so in bid to avoid payment of park fees. The motor vehicle was intercepted. The 1st Appellant was the driver of the motor vehicle and the 2nd Appellant was a passenger and was seated at the front passenger seat. There were two sacks of bhang at the back seats and a further two bags of bhang in the boot of the motor vehicle.

The 1st and 2nd Appellants were arrested and subsequently taken to **Loitokitok Police Station** together with the motor vehicle and the four bags of bhang. After investigations the Appellants were charged.

In his defence, the 1st Appellant gave unsworn evidence. He stated that his co-appellant hired the motor vehicle in question to be ferried from **Namanga** to **Loitokitok**. They were stopped by the Kenya Wildlife Personnel. The KWS personnel alleged that the motor vehicle was carrying ivory. They were arrested and taken to the park where allegations were made that they had been found with bhang and were escorted to **Loitokitok Police Station**.

The 2nd Appellant in his defence case stated that he had hired the 1st Appellant's motor vehicle to ferry him from **Namanga** to **Loitokitok**. They had two other passengers who alighted at **Mashenani** gate. After a few kilometers their motor vehicle was stopped by Kenya Wildlife Service personnel who alleged that the motor vehicle was carrying ivory. The Appellants were then taken inside the park where it was alleged that the motor vehicle was carrying bhang. The Appellants were then taken to **Loitokitok Police Station** where they were charged with the present offence.

In his judgment, the trial magistrate found the prosecution case was proved beyond reasonable doubts. The Appellants were convicted and sentenced to ten (10) years imprisonment each and a fine of Kenya Shillings one Million (Kshs.1,000,000/-).

The Appellants were dissatisfied with the conviction and sentence and appealed to this court.

The Application by the 2nd Appellant and the appeal by the 2nd Appellant were consolidated and heard as one. This judgment is therefore in respect of both appeals.

The grounds of appeal can be summarized as follows:-

- **The sentence was harsh and excessive.**
- **The prosecution evidence on identification was insufficient.**
- **Crucial witnesses were not called to testify.**
- **The process of sampling the bhang for testing at the Government Chemist was flawed.**
- **There was no ruling made on whether there was a case to answer.**
- **The rights of the Appellants prior to the taking of the defence case were not explained.**
- **Evidence of alleged confession was irregularly obtained.**
- **The defence case was not considered.**
- **The Appellants were not cautioned before being charged.**

The appeal was canvassed by way of written submissions.

The firm of **Koceyo & Co. Advocates** appeared for the Appellants. Essentially, their written submissions reiterated the grounds of appeal. It was also added that the Appellants did not understand the **Kiswahili** language which the proceedings were conducted in. That the Appellants needed a Maasai interpreter and since none was provided the cross-examination was limited. That the Appellants were denied an opportunity to call defence witnesses. The prosecution case was materially contradictory according to the defence submissions.

Mwenda, the prosecution counsel appeared for the State. The State conceded to the appeal on the grounds that the defence application for adjournment was rejected which amounted to a denial of an opportunity for the Appellants to adequately defend themselves. It was further submitted that the procedure set out in **section 74 (A)** of the **Narcotic and Psychotropic Substances** was followed as the report of the Government Analyst was only in respect of the 190 grammes sample of plant material that was taken to him.

This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

The Kenya Wildlife Service personnel, PW1 and PW2 have given a corroborative account of evidence on how they intercepted the motor vehicle that the Appellants were in. Indeed the Appellants did not deny that they were found inside the said motor vehicle while driving towards **Loitokitok**.

According to the Kenya Wildlife Service personnel (PW1 & PW3) they found the bags of bhang at the back seat of the motor vehicle and another two bags at the boot of the motor vehicle. The motor vehicle had tinted windows according to the evidence of PW1 and PW3. The appellants denied that there was any bhang in the motor vehicle. The defence mounted by each of the accused persons is that of a frame up. However, there are no reasons that emerge from the evidence herein why the KWS personnel would want to frame up the Appellants.

I have found no contradictions to the evidence of PW1 and PW3. The evidence of both PW1 and PW3 pointed out the motor vehicle they found the bhang in as a white saloon Nissan Sunny Reg. No. **KBE 326 B** and four sacks of bhang as what they recovered.

PW2 **Mary Ngingi Maraswa** a teacher and the employer of the 1st Appellant identified the motor vehicle in question as his and stated that the 1st Appellant was her employee and was running the motor vehicle as a taxi.

PW4 **Cpl Jane Chirchir** testified that he took over the four sacks of bhang and weighed the same. The four sacks weighed 112 kgs and she took a sample from the four bags and escorted the sample to the Government Chemist for analysis and thereafter received the report of the Government Chemist which was positive. The exhibit memo form and the report of the Government Analyst, the four sacks of bhang and the motor vehicle were produced as exhibits. PW5 **Antony Otieno Oyoyo**, the Government Analyst testified that he received the marked exhibit from PW4 which was 190 gms of plant material accompanied by a memo form. The plant material was analysed and found to be cannabis. The Government Analyst made a report which he produced in court as an exhibit.

I have perused at the exhibit memo form (exh. 1) and the entries made therein and the report of the Government Analyst (exh.5) and the entries made herein and I am satisfied the same refer to the same. Although the defence has raised issues on whether the samples tested by the Government analyst came from the four sacks of bhang, I do not find any reason to doubt the officer who carried out the sampling.

It is noteworthy that the arresting officers and the officer who carried out the sampling and escorted the samples to the Government Chemist (PW1, PW3 & PW4) did not know the Appellants before.

One of the grounds of appeal raised by the Appellants is that there was no ruling made on whether the Appellants had a case to answer. A perusal of the lower court record reflects that a ruling was made on 18/11/2010 that the Appellants had a case to answer. The provisions of **section 211** of the **Criminal Procedure Code** were explained to them prior to the defence case. The defence by each of the Appellants was considered by the trial magistrate. Each of the Appellants gave a detailed account of evidence and each spoke in **Kiswahili**. The mitigation was offered in **Kiswahili** language. The submission that the Appellants speak the **Maasai** language and did not understand **Kiswahili** language is therefore an afterthought.

The 1st Appellant had indicated to the trial court that he would call two witnesses while the 2nd Appellant indicated that he would call one witness. When the Appellants applied for adjournment to call witnesses the same was rejected on the grounds that no reasons were given why the witnesses were not in court and the trial court further observed that the said witnesses were not at the scene of arrest.

I have anxiously considered the submissions by the defence that the Appellants were not given adequate opportunity to defend themselves. The ruling that the Appellants had a case to answer was made on 18/11/2010. The defence case was fixed for hearing on 7/12/2010. The Appellants were given sufficient time to present their defence case to the trial court. Indeed both the 1st and 2nd Appellant testified. The 1st accused thereafter informed the court that his witnesses were not present when the arrest took place. The 2nd Appellant stated that his witness was the person he was going to visit when the arrest took place. The application of adjournment was rejected.

The trial magistrate ruled that the intended witnesses would not add any value to the case. Allowing

adjournment is a question of the discretion of the court. The court's discretion however should be exercised in a judicious manner. The appellants had made it clear to the trial court that the intended witnesses were not at the scene at the time of arrest. There were no reasons given why the defence witnesses were not present on the date in question. Courts should however be more accommodating especially where there is no legal representation. However, looking at this case in totality, I am satisfied that the Appellants were given adequate time to ventilate their case. The prosecution case was proved beyond reasonable doubts. The conviction is based on sound evidence and this court will not interfere with the same.

I have considered the mitigation that was offered by the Appellants. I have also taken into account the quantity of the bhang and its value. This court's view is that the sentence of ten years is harsh and excessive. The trial magistrate also fell into error when he failed to impose the default sentence in case the fine was not paid.

With the foregoing, I uphold the conviction but the sentence imposed by the lower court is quashed and substituted with a sentence of five years imprisonment. Right of Appeal 14 days.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of July 2013.

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B. THURANIRA JADEN

JUDGE