



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 443, 444 & 445 of 2010

SIMON NGONDI MERIKI

BARAKA ANTHONY JOSEPH

DANIEL KIMANI KARANJAAPPELLANTS

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 3191 of 2009 of the Chief Magistrate's Court at Mombasa L. Mutende - SPM)

JUDGMENT

The three appellants were Convicted and Sentenced to a fine of Ksh. 1,470,000/= or in default one year imprisonment, in addition each was sentenced to serve a term of fifteen (15) years imprisonment. 1st Accused was ordered to be repatriated to Tanzania upon completion of the Sentence.

They had been charged with trafficking in Narcotic drugs contrary to section 4(a) of the Narcotic and Psychotropic substances control Act No. 4 of 1994. The particulars of the charge was that on 30th day of September, 2009 at Bondeni area in Kaloleni, jointly trafficked in Narcotic drugs by transporting 245 kilogrammes of Cannabis Sativa with a market value of Ksh. 490,000/= in a motor vehicle registration Number KBA 872 Toyota Noah in contravention of the Act.

The appellants contention is that there was no evidence of trafficking, they were not found in the motor vehicle registration number KBA 872M as alleged and that they were not arrested at the scene.

They have also argued that they were not identified.

On the material day 30th September, 2009 traffic police officers based at Mariakani were on their normal duties when one of them PC Zawadi received a telephone call to the effect that a motor vehicle registration number KBA 872M Toyota Noah was involved in accident along Nairobi – Mombasa road and had defied orders to stop at a roadblock. Sergeant Milka Wairimu , PC Zawadi and PC Samuel Kibror erected a roadblock and waited for the vehicle in question but when it was stopped the driver did not heed the orders and forcefully evaded and drove away. PC Zawadi and Sergeant Wairimu gave chase in their vehicle and alerted other police officers. The fugitive vehicle got a tyre burst on the way and its occupants came out running.

They were later arrested on various stages. The vehicle upon inspection was found to be loaded with

9 bags containing a plant material suspected to be Cannabis Sativa.

The first appellant Baraka Anthony Joseph (Accused No.1) had been seen by PW 1 and PW 2 while inside the vehicle and after he was arrested by members of public and taken back to the scene. The trial magistrate was of the view that he was properly identified as the incident took place in broad daylight.

As for the 2nd appellant Simon Ngondi Meriki apart from having been seen while in the vehicle by PW 1 and PW 2, his identity card and driving licenses were recovered inside motor vehicle registration number KBA 872M. The recovery of his documents was even before his arrest.

The 3rd appellant Daniel Kimani Karanja was not in the vehicle at the time the other Accused persons were arrested.

A perusal of the proceedings shows that none of the witnesses had testified of having seen him at the scene. He was linked to this offence by virtue of the fact that he was the one who had hired the vehicle registration number KBA 472M from PW 8 for ferrying passengers from Mombasa Airport to Malindi. He does not deny this but his defence is that he hired it out the vehicle to one Kitsao (Accused No. 3) who who later absconded. The said Kitsao Accused No. 3 had told the court that he was given the vehicle by Kimani, the 3rd appellant to use it for funeral purposes.

Upon a careful evaluation of the evidence before the Court I am satisfied that the conviction of Simon Ngondi Meriki (1st appellant) and Baraka Anthony Joseph (2nd appellant) was safe. They were clearly seen in broad daylight by PW 1, PW 2 and PW 7 while in the vehicle while coming out of it after it had a tyre burst and after their arrest which was soon after they attempted to flee. The trial magistrate did consider all the ingredients of trafficking of narcotic drugs. As for the 3rd appellant Daniel Kimani Karanja, he was not found or seen anywhere near the vehicle that was ferrying the illicit drugs. The evidence that links him to this offence is that he is the one who hired out the vehicle to one Morris Kitsao Kazungu Accused No.3 (who later absconded). There is no evidence to the effect that he knew or ought to have known for what purpose the vehicle was being hired for. The evidence against him is basically circumstantial and largely based on suspicion. Its trite law that suspicion, however, strong cannot be the basis of a Conviction.

I am satisfied that the Conviction and Sentencing of the 1st and 2nd appellants was on safe grounds. The same cannot be said of the 3rd appellant. The appeal against the 1st and 2nd appellants is dismissed. The one for the 3rd appellant is allowed on both Conviction and Sentence.

His Conviction is quashed and his Sentence set aside. 3rd appellant Daniel Kimani Karanja is hereby set at liberty unless otherwise lawfully held.

Judgment read dated and delivered in open court this **23rd** day of **November, 2012**.

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M. MUYA
JUDGE

In the presence of:-

Mr. Tanui for the state

Court clerk - Philip

Appellants in person