



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Criminal Appeal 70 of 2011**

**JANE ATIENO ODERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.6033/2008 by Hon B. M. Atiang”, Senior. Resident Magistrate, dated 3<sup>rd</sup>

March, 2011]

**JUDGMENT**

This appeal arises from a conviction by B. Atiang’, SRM in which the learned magistrate found sufficient evidence to prove the charge of **trafficking in narcotic drug** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substance (Control) Act No.4 of 1994** (the Act).

According to the particulars of the charge, the appellant who was travelling in a bus on 2<sup>nd</sup> October, 2008 is said to have “*trafficked in 14kgs of cannabis sativa* “ with a street valued of Kshs.14,000/= . According to Cpl. Boniface Manyori and Cpl. Joseph Kipruto, they stopped a bus, KAY 218X at Suswa Road block at about 1.30a.m. and upon searching it, the former (Cpl. Manyori) found a black bag on which the appellant was stepping.

When she was asked to open it, she complied and inside it there was a polythene bag in which there was 14kgs of bhang. The appellant was arrested and a sample of the substance found in the bag submitted to the Government Chemist for analysis. Wachira Gathenya examined the substance and found “*that it was cannabis sativa.*” The report was produced on his behalf by P.W.5, Otieno Oyoo.

Both the driver and conductor of the bus in which the substance was found testified. The driver was categorical the passenger who had the bag containing the substance boarded the bus at Kaplong while it was the conductor’s testimony in chief that the passenger boarded at Chablat.

In cross-examination that came after 6 days after the examination in chief, the witness appeared to change his story and stated that the appellant boarded at Kaplong.

The appellant admitted having travelled in the bus in question on the material evening but denied that the bag in which the substance was found was hers. She maintained that she was only arrested for failing to carry her identification card; that when the card was eventually availed by her brother, she was surprised that it was being claimed that the bag in which the substance was found belonged to her. From that moment she was arrested and eventually charged with the offence in question.

In the considered opinion of the trial magistrate, the offence was proved beyond reasonable doubt. Upon

conviction, the appellant was sentenced to a fine of Kshs.1m and in default eleven (11) years imprisonment. Both the conviction and sentence aggrieved the appellant who has brought the present appeal on the following grounds:

- i) the prosecution evidence was contradictory;
- ii) the trial magistrate failed to consider that Cannabis Sativa is not defined in **Section 2** or in **Schedule 1** of the **Act**;
- iii) the sentence was severe and harsh and ignored the fact that the appellant was a first offender.

Learned counsel for the respondent conceded the appeal on the ground that **Section 744** of the **Act** was not complied with; that there were material contradictions in the prosecution evidence as to the point the appellant boarded the bus and where in the bus the substance was found.

I have considered the evidence on record as well as submissions in this appeal. Being the first appeal, it is the duty of this court to re-evaluate the evidence on record in order to arrive at its own independent conclusion based on that evidence but bearing in mind that this court did not see or hear the witnesses. See **Okeno V. Republic** (1972) EA 32.

While there is no dispute that the appellant was travelling in the bus from which the substance was found, there is no agreement as to:

- i) where the substance was found;
- ii) whether the substance was narcotic drug and;
- iii) whether the appellant was trafficking.

It was of paramount importance for the prosecution to link the appellant with the substance.

In his evidence in chief the bus conductor, told the court that the bus was stopped at Chablat by four (4) people. A lady boarded and a bag was handed to the conductor by a third party who did not travel. According to the conductor, it is in that bag that the substance was found.

The only nexus between the bag and the appellant is the fact that she boarded the bus at the point the bag was given to the conductor. It was not suggested that the appellant knew the third party who gave the bag to the conductor.

Secondly, when the police searched the bus, it would appear from the evidence of the two police officers that the bag was found in the cabin of the bus. But the conductor's evidence suggested that the bag was retrieved from the boot. Thirdly, it is not clear at what point the bag was brought in the bus. Was it at Kaplong or Chablat?

Finally, the boarding of the bus and the discovery of the bag and its contents was in the night. It is doubtful that in the bus that was full, the driver who was engaged in driving would be certain as to what each passenger carried into the bus.

The fourth point related to the charge. Since the appellant was charged under **Section 4(a)** of the Act, it was incumbent upon the prosecution to prove that the substance found in the bag was a narcotic drug or a psychotropic substance.

The First Schedule to the Act lists narcotic drugs while the Second Schedule list psychotropic substances. Cannabis, according to the First Schedule, is a narcotic drug and is either cannabis (also called Indian Hemp) or Cannabis resin (also known as Resin of Indian Hemp). In addition, **Section 2** of the Act defines only three types of Cannabis, namely, Cannabis (the flowering part of Cannabis plant), Cannabis oil,

cannabis plant and Cannabis resin. There is no drug called Cannabis Sativa. See **Daniel Nderitu Wachira V. Republic**, H.C. Criminal Appeal (Nyeri) No.149 of 2003 (B).

Finally, the elaborate pre-trial procedure set out in **Section 74A** of the **Act** was clearly not complied with.

For these reasons, this appeal succeeds. It is allowed with the result that the conviction is quashed and sentence set aside. The appellant shall be set free unless lawfully detained.

**Dated, Signed and Delivered at Nakuru this 16<sup>th</sup> day of November, 2012.**

**W. OUKO**  
**JUDGE**