



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 280 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 347 of 2010 of the Chief Magistrate's Court at Mombasa: L. Mutende – S.P.M.)

ALI ABDULSWAMAD APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **ALI ABDULSWAMAD** has filed this appeal against his conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned before the trial court on 1st February 2010 charged with the offence of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT NO. 4 of 1994**. The particulars of the charge were that:

“On the 29th day of January 2010 at Sparki area in Mombasa District within Coast Province trafficked in narcotic drugs by stowing twenty-four (24) rolls of Cannabis with a street value of Kshs.480/- in contravention of the said Act”

The Appellant entered a plea of **‘not guilty’** to the charge and his trial commenced on 12th February 2010 at which trial the prosecution led by **CHIEF INSPECTOR NDUBI**, called a total of four (4) witnesses in support of their case. The evidence in brief is that on 29th January 2010 police officers on patrol within Tononoka area received information that there was a person selling bhang within the Sparki area. The police informer led police to the scene where they found the accused preparing rolls of plant material. The accused was arrested and taken to the police station. The plant material was taken to the Government Chemist for analysis and was confirmed to be Cannabis Sativa. The accused was then charged with this present offence.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He opted to make a sworn defence in which he totally denied having been found with the Cannabis as alleged. On 13th May 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Trafficking. He was thereafter sentenced to a fine of Kshs.1,440/- in default two months imprisonment and in addition was sentenced to serve three (3) years imprisonment. It is against this conviction and sentence that the Appellant now appeals. **MR. OJODE**, learned counsel represented the Appellant during the hearing of this appeal whilst **MR. ONSERIO**,

learned State Counsel appeared for the Respondent State.

As a court of first appeal I am obliged to re-examine and re-evaluate the prosecution case and thereafter to draw my own conclusions on the same [see **AJODE –VS- REPUBLIC [2004]2 KLR 81**].

The plant material allegedly recovered with the Appellant was produced in court as an exhibit – 24 rolls of dry plant material **Pexb1. PW1 PC. GABRIEL NYONGESA** told the court that he prepared an exhibit memo form and forwarded the exhibits to the Government Chemist for analysis. **PW4 JOHN NJENGA** a Government analyst received the exhibits and examined the same. He found the plant material to be Cannabis Sativa. He filled and signed his report which he produced in court as an exhibit **Pexb2**. There is therefore clear proof that the 24 rolls of plant material was indeed Cannabis Sativa which is a prohibited drug.

PW2 PC JOSPHAT MUREITHI and **PW3 PC WARIO WAKO** both testified that they were led by their informer to an open garage in Sparki where they found the accused preparing rolls of bhang for sale. Both **PW1** and **PW2** positively identify the accused as the person whom they found in that garage. On his part the accused does not deny that he was arrested by police on the material day. The evidence of the two witnesses was they found the accused engaged in preparing rolls of bhang. The offence with which the accused has been charged is that of trafficking. S. 4(a) of the Anti-Narcotics Act provides:

“Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable –

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition, to imprisonment for life”

(b)

The term trafficking is described in S. 2 of the Narcotics Act thus:

“trafficking” means 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 officer in respect thereof”

The Appellant was found **‘preparing’** the rolls from the stock of Cannabis which he had. The Appellant’s actions amounted to **‘storing’** or keeping a stock of Cannabis Sativa from which he was going about the business of preparing the rolls. I am satisfied therefore that the Appellant was found storing the Cannabis in line with the definition of trafficking given under S. 2 of the Act.

In his defence the Appellant alleged that the officers planted the Cannabis on him. There is no evidence that the Appellant was known to these officers before nor that there was any pre-existing grudge between them. Neither **PW1** nor **PW2** had any reason or motive to fabricate evidence against the Appellant. On the whole I am satisfied that the Appellant was properly convicted and that his conviction on the charge of trafficking was sound. I do hereby confirm the same. The Appellant was allowed an opportunity to mitigate after which sentence was imposed upon him. The sentence was lawful and I find no reason to interfere with it. I do uphold the sentence imposed upon the Appellant by the trial court. This appeal therefore fails in its entirety.

Dated and Delivered in Mombasa this 30th day of May 2011.

**M. ODERO
JUDGE**

In the presence of:

Mr. Ojode for Appellant
Mr. Onserio for State