



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

*(Coram: Ojwang J.)*

**CRIMINAL APPEAL NO. 265 OF 2009**

**- BETWEEN -**

**IRENE AKINYI ODIDI.....APPELLANT**

**- AND -**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of Senior Principal Magistrate Ms. L. Mutende dated 7<sup>th</sup> December, 2009*

*in Criminal Case No. 1523 of 2009 at Mombasa Law Courts)*

**JUDGMENT**

The appellant was charged with the offence of trafficking in narcotic drugs contrary to s.4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994).

The specific allegation was that the appellant, on **4<sup>th</sup> May, 2009** at Mariakani Weigh Bridge along the Mombasa-Nairobi highway, in Kaloleni District, within Coast Province, trafficked in narcotic drugs by transporting 300 rolls of **cannabis** with a market value of Kshs. 18,000/= in a motor vehicle, Registration No. KAX 290S, Daiko Bus, in contravention of the said Act.

The learned Senior Principal Magistrate, in her Judgment, recorded that when the bus on which the appellant was travelling from Nairobi was stopped at Mariakani, two bags suspected to contain dry plant material thought to be **cannabis** were recovered, and the appellant herein was identified as the

owner. When the bags were opened at the police station, and suspected **cannabis** recovered, the appellant was arrested and charged. In her defence, the appellant denied having been the owner of the luggage in which the plant material was found. While the bus conductor (PW1) testified that the appellant herein is the one who had entered the bus in Nairobi with the two bags in question, the driver (PW2) said he had not seen the appellant when she entered the motor vehicle. After administering caution to herself that PW1's evidence was that of a single identifying witness, the learned Magistrate formed the opinion which she thus recorded in the Judgment: "*The defence put up by the accused...failed to [disprove] the case put up by the prosecution.*" And the learned Magistrate came to the conclusion that:

***"The prosecution has therefore proved the case against the accused beyond doubt. She is guilty and convicted for the same accordingly".***

After treating the appellant herein as a first offender and taking her statement in mitigation, the trial Court imposed a fine of Kshs. 54,000/= or one year's imprisonment in default; and in addition, the Court sentenced the appellant to a nine-year term of imprisonment.

In the petition of appeal, the appellant stated as follows:

**(i) *the charge was defective;***

**(ii) *the appellant's evidence relating to identification was not duly considered;***

**(iii) *there was a discrepancy in the evidence given by prosecution witnesses in Court and to the Police;***

**(iv) *there was doubt in the evidence, which was not resolved in favour of the appellant herein;***

**(v) *the sentence imposed was manifestly excessive.***

On the occasion of hearing this appeal, on **5<sup>th</sup> April, 2011** learned counsel, **Mr. Magolo** appeared for the appellant, and learned counsel **Mr. Onserio** for the respondent; and **Mr. Onserio** began and stated that he would concede the appeal.

**Mr. Onserio** submitted that the conviction was not safe, as the bus in question had some 50 passengers, and the prosecution had not shown a ticket with particulars on the appellant's status on the material day; and there had been conflicting evidence on the seating position of the appellant; there had also been a contradiction as to the number of bags that carried the suspected cannabis; the bags were not tagged with seat numbers; it was possible for any passenger to lodge a bag into the common rack; there was no reliable evidence of identification; no fellow-passenger of the appellant had been called to testify. Counsel submitted that the evidence given by PW1 was in conflict with that of PW6, as regards the number of bags in question; and, though two persons were found sitting under the rack with the bags in question, only the appellant was charged. Counsel urged that the nexus between the appellant and the offending bags had not been established, and the conviction was unsafe. In these circumstances, it was urged, the appellant should be given the benefit of the doubt.

**Mr. Magolo** submitted that the conviction depended entirely on the evidence of one witness, the bus-conductor, who said he could identify the passenger who had entered with the bags in question. Counsel

posed a question: “*Suspect bags from Nairobi are discovered in Mombasa; how could the conductor remember this particular passenger and her baggage, when he could remember no other passenger with his or her baggage?*”

Counsel submitted that since there was a second person who was initially suspected but not charged, would there be a basis for not charging that other? **Mr. Magolo** submitted that it was for the **prosecution**, to clear all these doubts.

Counsel submitted that, though it was alleged that 300 rolls of cannabis had been found, no evidence had been adduced on how these had been **tested**; what was presented in Court was a **Khaki** envelope with 9 rolls, said to have been tested – yet these had no connection with the 300 rolls; and the said envelope was not produced in evidence. Counsel submitted that the charge had not been proved beyond reasonable doubt.

From the evidence and from the submissions of counsel, the thread linking the accused to the offensive stuff is feeble, and, in my opinion, does not represent the proof **beyond all reasonable doubts** that is required in criminal prosecution. PW1, in cross-examination says the appellant got into the bus with **three bags**, while **P.C. Omondi** (PW6) says he recovered **two bags**.

Counsel for the appellant has raised pertinent issues of evidence which show considerable doubt in the **identification** process, and in the whole proof tendered by the prosecution.

I have also noted, in the formulation of the Judgment, that the entry is on record that the appellant was expected “*to [disprove] the case put up by the prosecution*”. Such is not a requirement of the **criminal law**; all the accused is obligated to do is to **raise a doubt** in the prosecution case, and she thereupon wins an acquittal.

I conclude that no proof, for the purpose of criminal law, was effected against the appellant, and she should have been acquitted.

I hereby allow the appeal, set aside the conviction, and vacate the sentences imposed. The appellant if held in custody, shall be forthwith set at liberty.

*Orders accordingly.*

**DATED and DELIVERED at MOMBASA this 3<sup>rd</sup> day of June, 2011.**

.....

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Appellant: *Mr. Magolo*

For the Respondent: *Mr. Onserio*