



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 201 OF 2007

FARIDA KIRIGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(Appeals against the conviction and sentence by L. W. Gitari, Senior Principal Magistrate, at Nyeri in Nyeri Chief Magistrate's Criminal Case No.4464 of 2006 dated 6th August 2007)

JUDGMENT

Mariam Ali and **Farida Karigo**, the appellants herein, with two others were jointly tried on a charge of three counts. In count I the Appellants faced a charge of trafficking in narcotic drugs contrary to *Section 4 (a)* of the Narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994. In count II, the duo were accused of being in possession of any pipe or other utensil for use in connection with smoking, inhaling or sniffing or otherwise using herein or any utensil used in connection with the preparation of any narcotic drugs or psychotropic substances contrary to *Section 5(1) (d)* of the aforesaid Act. Count III relates to an offence in respect of the appellants' Co-accuseds. The case was heard and in the end the quartet were convicted on the relevant counts. In count I the Appellants were each ordered to pay a fine of Ksh.250,000 in default to serve 4 years imprisonment. In count II they were each ordered to pay a fine of Ksh.100,000/= in default to serve two (2) years imprisonment. The appellants being aggrieved each preferred an appeal. The appeals though not consolidated were heard together.

On appeal, the appellants put forward the following grounds in their respective petitions:

0. ***You Honour I pleaded not guilty t the charge.***
1. ***That I am the first offender.***
2. ***Your Honour we are in prison both me and my sister, and our parents are very old and they depend on us. They have nobody to care for their daily needs.***
3. ***Your Honour I beg for leniency because I have three children I left them with my old parents and they have already dropped out of school.***
4. ***Your Lordship accused No. 3 who was our witness told the court that the bhang was his and was found in his house, but the Learned Judge disregarded our witness.***
5. ***Your Honour the sentence of 10 years imprisonment is very harsh and excessive. I beg your honourable court to consider my appeal and set me at liberty.***
6. ***I wish to be present during the hearing of the appeal.***

When the appeal came up for hearing, Mr. Peter Muthoni, learned counsel for the Appellants argued one main ground which was to the effect that there was no sufficient evidence to sustain a conviction in counts I and II of the charge. Mr. Muthoni pointed out that there was no evidence that the Appellants were the owners of the premises where the bhang was found.

Mr. Makura, learned Senior State Counsel, was of the view that there was overwhelming evidence to sustain a conviction. He pointed out that there was evidence to show that the bhang was recovered from the Appellants' rented house.

The question which has been posed to this Court to determine is whether there was sufficient evidence to sustain a conviction. I will determine that question by re-evaluating the evidence tendered before the trial Court. The facts of the case appear to be short and straight forward. On 19th September 2006 Police Officers raided a home upon receipt of information that they were people dealing with narcotic drugs. The raid led to the recovery of 8 rolls of cannabis sativa. The Police also recovered four packets of rizlas papers and a roller. Those exhibits were forwarded to the government Chemist for analysis. The Government analyst gave a report showing that the plant material were cannabis sativa. The rizlas papers and the roller were found to be tools for making rolls of cannabis sativa. P.C. Michael Muthoka (P.W.2) told the trial court that the Appellants are sisters. He said that on 17th September 2006 he went and posed as a buyer and actually bought some bhang from the appellants. On 19th September 2006, P.W. 2 together with other Police Officers went to the appellants' home where they conducted a search and recovered the items I have hereinabove mentioned inside the Appellants' home. An inventory was prepared which the Appellants herein signed together with the Police. P.W. 2 took those samples to the government Chemist where they were examined by Patrick Nyaoke (P.W.1) and found the plant material to be cannabis sativa. Mariam Ali stated in her defence that she was outside her compound fetching water when Police arrived and ordered her to sit down. She claimed the police in company of the owner of the premises entered their house and when they came out they told them to accompany them to the Police Station. She claimed they were ordered to sign certain documents. Farida Karigo also gave a near similar story as that of Mariam Ali. After a careful reconsideration of the evidence of both sides, I believe the evidence of P.W. 2 that on 17th September 2006 he visited the home of the Appellants where he bought cannabis sativa from Mariam Ali. I further believe that on 18th September 2006 P.W. 2 bought the same stuff from Farida Karigo. I also believe the evidence of P.W. 2 that on 19th September 2006 the Police raided the home of the appellants and recovered cannabis sativa and that the appellants duly signed the inventory of the items recovered from their home. I am convinced the defence put forward by the Appellants is a make up story. I am convinced the evidence tendered by the prosecution proved the charges facing the Appellants in counts I and II beyond reasonable doubt. I am further convinced that the Appellants were found trafficking plant materials which were found to be cannabis sativa. I am also satisfied that it is safe to make an inference that the rizlas paper, roller and the pair of scissors were utensils for use in connection with smoking, inhaling, sniffing or in connection with the preparation of narcotic drugs or psychotropic substance. It is clear from my analysis that the appeals by the Appellants must be dismissed. I have been urged by the learned Senior State Counsel to correct the sentences. Let me start by pointing out that the default sentences meted out by the learned Senior Principal Magistrate are contrary to the provisions of *Section 28(2)* of the Penal Code. Under the aforesaid Section, the law prescribes that a default sentence of a fine not exceeding Ksh.50,000/= shall not exceed twelve months. In Count I the Appellants were each ordered to pay a fine of Ksh.250,000/= in default to serve four (4) years imprisonment. In count II the duo were each ordered to pay a fine of Ksh.100,000 in default to serve two(2) years imprisonment. The aforesaid default sentences must be set aside which I hereby order and substitute the same with one of eight (8) months. Mr. Makura has also urged this Court to correct the sentence to conform with that provided for under *Sections 4 (a) and 5 (i) (d)* of the narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994. I have carefully considered the aforesaid arguments and I think there is merit in Mr. Makura's submissions. Under *Section 4 (a)* of the aforesaid Act, the convicting Court is enjoined to fine the convictee a sum of Ksh.1,000,000/= or an amount which is three times the market value of the Narcotic drug or the Psychotropic Substance whichever is greater and in addition to pronounce sentence of life imprisonment. It would appear from a careful reading of the aforesaid provision that the law envisages that the minimum fine to be imposed is Ksh.1,000,000/= where the market value is less or where the market value is not

stated. In the case before this Court, the street value of the narcotic drug or Psychotropic substance the Appellants were alleged to have trafficked is given as Ksh.80/=. It is obvious the aforesaid figure is lower than the minimum prescribed by law. With respect, I agree with Mr. Makura that the sentence should be corrected in respect of Count I under *Section 354* of the Criminal Procedure Code. Consequently the order imposing a fine of Ksh.250,000/= is set aside and is substituted with a fine of Ksh.1,000,000/=. The law further requires that an additional jail term of life imprisonment be imposed. The trial Magistrate did not take that into account. That error can too be corrected under *Section 354* of the Criminal Procedure Code. In addition to the fine of Ksh.1,000,000/= I order that the duo each be sentenced to serve five (5) years imprisonment. In count II, the law prescribes a maximum fine of Ksh.250,000/= under *Section 5(1)(d)* of the Narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994 or 10 years imprisonment. In this regard the trial Magistrate ordered the Appellants each to pay a fine of Ksh.100,000/=. I think the trial Magistrate cannot be faulted in her sentence in Count II save for the default sentence.

In the final analysis, the appeals as against conviction are dismissed. However, the orders on sentences are altered to conform with the law in the following terms:

The fine of Ksh.250,000/= imposed in Count I is set aside and is substituted with an order directing each Appellant to pay a fine of Ksh.1,000,000/= in default to serve ten (10) months imprisonment. In addition to the order of fine, the Appellants to each serve five (5) years imprisonment. The fine of Ksh.100,000/= imposed in Count II shall remain save that the default sentence of two (2) years imprisonment is hereby set aside and is substituted with that of eight (8) months imprisonment.

Dated and delivered at Nyeri this 1st day of November 2011.

J. K. SERGON
JUDGE

In open court in the presence of Miss Ngalyuka for the State. The Appellants present in person. No appearance for P. Muthoni Advocate.