REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 107 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 775 of 2011 of the Chief Magistrate's Court at Mombasa – R. Mutoka, CM)

MARY WAMUHU THAIRU …….....…….....……. APPELLANT

- Versus -

REPUBLIC…….....…….....… RESPONDENT

JUDGMENT

Mary Wamuhu Thairu appeared before The Chief Magistrate, Mombasa on 7th March 2011 and was charged with the offence of trafficking in Narcotic Drugs contrary to Section 4(a) of The Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994 (hereinafter the Act). She was tried and convicted of the offence and sentenced to a prison term of 10 years plus a fine of Kshs. 300,000/- (*three hundred thousand*) and in default to serve 1 year imprisonment.

Aggrieved by both the conviction and sentence, the appellant has preferred this appeal on the following grounds-

1. That the Learned Trial Magistrate erred in law and fact in proceeding with and reaching a finding based on a charge that was defective.
2. That the Learned Trial Magistrate erred in law and fact in finding that indeed what was recovered was cannabis sativa and in proceeding from the premise that the issue was not in dispute.
3. That the Learned Trial Magistrate erred in law and fact in relying without question on the evidence of the two arresting officers.
4. That the Learned Magistrate erred in law and fact in proceeding to convict the Appellant of the charge laid, while the evidence showed something different.
5. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's defence without justification.
6. That the Learned Trial Magistrate erred in law in failing to give the Appellant the benefit of doubt.
7. That the sentence was manifestly excessive."

At the hearing Mr. Magolo represented the appellant and Mr. Jamii the State. Mr. Jamii opposed the appeal and in fact sought an enhancement of sentence. At that point the court warned the appellant that this Court can, applying Section 354(3) (b) of the Criminal Procedure Code, in appropriate circumstances increase sentence. The appellant nevertheless chose to press on with the appeal that possibility notwithstanding.

The facts of this case do not present any difficulty. PW1 and PW2 are police officers. Acting on a tip-off they visited the home of the appellant. They found the appellant standing in her compound behind her gate. That she was taken aback by the visit. She held her hands at her back and was hiding something. PW1 and PW2 went in and found that she was hiding a black nylon bag. Inside it were rolls of dry plant material. These were later analyzed by a Government Analyst and were found to be cannabis as included in the first schedule of the Act.

On her part, the appellant recalls the visit of PW1 and PW2. That they asked to search her house and conducted the search. That later one of them had a nylon bag and claimed it was cannabis sativa recovered from her house. That she was framed and is innocent.

Mr. Magolo argued grounds 1 and 4 together. I propose to start there. The appellant was charged with an offence under Section 4(a) of The Narcotic Drugs and Psychotropic Substances (Control) Act which reads as follows-

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

On the evidence, this court does not find any reason to depart from the finding of the learned Magistrate that the appellant was found in possession of 30 rolls of cannabis sativa on 5th March, 2011. The court, however, does have some difficulty with the question posed by the learned Magistrate as the issue for determination. This is what the learned Magistrate said-

"the only issue that I need to address is whether the narcotic drugs recovered belonged to and was found in the possession of the accused person." (emphasis mine)

The appellant faced a charge of trafficking which is defined, in Section 2(1) of The Narcotic Drugs and Psychotropic Substances (Control) Act as follows-

"trafficking' means the importation, exportation, manufacture, buying, sale, giving, supplying, storing … 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."

In the particulars of the offence it was alleged that the appellant was found trafficking by storing 30 rolls of cannabis. The evidence of PW1 and PW2 is that they found the 30 rolls on the person of the appellant and that she was at home. They were both unequivocal that they never searched her house. The evidence is that the appellant possessed 30 rolls of cannabis on her person. What should have become an issue for the court to determine at that point was whether the appellant was a possessor or a trafficker of the drugs.

The word "***store***" is not defined in the Act, but I would think that it needs to be construed in its natural meaning. The concise Oxford English Dictionary, 11th Edition defines it to mean (*as is relevant*)-

"(1) quantity or supply kept for use as needed (ii) a place where things are kept for future use or sale."

To demonstrate the offence of trafficking by storing the prosecution needs to prove that the accused person was keeping the outlawed drugs or substances for purposes of participating or aiding or helping or complementing or facilitating in its trade, or in the chain or process of trafficking. This would include, but may not be limited, to importation, exportation, manufacture, supply, administration, conveyance, delivery or distribution of the narcotic drug. The quantity of the drug kept or the frequency in which the accused deals with it may be proof of the offence. Each case will have to be considered in its own circumstances. In the matter before this court it was not proved that the appellant was keeping the 20 rolls of bhang for trade or some other active process. See the decision in **Nrb Criminal Appeal No. 412 of 2007 John Maina Kamunya –Vs- Republic** in which Justice J. B. Ojwang (*as he then was*) held that-

"Storage itself would, in my opinion, only give the impression of possession, unless it was shown that

the act of storage was related to a more active process, such as commercial transactions, or delivery to some place or places."

It would seem that the appellant committed an offence under Section 3(1) of the Act which makes it an offence to be in possession of any Narcotic Drug or Psychotropic Substance. She should have been charged and/or convicted of this offence. I shall return to this shortly.

On Ground 2 of the appeal, Mr. Magolo argued that there was no proof that the substance recovered from the appellant was cannabis sativa. In his view that report of Government Analyst was received in evidence in contravention of Section 33 of The Evidence Act as it was not produced by the maker. Counsel relied on the Decision of Justice D. A. Onyancha in **Mbsa Criminal Appeal No. 214 of 2001 Fahim Salim Swaleh –Vs- Republic** and more specifically the following passage-

"The provisions of Section 77 must therefore be read together with the provisions of Section 33 and other relevant sections of the Evidence Act where such may apply. Under Section 33, statements written or oral, of admissible facts made by persons whose attendance inter alia, cannot be produced or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to be unreasonable, are themselves admissible when such a statement among other conditions, was made in the discharge of a professional duty such as was the case herein. It is however now an established practice and law that before the court admits such a statement (which in this case, is the Government Analyst report) it has to be satisfied that the necessary conditions for such admission have been proved on the court record."

With respect, I see it differently. Section 77 of the Evidence Act, as I read it, provides that courts will generally admit reports of Government Analyst without requiring the maker of the document to produce it. The court will do so without enquiring as to why the maker cannot attend court. Nevertheless the court acting on its own motion or at the insistence of an objecting party may summon the analyst to tender evidence on the report. The sense in this provision is, partly, that it would be a harcules task to require the few Government Analyst to attend courts to produce each and every of the numerous documents they make. I find comfort in that Justice D. A. Onyancha, again, considering the same Section more recently in the case of **Busia Criminal Appeal No. 53 of 2009 Samson Omollo Otieno –Vs- Republic** had this to say-

In my understanding of the above the provision thus gives way to any challenge being raised by the accused person on the said presumption. In the absence of any such challenge the presumption of authenticity stands. The trial court is however, suo motto or by request of the accused person, given discretion to call for the maker of such document to appear in court and be cross examined on the form and content of the report or document."

Even more assuring is that the Court of Appeal has emphatically held that Section 77 of the Act is not subject to Section 33 and may be acted upon independently by the court (**Criminal Appeal No. 78 of 2004 Joseph Odhiambo Oyiendu –Vs- Republic**. The appellant never objected to PW3 a police officer at Bamburi Police Station producing the report of the Government Analyst. The report was properly received in evidence. The Government Analyst found the substance in possession of the appellant to be cannabis.

Also, in respect to the prosecutions or proceedings under the Act Section 67 thereof provides a special regime for admissibility of reports by duly qualified analyst – see Section 67(1) and 67(2) of the Act-

"(1) The Minister, in consultation with the Minister for the time being responsible for matters relating to health, may from time to time by notice in the Gazette designate any duly qualified analyst whose qualification shall be prescribed by the Minister for the purposes of the Act.
(2) In any prosecution or other proceedings under this Act a certificate signed or purported to be signed by an analyst, designated under subsection (1), stating that he has analysed or examined any substance and the result of his analysis or examination, shall be admissible in evidence and shall be prima facie evidence of the statements contained in the certificate and of the authority of the person

giving or making the same, without any proof of appointment or designation or signature."

This court is aware that George Oguda who made the report that was produced at the trial was duly designated an analyst for purposes of the Act by The Minister of Health via Gazzette Notice No. 1837 dated on 11th March 2005 and published on 18th March 2005. So whether under Section 77 of The Evidence Act or Section 67 of the Act, the Government Analyst report was properly admitted into evidence.

The appellant also argues against the conviction on the ground that the police informer was not called to give evidence. The prosecution chooses the persons to call as witnesses. The courts will not question the exercise of this prerogative unless it is shown that the prosecution has exercised it to surpress the truth or for some oblique motive. The evidence of the three prosecution witnesses called corroborates each other and is consistent. That evidence was sufficient to prove that the appellant was found in possession of 30 rolls of cannabis. It was not suggested by the appellant that the prosecution was ill-motivated in not calling the informer as a witness.

Finally on conviction, the learned Magistrate in her judgment considered the appellants defence and rejected it. The Magistrate found no merit in the Appellants averment that PW1 and PW2 framed her. The trial court was entitled to make this finding in the face of overwhelming evidence by the prosecution witnesses.

Although this court will eventually quash the conviction on the charge under Section 4(a) of the Act, the arguments made by Mr. Magolo on sentence deserves some discussion. The appellant argues that the sentence is not only harsh but also illegal. Harsh because the trial court considered extraneous matters before arriving at a custodial sentence and illegal because the fine was imposed without proof of the value of the prescribed drug. A person convicted under Section 4(a) of the Act is liable to-

"… a fine of one million shilling or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater and in addition to imprisonment for life."

This Section is clear enough. On the jail term a convictee is liable to a maximum sentence of life imprisonment. On the fine the trial court can impose a fine of one million shillings or treble the market value of the drug or substance whichever is the greater.

Section 329 of The Criminal Procedure Code allows a sentencing court to receive such evidence as it seems fit in order to inform it as to the proper sentence to pass. But it must not receive extraneous or unproved evidence. There is merit in Mr. Magolo's argument that the pre-sentence probation report contained extraneous and unproven allegations which were prejudicial to the appellant. Nevertheless looking at the possible maximum sentence of life imprisonment this court would not have interfered with the jail term of ten years imposed if it were to uphold the conviction.

On the fine, the valuation of the drug or substance is essential where the treble value of the drug or substance as stated in the charge sheet is in excess of one million shillings. In the instant case the appellant was charged with trafficking by storing drugs with a street value of Kshs. 2,400/-. The value, three times over, falls way short of Kshs. 1,000,000/-. For that reason the Magistrate could only impose a maximum fine of Kshs. 1,000,000/- and a valuation was therefore unnecessary. The fine imposed was Kshs. 300,000/- and would therefore be lawful even without specific proof of the market value of the cannabis. Where however, the valuation is necessary Section 86 of The Act is of utmost importance. That Section provides as follows-

"Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof."

I am in complete agreement with the statement of the Court of Appeal **Nrb Criminal Appeal No. 84 of**

2004 Priscilla Jemutai Kolongei –Vs- Republic (UR) in respect to that Section when it said as follows-

"We think the enactment of that Section was an obvious recognition of the difficulty in the availability of first hand knowledge of what a willing seller would accept from a willing buyer for goods such as narcotic drugs which are illegal. The certificate remains prima facie evidence which may be challenged by other evidence, in the absence of which it is the only evidence to be relied upon in addition to any other evidence on record."

Now then, the Court finds that on the evidence the appellant is not guilty of the offence of Trafficking by Storing Contrary to Section 4(a) of The Act. But should the appellant be set at liberty? The facts prove that the appellant was in possession of cannabis in a manner that contravened Section 3(1) of the Act. This is a suitable case for invoking Section 179(2) of The Criminal Procedure Code. This court quashes the conviction for the offence under Section 4(1) of The Act and substitutes it with a conviction under Section 3(1) of The Act. The sentence of 10 years imprisonment and fine of Kshs. 300,000/- are hereby set aside. The fine should be refunded, if paid.

Sentence in respect to an offence under Section 3(1) of the Act is provided under Section 3(2) (a) as follows-

"in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years."

The appellant is a grandmother of 51 years. Although remorseful in her mitigation before the trial court and although treated as a first offender she owes it to the generations that follow her to provide a good example. This she has failed. All factors considered the appellant is sentenced to a prison term of one (1) year effective from the 26th April 2011 when she was wrongly convicted in the Subordinate Court.

Those are my orders.

Dated and delivered at Mombasa this 19th day of December, 2011.

F. TUIYOTT
JUDGE