REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 71 OF 2010

(From original conviction and sentence in Criminal Case No. 48 of 2009 of the Chief Magistrate's Court at Nakuru - J. G. Kingori {S.P.M.})

JANE MWIHAKI JUMA alias WANJIRU…….....
…….APPELLANT
VERSUS

REPUBLIC…….…....
……RESPONDENT

JUDGMENT

The Appellant was charged with the offence of trafficking in a narcotic drug contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act 1994 (No. 4 of 1994). On the evidence she was found guilty convicted, and sentenced to a fine of Kshs 1.0 million and ten (10) years imprisonment. Aggrieved with both her conviction and sentence she has appealed to this court on six grounds namely -

*1. THAT the Learned Magistrate erred in law and fact in convicting the appellant even when the prosecution had failed to prove **mens rea** on the part of the appellant and/or failed to discharge the burden of proof fully and satisfactorily.*

2. THAT the Learned Magistrate erred in law and fact in determining the matter against the weight of evidence and/or on framed-up evidence whereby relevant witnesses who were present at the locus of arrest were not called to testify.

3. THAT the Learned Magistrate erred in law and fact in failing to give sufficient cognizance and recognition to the Appellant's reasonable defence.

4. THAT the Learned Magistrate misdirected himself when he gave weight to admissions made out of Court by the Appellant and which admissions tended to prove her guilt and thereby arriving at wrong conclusions.

5. THAT the Learned Magistrate erred in law and fact by failing to find that the evidence of exhibits produced was unconnected and filled with irregularities and therefore unsafe to convict the Appellant.

6. THAT the Learned Magistrate erred in law and fact in imposing upon the Appellant a sentence that was not only harsh and manifestly excessive but also invalid on the one part.

The Appellant was represented by Mr. Kanyi Ngure while Mr. Nyakundi Senior State Counsel represented the State, and opposed the Appeal.

The issues raised by the Appeal may be summarized into-

(1) whether an issue of mens rea arises on the charge of trafficking in narcotics drug or other psychotropic substances under the Narcotic Drugs and Psychotropic Substances (Control) Act 1994 (No. 3 of 1994),

(2) whether there was evidence to convict the appellant,

(3) whether the Appellant's evidence was considered by the trial court,

(4) whether the sentence was harsh or manifestly excessive.

The other issues raised are subsumed into those issues. The submissions by respective counsel will appear in the subsequent passages of this judgment.

Of mens rea and the charge of trafficking in Narcotic Drugs

The expression *mens rea* literally means *"guilty mind"* or *"wicked mind"*, or more accurately *"criminal intention, or an intention to do the act which is made penal by statute or by the common law"*, **ALLARD VS SELFRIDGE LTD [1925] 1KB 129**. It is the so-called *"fault element"* of an offence. It may include also recklessness relating to circumstances and consequences of an act which comprise the *"actus reus"*. The *"actus reus"* is the outward conduct, its results and surrounding circumstances. For instance the *actus reus* of false imprisonment is X's unlawful restraint of Y. Sometimes the *actus reus* may merely be a *"situation"* offence, for example a road traffic accident. Or again as Mr. Nyakundi aptly pointed out in his submission, it is an offence to possess a firearm or ammunition without a licence therefor. Possession of such a prohibited item is the *actus reus*. It has nothing to do with the condition of the mind.

In the English case of **REGINA (R) vs. TAAFFE [1984]1 ALL ER 747**, the Appellant was charged under Section 170(2) of the Customs and Excise Management Act 1979*(of the United Kingdom)* of being -

"Knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug".

Lord Lane CJ construed the subsection under which the respondent was charged as creating an offence not of absolute liability but one of which an essential ingredient is a guilty mind. To be *"knowingly concerned"* meant in his judgment *"knowledge not only of the existence of a smuggling operation but also that the substance being smuggled into the country was one the importation of which was prohibited by statute."* In that case the Respondent thought he was concerned in a smuggling operation but believed that the substance was currency, the importation of which was not subject to any prohibition.

The earlier English case of **R (REGINA) vs. HUSSAIN [1969]2 ALL ER 1117** concerned the construction of S. 304(b) of the word *"knowingly"* used in the English Customs and Excise Act 1952 and also concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place.

If, therefore, an accused knows that what is on foot is the evasion of a prohibition against importation and he knowingly takes part in the operation, that is sufficient to justify his conviction, even if he does not know precisely what kind of goods are being imported. It is essential that he should know that the operation with which he is concerning himself is an operation designed to evade the prohibition and evade it fraudulently.

Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act 1994 (No. 4 of 1994) is unlike either S. 304(b) of the Customs and Excise Act 1952, or Section 170(2) of the Customs and Excise Management Act 1979. It says -

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

(b) .."

The essence of the offence is *"trafficking"* of a narcotic drug or psychotropic substance, not *"knowledge"* of trafficking *"trafficking"* means - *"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 any offer in respect thereof …"*

The question here is not that the Appellant held out or represented the narcotic drug or psychotropic substances. The charge here is one of conveyance. The charge sheet is clear. The Appellant ***"trafficked in 20.6 kgs of cannabis sativa with a street value of Kshs 20,000/= by transporting No. KBD 726 D, Toyota Hiace Matatu in contravention of the Act."***

The issue to be proved here is whether the Appellant trafficked in the narcotic drug or psychotropic substance. Counsel for the Appellant contended that the Appellant did not do so, that there was no evidence that the two carton boxes which contained the cannabis sativa did belong to her, and not one Wanjiru from whom she allegedly bought the ticket, and who Counsel said, was not called to testify. With respect, I do not agree with counsel for the Appellant.

The evidence of PW2 the driver of the matatu was clear. The Appellant gave the two boxes to be loaded in the matatu at Eldoret. It was day time. The vehicle carried eleven passengers. The other luggages were suit cases. The driver knew which luggage belonged to which passenger. There was no mistake.

The Appellant sat with the driver (PW2) at the front in seat No. 1. When the vehicle was stopped and searched at Kiamunyi near Nakuru, PW2 said without hesitation that the luggage belonged to the Appellant. The Appellant acknowledged that the boxes were hers. The motor vehicle was photographed together with the cartons which photographs were produced as exhibits at the trial. The two carton boxes were on a search found to contain cannabis sativa. The Government Analyst (PW1) certified that it was cannabis sativa, a narcotic drug under the First Schedule to the Act.

I do not also think that the case of **ANZWENI KADIMALA VS. REPUBLIC [2006]eKLR** is of much assistance to the Appellant.

In that case, the Appellant shared the house with her husband. She was charged alone, nor was the husband called as a witness. My brother Hon. D. Maraga J., held that with the omission to charge the husband or call him as a witness, it could be conclusively held that the narcotic drug could also have belonged to the husband.

The case does not also help her because there were eleven passengers and she was singled out. Every other passenger had his/her own luggage. PW2 testified that this is luggage the Appellant gave to

him to load into the boot-compartment of the matatu. The issue that luggage did not belong to her did not arise. The claim must therefore fail.

Of a mix-up

On the question of custody of the narcotic drug, I do not think there was any mix-up of the samples taken form the appellant's stuff, and any other. The evidence of PW5 (Cpl. Bonface Mwanyasi) searched and found the narcotic drug. Cpl. Jane Andanyi (PW4) took the samples to the Government Analyst, the number of days taken is not an issue as there is a clear chain of handling. This ground too fails.

Of Inadmissible Evidence

With tremendous respect to counsel for the Appellant, there was no confession recorded from the appellant. The case of **JOSEPH NJARAMBA vs REPUBLIC (1982-1988)1 KAR 1165** is really of no assistance to the Appellant. What is a *"confession"* in law? It is in my view a concession or admission of the truth of a statement, or agreement. It may also in context, mean, an acknowledgement before a proper authority of the truth of a criminal charge.

In a routine Traffic Police Check, one is asked to identify one's luggage, and a passenger points at his luggage or nods that that is his luggage is not a confession or admission of the truth of the fact that the luggage belongs to the passengers who says it is his. At that stage, the proper authority or Traffic Police officer is not investigating any criminal charge, he is merely engaged in the onerous duty of detecting and preventing crime. If he detects one, then the question of an *"admission"* amounting to a *"confession"* may arise, and the provisions of Section 25A may then come into play. Clearly here the evidence of either PW2 or PW3 that the Appellant admitted the boxes were hers, were merely statement of fact that were made on a routine inquiry and practice in travel in our roads.

If on the other hand upon discovery of the cannabis sativa, the officers asked the Appellant whether the contents were hers, and she admitted they were, that would be a confession to a criminal charge, for conveyance of such narcotic drug or psychotropic substance is illegal. At that stage then provisions of Section 25A of the Evidence Act apply. That stage had not been reached in the evidence both PW2 and PW3. The contention to the contrary therefore fails.

Of whether the Appellant's Evidence was taken into account

The Appellant's evidence consisted of an unsworn statement the veracity of which could not be tested by any cross-examination. However if a comparison is made between the Appellant's unsworn statement and the evidence adduced by the prosecution, it is clear that the unsworn statement is quite a contradiction of the evidence of PW2 that it was the Appellant who handed over the boxes to PW2 at Eldoret, and it is the Appellant who also acknowledged that the boxes were hers when asked by PW3. It is quite clear from the evidence of PW3, PW4 and PW5 that there were no threats against PW2 by any of those witnesses. The Appellant's assertion that PW2 was threatened by the officers has absolutely no basis. On the contrary the learned magistrate took account of the appellant's statement and concluded that the two cartons in which the cannabis sativa were contained, belonged to her. I agree with that finding, and have no reason for holding otherwise.

Of whether the sentence was harsh

The punishment for the offence of trafficking by conveyance of a narcotic drug …. is either a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is greater, and, in addition, to imprisonment for life.

In my view, the primary punishment here is a fine of Ksh one million, or if the market value is greater than that sum, then the fine is or becomes three times the market value. So if the market value is Kshs 1.0 million, the fine becomes Kshs 3.0 million, because the market value cannot be lower than the minimum punishment of one million, and, *(conjuction),* to a term of life imprisonment.

The charge equates *"market value"* to a *"street value"*. So if the *"street value"* dictates the market value, then the sum of Kshs 20,600/= as the market value is much less than the minimum fine of Kshs 1.0 million. The trial court was correct in imposing the fine of Kshs 1.0 million. I uphold that fine. As there is no provision for default term the trial court exercised its discretion, to impose a term of one year. The conjunctive term of 10 years is compulsory. There is no discretion. I have no cause to interfere with it.

In all, I find no merit in this appeal. It is dismissed. That is the order of the court.

Dated, signed and delivered at Nakuru this 15th day of October 2010

M. J. ANYARA EMUKULE
JUDGE