



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 316 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 3947 of 2009 of the Chief Magistrate's Court at Mombasa: L. Mutende – S.P.M.)

MARGARET ACHIENG NYAMBERE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **MARGARET ACHIENG NYAMBERE**, had been charged before the lower court with the offence of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT, 1994**. The particulars of the offence were as follows

“On the 7th day of December 2009 at Burukenge area in Mombasa District within Coast Province, trafficked in narcotic drugs by selling 17 big rolls of cannabis with a street value of Kshs.3,400/- in contravention of the said Act”

The Appellant's trial commenced on 11th January 2010 and the prosecution led by **CHIEF INSPECTOR NDUBI**, called a total of four (4) witnesses in support of their case. At the close of the prosecution case the Appellant was found to have a case to answer and was placed on her defence. She gave an unsworn defence in which she denied the charge and called one (1) witness in support of her defence.

On 23rd June 2010 the learned Senior Principal Magistrate delivered her judgement in which she convicted the Appellant of the charge of Trafficking and imposed upon her a fine of Kshs.10,200/- in default six (6) months imprisonment and in addition sentenced the Appellant to serve ten (10) years imprisonment. The Appellant being dissatisfied with both her conviction and sentence filed this present appeal.

MR. MAGOLO, Advocate appeared and argued the appeal on behalf of the Appellant whilst **MR. ONSERIO**, State Counsel informed the court that he would be conceding the appeal.

I have myself carefully perused the record of the proceedings before the lower court. The plant material allegedly recovered inside the Appellant's house was produced before the lower court as an

exhibit **Pexb1**. **PW3 GEORGE LAWRENCE OGUDA**, the Government analyst, testified that he examined the 17 rolls and found them to be Cannabis Sativa, a prohibited drug. He produces his report to this effect as an exhibit **Pexb4**.

The two police officers **PW1 PC LAWRENCE MUTISYA** and **PW4 PC DAVID MWITA** both testified as to how acting on a tip-off they searched the Appellant's house and recovered the 17 rolls hidden behind a curtain. Both witnesses positively identify the Appellant as the lady they found inside that house.

The Appellant was charged with the offence of '**Trafficking**' contrary to S.4(a) of the Narcotics Act 1994. The word trafficking is defined in S. 2 of the same Act as follows

“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”

The particulars of the charge indicate that the Appellant ***“trafficked in narcotic drugs by selling (my emphasis) 17 big rolls of Cannabis”***. The particulars therefore imply that the Appellant was caught in the act of '**selling**' the Cannabis. This is not borne out by the facts. Neither **PW1** nor **PW4** state that they found the Appellant selling anything let alone the rolls of bhang. She was found seated inside her house and the 17 rolls were found hidden behind the curtain near a wall. There is no suggestion that the Appellant attempted to make a sale to either **PW1**, **PW4** or to any other person. This act of 'selling' as alleged in the particulars of the charge was not proved as against the Appellant at all.

In her judgement the learned trial magistrate considered the fact of recovery of Kshs.1,200/- in the Appellant's house to suggest evidence of selling. With respect I do not agree. Kshs.1,200/- is a small sum of money which the Appellant could quite reasonably have had in her possession for normal household use. The Appellant's possession of this amount of money is not in itself suspicious at all. The existence of this money in her house has not in any way been shown to have been connected with the Cannabis. No nexus is shown to exist between the two.

I note that in her defence the Appellant claimed that **PW4** had vowed to '**fix her**' for spurning his advances to her. I feel that the trial magistrate did not give due weight and consideration to this defence bearing in mind the fact that it was properly corroborated by **DW2 ELIZABETH WANGOI MWANGI**, the Appellant's landlady who confirmed that the Appellant had told her of these advances as well as the threats by **PW4**.

On the whole I find that the evidence adduced in the lower court was at variance with the allegation of trafficking by '**selling**' contained in the charge and particulars. At the very most the Appellant could have been held to have been in '**possession**' of the Cannabis. No charge of possession was brought against her. I am not satisfied that the Appellant's conviction was sound and I do hereby quash the same. The subsequent sentence is also set aside. This appeal succeeds. The Appellant to be set at liberty forthwith unless she is otherwise lawfully held.

Dated and Delivered in Mombasa this 9th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO
JUDGE

9/11/2010