



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 210 of 2006

(From Original Conviction and Sentence in Criminal Case No. 249 of 2006 of the Senior Resident Magistrate's Court at Taveta – J.M. Githaiga Esq., SRM)

ZAINATI HAJI KUPASA APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The appellant, Zainati Haji Kupasa, was charged in the Senior Resident Magistrate's Court, Taveta, with trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994. The particulars of the charge were that on the 22nd day of April, 2006 at about 7.15 p.m. at Taveta Town Bus stage within Taita Taveta District of the Coast Province, jointly with two other persons trafficked in narcotic drugs by conveying 312 kilogrammes of cannabis sativa (bhanga) with a street value of Kshs. 264,000/= in contravention of the said Act. After a full trial, she was convicted as charged and sentenced to pay a fine of Kshs. 500,000/= and in default to serve 5 years imprisonment. She has appealed to this court against both conviction and sentence.

The prosecution case in which the appellant was implicated was based on the evidence of Fredrick Otieno Choli (P.W.1) and Jackson Nzomo (P.W.2). According to the facts as found by the trial magistrate –

“The prosecution case was that on 22nd April, 2006, Fredrick Otieno Choli (P.W.1) and Jackson Nzomo (P.W.2) were loading luggage onto a lorry at the Taveta – Malindi stage when the third accused took 6 sacks (Exhibit 1) containing what appeared to be bananas to the stage. The sacks were bearing the name “ADIJA” marked on them. The 3rd accused instructed loaders at the stage to ensure the luggage was packed in a vehicle that would transport them from Taveta to Malindi. She was asked about the contents of the 6 sacks but she claimed she did not know as the luggage was entrusted to her by an undisclosed person. She was asked to open the sacks whereupon she pretended she was going to get or point out the owner of the luggage and escaped from the scene where the luggage was. P.W.1 Fredrick Otieno Choli and other loaders checked inside the 6 sacks and noted bhanga hidden therein ...”

In her defence, the appellant, who was the third accused at the trial, took oath and testified that she was selling tomatoes near the bus stage in the evening of 22nd April, 2006 when some loaders claimed she knew something about some sacks that were suspected to contain bhanga. She denied having instructed anybody to load the sacks which also contained bananas onto any vehicle. She explained how she was arrested and charged after 2 civilians pointed out her home to Police Officers.

In his judgment, the learned trial magistrate said of the appellant, inter alia –

“... There is little doubt the 3rd accused took 6 sacks containing bananas to the Taveta – Malindi vehicle stage on 22nd April, 2006 ... In her sworn statement she did not dispute she was at the scene where the luggage loaders suspected to contain bhang was found in the evening of 22nd April, 2006. It is clear that in the luggage the 3rd accused took to the stage were found plant material ... which was confirmed ... to be cannabis sativa.”

In his evidence in chief, Fredrick Otieno Choli said that he went to get onions from the other side of town, and when he returned, he found some luggage near the lorry, and the 3rd accused told him it was her property. When he asked her what was in the sacks, she did not answer but left the scene telling him that the luggage had been entrusted to her by her customer whom she did not name. She claimed she did not know what was in the luggage.

Just about then, the 2nd accused appeared and told the witness that the luggage in the 6 sacks was his property and that he wanted it. In cross-examination by the 2nd accused, he responded –

“You claimed the luggage was your property. You purported to be a police officer and then also claimed the luggage was yours. I did not scream when you said the bhang was yours because that was the same time when police officers arrived and you ran away ... You said the bhang was yours.”

The prosecution witness was very emphatic that the second accused had owned up to being the owner of the bhang.

The second accused was also reported by P.W.3, Florence Riziki, to have threatened to kill some loaders at Taveta Market who had caused his luggage worth Kshs. 200,000/= to be taken by police.

In his own evidence, P.W.2, Jackson Nzomo, testified that the 3rd accused claimed that the person who entrusted the luggage to her was a tenant in a nearby house. She said she was to take of the bhang. Read against her other statement that she did not know what was contained in the 6 bags, this statement from P.W.2 ought to be taken within caution. It is possible that she may not have known what was contained in the bags.

From the above evidence, it seems that accusing fingers were directed mainly at the 2nd accused. He is said to have stated that the six bags were his property. There is a suggestion by the learned trial magistrate that the appellant brought the 6 bags to the bus stage. But the direct evidence by P.W.1 is to the effect that he found the luggage near the lorry. He did not say who brought the luggage there. It may be she brought it, but that does not come out directly from the evidence. And since the learned trial magistrate said that there was little doubt that the third accused took the 6 sacks to the vehicle stage, then the appellant ought to have been given the benefit of that doubt.

In spite of some damning evidence against the 2nd accused, he was acquitted. In acquitting him, the trial magistrate said –

“In view of the vigorous defence he mounted, and circumstances of this case, the court gives him the benefit of doubt on the 1st count. He is found not guilty and acquitted.”

If by this statement the court meant that one will be acquitted if one vigorously defends oneself, that it is improper. In our system of criminal justice, everyone is presumed innocent until proved guilty beyond reasonable doubt. The onus of proof is always on the prosecution to prove the case beyond reasonable doubt. That burden never shifts back to the accused, and if there is a reasonable doubt, it must be given to the accused and the accused must be acquitted.

In the instant case, the appellant put up a feeble defence compared to the vigorous one mounted by

the 2nd accused. And yet it was the 2nd accused who was heavily incriminated and who was alleged to have claimed that the luggage was his. Given the evidence of P.W.1, P.W.2 and P.W.3 about the 2nd accused claiming to own the bhang consignment in the 6 sacks, and the lack of direct evidence that the 3rd accused brought the luggage to the stage, there is a doubt that the appellant was guilty as charged. There is suspicion that she may have been involved, but no matter how strong suspicion may be, it cannot form the basis of a criminal conviction.

For these reasons, I give the appellant the benefit of doubt and allow her appeal. The conviction against her is hereby quashed and the sentence set aside. She is accordingly released forthwith unless otherwise lawfully held. It is so ordered.

Dated at Mombasa this 20th day of May, 2008.

L. NJAGI

JUDGE