REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 78 & 79 of 2005

EVALINE WANGARI NJERI ……..…..……...…1st APPELLANT

JOYCE MICHAEL BARNABA…….2nd APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

J U D G M E N T

The two appellants Evaline Wangare Njeri and Joyce Michael Barnaba were convicted by the Senior Resident Magistrate, Voi for the offence of trafficking narcotic drugs under Narcotic Drugs and Psychotropic substances (Control) Act No. 4 of 1994. They were each sentenced to serve 18 years imprisonment plus a fine of Kshs.1,000,000/- each in default to serve three (3) years imprisonment. Being aggrieved the appellant each filed an appeal which appeals were consolidated at the instance of the Attorney General. The appellants each raised various grounds on appeal which are to the effect that the prosecution did not tender evidence to prove the offence they were convicted for. They also sought for the sentences to be interfered with because they are of the view that the same are harsh and excessive. When the appeal came up for hearing, Mr. Monda, learned State Counsel conceded the same on the ground that the offence of trafficking was not proved save for that of possession which the appellants were not tried for.

Before considering the appeal, it is important to set out the case that was before the trial court. The prosecution's case is supported by the evidence of three witnesses. P.C. Kalume (P.W.1), a Police Officer who was in Civilian boarded matatu registration No. KAD 252G from Chala towards Taveta. Inside the matatu he saw a blue red bag placed in the middle of the motor vehicle. P.W.1 was requested by Joyce Michael Barnaba (2nd appellant) to pass that bag to her because the 2nd appellant thought it was inconveniencing him. The 2nd appellant was seated on the second seat behind him. As he lifted the bag P.W.1 suspected the contents of the bag to be cannabis sativa from the smell it was emitting. At Challa Secondary School the passengers boarding matatu registration No. KAD 252G alighted and were transferred to Motor Vehicle registration No. KAK 259Y. P.W.1 saw the 2nd Appellant carry the same to that vehicle. P.W.1 also saw Evaline Wangare Njeri (1st appellant) carry a red bag and sat at the second to the last seat of the second matatu. She placed the bag on her legs. At Darajani road block P.W.1 alighted and informed P.C. Wasike (P.W.2), P.C. Kamau, P.C. Koskei (P.W.3) and P.C. Julie Kamunguni of the suspicious women and their bags. The appellants were ordered to alight with their bags from the matatu. Those bags were searched and found to contain green plant substances which were later examined and found to be cannabis sativa by the Government Chemist.

The appellants each testified by giving sworn testimonies. Evaline Wangare Njeri (1st Appellant) said that the matatu which she boarded took the passengers to Taveta Police station where they were asked for their passports and Identity Cards. She said she had no identification documents hence she was placed in police cells and taken to court the next day. She denied ever being in possession of the cannabis sativa. On the other hand Joyce Michael Barnabas (2nd Appellant) claimed she had gone to visit her aunt in

Taveta and in the evening she boarded a matatu at Chala which was driven straight to Taveta Police Station. At the station she those who had no Identity Cards were placed in the cells and taken to court the next day. However they each admitted in cross-examination that the matatu they boarded was stopped at Darajani road block though they each denied seeing the bags containing the cannabis sativa.

After a careful re-assessment of the evidence there is no doubt in my mind that the appellants were found with cannabis sativa. The evidence of P.W.1, P.W.2, P.W.3 and P.W.4 is watertight. The question which remains to be answered is whether or not the offence of trafficking was proved. The learned Senior Resident Magistrate agonized over this issue by critically examining the definition attached to the word trafficking in section 2 of the Act and came to the conclusion that the offence of trafficking was established. The learned state counsel is of the view that the offence of trafficking was not proved but what was proved instead is that of possession. I have anxiously considered the issue. At some point the learned Senior Resident Magistrate stated as follows in his judgment

"**The two women were found red handed being in possession of the bhang though they deny it."**

It is obvious that the trial magistrate was alluding that the offence of being in possession was established by the evidence. The court of Appeal dealt substantively with the difference between "trafficking" and "possession" in the case of **Madline Akoth Barasa and Gabriel Ojiambo Nambesi –vs- Republic C.R. Appeal No. 193 of 2005** and had this to say:

"**It is evident from the definition of "trafficking" that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance.**

In our view, for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking. In this case, neither the charge sheet nor the evidence disclosed the dealing with the bhang which constituted trafficking."

Going back to the appeal before this court, it is also obvious that the charge sheet did not specify the ingredients of trafficking. The evidence tendered also did not establish any of those ingredients. In section 2 of the Act 'Trafficking' means

"**the importation, exportation, sale, 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…"**

I have no doubt in my mind that the evidence tendered by the prosecution proved the offence of possession of cannabis sativa contrary to section 3(1) as read with Section 3(2) (a) of the Act. I have already shown that the trial magistrate actually found that the offence of possession was committed but he nevertheless did not convict the appellants under Section 179(1) of the Criminal Procedure Code. I am convinced that Mr. Monda, rightly conceded to this appeal. This court is enjoined under Section 361(4) of the Criminal Procedure Code to substitute the conviction for possession of narcotic drugs for that of trafficking and pass a sentence in substitution of 10 years as may be warranted in law for the offence of possession. The sentence of 18 years imprisonment was for a more serious offence of trafficking which carries both sentence of a fine and a maximum prison term of life imprisonment. Had the appellants been convicted for the lesser offence of possession of narcotic drugs, it is probable that the trial magistrate could not have imposed a sentence of more that say 7 years imprisonment.

For the above reasons I allow the appeal to the extent that I quash the conviction for the offence of trafficking in narcotic drugs, set aside the sentence of 18 years' imprisonment and substitute thereof a conviction for the offence of possession of cannabis Sativa contrary to section 3(1) as read with Section 3(2) (a) of the Act for which I sentence each appellant to six (6) years imprisonment. The sentences of imprisonment to run from the date of conviction by the trial court i.e. 8th April 2005. It goes without saying that the order imposing a fine of Kshs.1,000,000/- on each appellant is set aside and direct any

fines that may have been paid should be refunded forthwith.

Dated and delivered at Mombasa this 27th day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Monda for the state and the appellants in person.