



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

**Criminal Appeal 141 of 2004**

**(From original conviction and sentence of the Senior Resident Magistrate's Court at Narok in  
Criminal Case NO.769 OF 2003 – S.M. Githinji – [S.R.M.]**

**MARY KERUBO ONKAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT OF THE COURT**

**Mary Kerubo Onkaga** 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)**.

The particulars of the offence were that, on the 31<sup>st</sup> day of October, 2003 at about 3.30 p.m. along Narok Mai Mahiu road at Ntulele in Narok District of the Rift Valley Province were trafficking in a narcotic drug namely cannabis sativa (**bhang**) to wit 18 kilogrammes in a matatu registration number KAP 205X Toyota Shark valued at Kshs.36,000/= in contravention of the said Act. The appellant pleaded not guilty and after a full trial, she was convicted and sentenced to serve 5 years imprisonment and in addition to pay a fine of Kshs.30,000/= or an additional 2 years imprisonment.

The appellant was aggrieved with the above conviction and sentence and she appealed.

In the petition of appeal the appellant has challenged the judgement of the trial court which was based on uncorroborated evidence.

The defence offered by the appellant which was duly corroborated by the appellant's co-accused was disregarded by the court. The appropriateness of the sentence passed against the appellant was also challenged, so was failure by the trial court to consider the appellant's compelling mitigation.

The appellant's co-accused in the lower court one **Moreen moraa Mogere** pleaded guilty to the charge, was convicted on her own plea of guilty and sentenced to a similar term of 5 years imprisonment and a fine of Kshs.30,000/=.

The said co-accused appealed against the sentence in Criminal appeal No. 503 of 2003 and her sentence was commuted to the period served on 1<sup>st</sup> February, 2006.

In view of the judgement of this court in Criminal appeal No. 503 of 2003 regarding the co-accused, it is appropriate that the appellant in this appeal who was charged with **Moreen Moraa Mogere** should similarly be set at liberty by the sentence being commuted to the period already served.

Since the appellant has also challenged the conviction, it is important that the evidence by the prosecution's case as well as the defence be subjected to this court's evaluation.

The prosecution's evidence was that the appellant, who was in the company of a co-accused were arrested on 31<sup>st</sup> October, 2003 from a Public Transport Vehicle registration No. KAP 205X Toyota matatu while transporting cannabis sativa in two bags which weighed 18 kilogrammes.

The appellant's co-accused **Moreen Moraa Mogere** pleaded guilty to the charge and was convicted and sentenced to 5 years imprisonment and to pay a fine of Kshs.30,000/=. The appellant was put on her defence and she denied that she had anything to do with the consignment of bhang. She explained in her defence that she was invited by the co-accused to accompany her and travel from Kisii to Nairobi, so that she could get for her employment as a maid. They travelled together and Moreen paid for the fare.

The appellant also called Moreen as a defence witness and Moreen confirmed in her evidence that the bags containing the consignment of drugs belonged to her and the appellant was merely travelling with her. We are satisfied that the appellant offered a reasonable defence and a cogent explanation of how she was travelling in the company of Moreen who owned up as the owner of the drugs. Had the trial magistrate considered the appellants defence, the appellant ought to have been acquitted.

Accordingly we hereby allow the appeal on conviction and set aside the conviction and sentence imposed on the appellant.

The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**Judgement read and signed at Nakuru this 20<sup>th</sup> day of July, 2006.**

**MARTHA KOOME**

JUDGE

**L. KIMARU**

JUDGE