



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Criminal Appeal 287 B of 2003**

*(From Original Conviction(s) and Sentence(s) in Criminal Case No. 1719 of 2003 of the Chief Magistrate’s Court at Machakos: J. R. Karanja SPM on 3/1/03)*

**LAWRENCE GATHARA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL 294 OF 2003**

**ELIZABETH NJERI NJUGUNA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL 293 OF 2003**

**1. LIVINGSTONE NDIGO**

**BARDALOME**

**2. ESTHER MBITHE KILONZO**

**3. MARGARET NJERI NGUNYENJE ..... APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

The four appellants were charged in Criminal case No. 1719/03 at Machakos Chief Magistrate’s Court with an offence of 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 the six

people charged with the offence were found trafficking in narcotic drugs i.e. 11 bags of Cannabis Sativa valued at 1,500,000/= on motor vehicle Ref No. KAC 842 Y Toyota Hilux which was not in medical preparation.

Before the Chief Magistrate's Court, six people were charged. The 2<sup>nd</sup> accused was acquitted of the charges whereas the 6<sup>th</sup> accused is since deceased.

After the trial the court found these appellants guilty and convicted them and sentenced each to a fine of Ksh. 1 million in default five years imprisonment and in addition they would serve ten years imprisonment. They were aggrieved by the convictions and sentences and filed appeals against the same.

The 1<sup>st</sup> appellant Lawrence Gathara filed appeal No. 287 B/03, is represented by Mogikoyo Advocate, the 2<sup>nd</sup> appellant Livingstone Ndige filed appeal No. 293/03, was unrepresented; 3<sup>rd</sup> appellant Margaret Njeri filed appeal No. 293/03 which the court found to be defective as three appellants had filed a joint appeal. She is unrepresented. The 4<sup>th</sup> appellant Elizabeth Njeri was appellant in Criminal Appeal 294/03 and represented by Mr Wandugi. All the appeals were consolidated to proceed as Criminal Appeal 287 "B" of 2003 for expediency.

Briefly stated the case for the prosecution in the lower court was that on 13/6/03, police from Athi River Police Station received information that a vehicle KAC 843 Y Pick up would be transferring suspicious goods. While on patrol duties at Mlolongo they spotted the vehicle being driven from Athi River heading towards Nairobi at about 9.00 p.m. They managed to stop it while at Kapa Oil. They found the 1<sup>st</sup> appellant in the front cabin who was the driver and five others on top of the Pick up and eleven bags of Cannabis Sativa were also found on the pick up. They were all arrested and taken to police station where they were later charged for the present offence. Samples from the eleven bags were taken to the Government Chemist for analysis while the motor vehicle KAC 842 Y was detained and it was later ordered forfeited to state. The Government Chemist (PW 4) produced his report in evidence as Exhibit No. 2 in which he confirmed that the plant material taken to him for analysis was Cannabis Sativa.

The 1<sup>st</sup> appellant, the owner of the motor vehicle said on oath that he was hired to carry second hand clothes from Athi River to Nairobi when he was stopped by police. The two ladies who were at the front cabin with him ran off when they were stopped. He denied having known what was contained in the eleven sacks that he was carrying till they were stopped by police.

The 2<sup>nd</sup> appellant said he was hired as a loader by the 1<sup>st</sup> appellant and it is after arrest that he saw the Cannabis Sativa of which he denied any knowledge. 3<sup>rd</sup> and 4<sup>th</sup> appellants claimed to have been given a lift on the pick up when it was found to be ferrying Cannabis Sativa.

The grounds contained in the petitions of appeal of the 1<sup>st</sup> and 3<sup>rd</sup> appellants can be summed up as follows:

That the magistrate erred in finding a conviction which was against the weight of the evidence; that the charge was not proved beyond any doubt; that their defences were not considered and lastly that the sentences were harsh and excessive in the circumstances. In addition, the 4<sup>th</sup> appellant contends that there is no evidence that PW 4 was a gazetted analyst; that the value of the drugs was not proved which was fatal to prosecution case. I will proceed to consider the submissions of Mr Wandugi who seemed to have submitted on behalf of all the appellants as the others had hardly anything to add to 4<sup>th</sup> appellant's submissions.

Mr Wandugi for 4<sup>th</sup> appellant submitted that the charge that the appellants faced in the lower court was defective because the appellants were charged with possession of Cannabis Sativa and yet there is no substance in the 1<sup>st</sup> schedule of Act 4 of 1994 referred to as Cannabis Sativa. Mr O'mirera, for state argued that the appellants were not prejudiced by virtue of misdescription of the particulars of the charge because the substance was a banned Substance and that defect can be cured by Section 382 of the

Criminal Procedure Code.

I have scanned the record of appeal and it is true that the charge indicates in brackets that the narcotic drugs allegedly found with appellants were described as 'Cannabis Sativa'. Indeed PW 1 and 2 talked of having recovered Cannabis Sativa from the appellants and PW 4 the Government analyst did testify that he confirmed the plant material sent to him for analysis to be Cannabis Sativa which is included in the Narcotic Drugs and Psychotropic Substances. This is as per his report which he produced in evidence. It is Mr Wandugi's submission that possession of Cannabis Sativa is not wrong and that it is only possession of the leaves and flowers that are offending. I have looked to the Act – No. 4 of 1994. Section 2 of the interpretation describes Cannabis as follows:

***“The flowering or fruiting tops of Cannabis plant excludes the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.”***

Under the same section, Cannabis plant is described as follows:

***“any plant of the genus Cannabis by whatever name called and includes any part of that plant.”***

My understanding of this section on what Cannabis is, is that several names are used to describe it as indeed under the 1<sup>st</sup> schedule, in the list of narcotic drugs, Cannabis is referred to as Indian hemp or Cannabis Resin. I have also looked at the description of the term in the dictionary. In the Concise English Dictionary, Cannabis is described as ***“a genus of plants containing the Indian hemp, a narcotic drug obtained from the leaves and flowers of plants of the genus and especially Cannabis Sativa”***

The Oxford Advanced Learner's Dictionary defines Cannabis thus, ***“a drug made from the dried leaves and flowers of the Hemp plant which gives a feeling of being relaxed when it is smoked or eaten.”*** The Concise Oxford English Dictionary describes Cannabis as follows: ***“Cannabis is used to produce hemp fibre or Cannabis Sativa.”*** Cannabis Sativa is one and the same as Indian hemp listed in the 1<sup>st</sup> schedule as a narcotic drug.

The use of different terms but which refer to the same substance does not render the charge defective. In any event the Government analyst found Cannabis Sativa to be one of the narcotic drugs as per the Narcotics and Psychotropic substances Control Act. There is no defect in the charge. Counsel for 4<sup>th</sup> appellant also submitted that the Government analyst was not gazetted as required by Section 67 of Act 4 of 1994. The said Government analyst testified in the lower court. His being gazetted or otherwise was never challenged at that stage. This is an issue that should have been raised at that stage that he was not competent. I believe Section 382 of the Criminal Procedure Code comes into play at this instance and whether or not the Government analyst was gazetted or not cannot be raised at this stage when the appellants had a chance to do so during the trial. I believe specimens for analysis will be taken to the Government Chemist Department and will be allocated to those who are gazetted and not anybody can take up the task of analysis unless he has the authority to do so. The submission by counsel cannot be sustained at this stage.

The appellants were charged with trafficking Cannabis Sativa worth Ksh. 1.5 million. No evidence was adduced in support of the value of the substance. Indeed the magistrate conceded that no evidence was led in support of the alleged value of Ksh. 1.5 million. It is the appellants' contention that the value of the drug is an ingredient of the charge that needed proof. Section 86 of Act 4 of 1994 provides that in a case where fine is to be determined by the market value of any narcotic drug, a certificate under the hand of the proper officer shall be accepted by the court as prima facie evidence of the value - where 'proper' officer means the officer authorized by the minister by notification in the gazette for purposes of valuation. Under Section 4 (a) of Act 4 of 1994, the fine to be meted is pegged on the market value of the drugs in question. In light of Section 86 of the same Act it was imperative that the value of the drugs be ascertained by the proper officer which was not done. Counsel cited the case of ***HAMAYUN KHAN versus REPUBLIC Criminal Appeal 159/00*** where the Court of Appeal found the sentence meted on the appellant without ascertaining the value of the Heroin to have been invalid and I am bound to find that the sentence meted in the present case is invalid as the value of the drugs was not ascertained and yet the

appellants were sentenced to a fine of one million each.

The appellants were all arrested in the vehicle where the drugs were found. 1<sup>st</sup> appellant was the driver and the one who was hired. His explanation is that he was hired to carry second hand clothes. He admitted that the sacks were found to contain Cannabis Sativa although they were said to contain second hand clothes. They were loaded on his vehicle in Athi River. The 1<sup>st</sup> appellant being the owner of the vehicle would have been expected to ascertain what it is he was being hired to transport. The trial magistrate in his judgment went into great depths of the evidence adduced before him. He found that all the appellants were involved in trafficking of the drug. Section 2 of Act 4 of 1994 describes trafficking as “importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug.”

All the appellants were found in the vehicle that was carrying the drugs and were, therefore, trafficking.

The other issue to consider was whether the appellants were aware of the presence of the drugs in the vehicle and whether they were, therefore, in possession.

The driver and owner of the vehicle should have known the contents of the goods he trafficked unless they were so concealed that he could not tell. For example if the Cannabis were hidden amongst clothes that he could not see, that could have been a different story. This case is different. The Cannabis Sativa was packed in bags which he was able to see and even smell if he had a sense of smell. Though he denied knowledge of ferrying drugs the lower court went in detail to examine his demeanor and conduct which did corroborate the prosecution case that he was indeed in possession and knew the contents of the bags on his vehicle. He deliberately concealed who the hirer was, he went on to deny having known how the ladies 3<sup>rd</sup> and 4<sup>th</sup> appellants got into the vehicle. That was absurd, him being the driver. There was obviously something he was trying to hide. His conduct did show that he knew that he was ferrying narcotic drugs and he was, therefore, in possession and in control being the owner of the vehicle. 1<sup>st</sup> appellant said that two ladies claimed to have betrayed after being stopped and they fled. He never attempted to stop them from fleeing if indeed they did escape. The magistrate correctly found that 1<sup>st</sup> appellant was in possession of the Cannabis Sativa. The conviction against the 1<sup>st</sup> appellant is sound and I find no reason to interfere with it. Conviction is confirmed. As for the other appellants, they were found on the Pick up where the eleven bags of the drugs were loaded. They have given various explanations as to why they were on the vehicle. From the evidence, there are very strong suspicions as regards their involvement in the offence. All we have, however, is suspicion and circumstantial evidence of their being found in the vehicle that ferried the drugs. There is no direct evidence to show that they actually knew the contents of the bags or that the goods were there with their permission or that they had any control over the goods. The standard of proof in such cases is beyond any reasonable doubt. A conviction should not have been founded on suspicion. If it was also based on circumstantial evidence it should have pointed irresistibly at the guilt of the appellants which it did not. There was doubt in the prosecution case as regards involvement of the three appellants and they should have been given the benefit of doubt which I hereby do. The convictions against 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants is hereby quashed. The sentence was found to be invalid and the three 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are hereby set at liberty forthwith unless otherwise lawfully held.

In respect of the 1<sup>st</sup> appellant, I found the sentence to be invalid for lack of a valuation by the proper officer. It is set aside but this court has jurisdiction to impose an alternative sentence and I hereby sentence 1<sup>st</sup> appellant under Section 3 (2) (a) for a period of ten (10) years imprisonment. The orders of forfeiture and destruction of the drugs are sustained.

Dated at Machakos this 1<sup>st</sup> day of December 2004

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**