



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 79 OF 2019

FRANCIS MUKANDI MBINDYO.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGEMENT

1. The Appellant was charged with offence of trafficking of narcotic drugs (bhang) contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on the 28th day of June, 2015 along Salama, Nunguni Road in Kilungu Sub-county within Makueni County was found being conveying cannabis sativa (bhang) to wit 1270grams worth Kshs.170,000/= market value which was not medically prepared.

2. He pleaded not guilty and matter went into full trial. He was found guilty and convicted. He was sentenced to serve to a fine of Kshs.1 million and also to serve 10 years imprisonment.

3. Being aggrieved by the above verdict, he lodges instant appeal and set out 5 grounds of appeal namely:

(i) That the learned magistrate erred in both law and fact by failing to make a specific finding in relation to the burden of prove which was not discharged.

(ii) That the learned trial magistrate erred in both law and fact by failing to observe keenly the evidence of PW. 4 who informed the court that the appellant upon boarding the matatu sat at the back seat whereas the yellow bag containing cannabis sativa was found just behind the conductor's seat hence no link.

(iii) That the learned trial magistrate erred in both law and fact by failing to make an adverse inference as to the contradictions in the evidence of PW.3 and PW.4 in relation to the position where the appellant sat in the matatu.

(iv) That the learned trial magistrate erred in both law and fact by failing to make adverse inference as to the prosecution failure to sermon at least one of the 14 passengers who were in the matatu on material date and time of the alleged incident neither was any made to sign the inventory list of recovery.

(v) That my defence statement was no adequately considered in the light of the provisions of Section 169(1) of the CPC.

4. The parties agreed during directions to canvass appeal via submissions of which only appellant filed.

5. The prosecution submitted that the conviction was fulfilled as that was prove of the offence beyond unreasonable doubt but on sentence, it should have been either fine or imprison him not both.

6. The appellant submitted that the prosecution did not prove its case beyond unreasonable doubt nor did it the trial courts comply with provisions of Section 169(1) CPC. He sought to be acquitted.

Issues Analysis and Determination:

7. This court is obliged to evaluate the tendered evidence and give its conclusion. See **Okeno vs Republic**.

8. The ingredients of the charge/offence are set out in Section 4(a) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and PSC Act. This includes confirming the cannabis sativa.

9. Thus in evidence PW1 stated to court that he is the one who arrested the accused with the yellow paper that contained the cannabis sativa or substance believed to be cannabis sativa.

10. **PW2 Deputy OCS Kilome** stated that she is the one who alerted PW1 of the cannabis sativa or presence thereof of the same in motor vehicle KCC 779B.

11. **PW3** the Investigating Officer PC Moses Karani took the recovered suspected cannabis sativa to the Government Chemist and it was certified as cannabis sativa *sp* which falls under the first schedule of the Narcotic Drugs and Psychotropic Substance(Control) Act Section 1 of the Act: which states in part;

“Narcotic drug means any substance specified in the first schedule or anything that contains any substance specific in that schedule.”

12. Thus the cannabis *sp* was a narcotic drug.

13. It is not disputed by both the accused and prosecutions that the drug was recovered on motor vehicle registration No. KCC 779B a Nissan matatu. The vehicle was travelling from Nairobi to Nunguni.

14. PW1 alleges that he recovered the cannabis from the accused. PW4 the conductor support that assertion. Accused disputes the fact. He states that he indeed was inside the vehicle registration No. KCC 779B. He entered the vehicle with a yellow paper bag. He stated that his yellow paper bag contained groceries and clothes and shoes.

15. He stated that indeed there were more yellow paper bags in the vehicle and so his was not the only paper bag in the matatu. However, the conductor asserted that the accused was indeed the one who entered the vehicle with the yellow paper bag at Nairobi. He could not mistake the fact. Also that the accused did not enter at Machakos Junction but at Nairobi.

16. He said accused exhibited suspicious behavior by refusing to alight at Kyale market and also at Nunguni market whereas he had indicated so.

17. It would appear that the only reason that he was refusing to disembark was because he had a suspicious cargo which he feared the police whom he knew and were present would discover.

18. Also the issue of the groceries to was an afterthought. It was never brought up even once in cross-examination and thus it was being raised in the defence was an afterthought.

19. I do note that accused gave unsworn evidence. I could only presume that he did not want to be cross examined on the contents of his defence in the circumstances watering down his defence to of little value.

20. Thus it is my finding of fact that the appellant was indeed the person who entered matatu registration No. KCC 779B at Nairobi holding the yellow paper bag later recovered from the vehicle.

21. Thus was the accused within the ambit of trafficking under Section 1 of the Act. Section 1 of the Act defined conveying as a conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicles or vessel.

22. The accused was carrying the cannabis *in* a yellow paper bag placed on himself on the seat of a matatu. A matatu is a conveyance used for carriage of persons and goods indeed it is a vehicle. Thus trial court finding the accused was conveying the bhang cannabis *sp* from Nairobi to Nunguni using a matatu was justified and supported by evidence on record.

23. Conveyancing is one of the acts described in Section 1 of the Act to be an act that constitutes trafficking.

24. Thus the court finds no merit in the appeal and dismisses the same, The therefore makes the orders;

i) Appeal is dismissed, conviction is upheld and sentence confirmed

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE