REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 20 OF 2015

DANIEL MWANZA MWIKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence of D.G Karani PM in Criminal Case No.1132 of 2014 delivered on 10th December 2014 at the Principal Magistrate's Court at Kithimani)

JUDGMENT

Daniel Mwanza Mwiko (hereinafter "the Appellant"), was convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994. The particulars of the offence were that on the 7th November 2013 at Matuu township in Yatta sub-county, within Machakos County, the Appellant was jointly with another found trafficking narcotic drugs, namely 1 kilogramme and 250 grammes of narcotic drugs with a street value of Kshs 15,000/=, by storing it in his house.

The Appellant was arraigned in the trial court on 10th December 2013, when he pleaded guilty to the charge. He was convicted of the offence, and sentenced to life imprisonment, and in addition sentenced to pay a fine Kshs. 1,000,000/=. The Appellant is aggrieved by the judgment of the trial magistrate and preferred this appeal in a Petition of Appeal dated 8th December 2015, and amended grounds of appeal and submissions dated 8th June 2016. His grounds of appeal are that the issue was concluded on a defective charge which could not be remedied under section 382 of the Criminal Procedure Code; the learned trial magistrate erred in point of law and fact by shifting the onus of discharging the proof to the Appellant; and that it was not indicated what language the Appellant understand.

According to the Appellant, the most appropriate charge that the prosecution ought to have preferred against him was section 3(1)(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994, as none of the evidence indicated the act of trafficking. It was contended in this respect that the evidence that was adduced was of an act or rolling the bhang but not storing, and that the act of rolling bhang is only done when somebody wants to consume or sell to someone. Further, that the prosecution did not discharge their duty of proving its case beyond reasonable doubt that the 1.25kg of bhang found on the Appellant could have been meant for consumption alone. Lastly, the sentence that was imposed of life imprisonment and a fine of Kshs.1,000,000/= was also contested by the Appellant.

Ms Rita Rono, the learned prosecution Counsel, filed written submissions dated 15th August 2016 in opposition to the appeal. It was submitted therein that the appellant pleaded guilty during the trial, and that section 348 of Criminal Procedure Code is very clear that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by subordinate court, except

as to the extent or legality of the sentence. The prosecution conceded that from the evidence, the amount of cannabis the Appellant was found with in his house was for consumption, and asked the Court to invoke its powers and to substitute the charges of trafficking narcotic drugs to being possession of narcotic drugs under section 3(1) (2) (a) of above said act, and to give the appropriate sentence. It was further submitted that the court should note that the Appellant had a previous conviction of a similar offence.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that they raise two issues. These are firstly, whether the charge sheet under which the Appellant was convicted was defective; and secondly whether the sentence imposed upon the Appellant was lawful.

On the first issue, the Appellant was charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994 which provides as follows;

> **"Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—**
>
> **(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or**
>
> **(b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years..**

However, having perused the record of the trial court, I am of the opinion that the evidence adduced could not sustain a charge of trafficking of a narcotic drug contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. The facts by the prosecution after the plea of guilty were as follows:

> **"On 7.11.2014 at about 8.00 p.m police officers from Matuu Police station received a tip-off that the two who are husband and wife were rolling bhang in their house. They proceeded there and recovered 1 kg and 250 grams of bhang on conducting a search therein, same was not in medicinal preparation. They were arrested and escorted to Matuu Police station together with the bhang. A sample thereof was forwarded to the Government analysis and a report was thereafter obtained. This is the bhang - P.Exh. 1, Exhibit memo form and report from Government chemist - P.Exhibit 2 and 3."**

"Trafficking" is defined in section 2 of the Narcotic Drugs and Psychotropic Substances Control Act to mean:

> **"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…"**

The Court of Appeal addressed the establishment of the element of "trafficking" of a narcotic drug in the case of **Madline Akoth Barasa and Gabriel Ojiambo Nambesi –vs- Republic C.R. Appeal No. 193 of 2005** as follows:

"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."

In the present appeal, the charge sheet specifies one of the ingredients of trafficking which is that of storing, and in support of this charge it was stated that 1 kg and 250 grams of bhang (*cannabis sativa*) was recovered from the Appellant's house. To store or storing according to the **Collins English Dictionary** is "to keep, set aside or accumulate for future use", and "to place in a warehouse , depository etc for future use".

According to the facts set out hereinabove, it is not specified whether the *cannabis sativa* was found in the Appellant's house or on his person, and more importantly, there were no facts adduced to show that the Appellant was dealing with the said drug. It cannot therefore be found beyond reasonable doubt that the drug was in a storage place for purposes of dealing. To this extent the charge was defective as the facts did not disclose the commission of the offence of trafficking in narcotic drugs, and the conviction of the Appellant was therefore not lawful.

This finding notwithstanding, I have no doubt that the facts 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 which provides as follows:

1) "Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

2) A person guilty of an offence under subsection (1) shall be liable—

(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and…"

Possession can be either actual or constructive under **section 4 (a)** of the *Penal Code* which defines possession as follows:

'***be in possession' or ' have in possession' includes not only having one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."***

Although I have found the charge defective, I reduce the charge to one of possession of being in possession of *cannabis sativa* contrary to **section 3(1)** as read with **section 3(2)** of the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994,* and convict the Appellant accordingly under Section 361(4) of the Criminal Procedure Code. The sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of *cannabis sativa* are the maximum sentences, and the court can lawfully impose any shorter term of imprisonment. Furthermore, Section 3 (2) (a) of the Act does not expressly provide for a fine.

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 life 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 *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994,* for which I sentence the Appellant to three (3) years imprisonment which term shall run from the date of his conviction by the trial Court . The order imposing a fine of Kshs.1,000,000/- on the Appellant is set aside, and I direct that any

fines that may have been paid by the Appellant should be refunded forthwith.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE