



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 47 OF 2014
(FORMERLY KISII HCCRA NO. 102 OF 2012)

BETWEEN

PAUL CHACHA MAGAIWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 545 of 2011 at Senior Resident Magistrate's Court at Kehancha, Hon. J.R. Ndururi, SRM dated on 2nd April 2012)

JUDGMENT

1. The appellant, **PAUL CHACHA MAGAIWA** was charged with a co-accused, **JOSEPHINE NYASIOBOKA** with the offence of trafficking in narcotic drugs contrary to **section 4(1)** of the *Narcotics Drugs and Psychotropic Substances Control Act, 1994* ("the Act"). The particulars of the charge were as follows;

On the 10th day of November 2011 at Nyamekona area within Kuria West District in Migori County [they] were jointly found trafficking narcotic drugs to wit 113 kgs of bhang in form of brooms with street value of Kshs. 153,000/- in car registration number KBM 295Y Toyota Probox in contravention of the said Act.

2. After hearing 4 prosecution witnesses and the defence, the appellant was convicted and sentenced to 5 years imprisonment and in addition to pay a fine of Kshs. 1,000,000/- in default to serve 12 months imprisonment. He now appeals against the conviction and sentence on the grounds set out in the petition of appeal filed on 21st April 2013. In summary, he argues that he was not found with the bhang as such the prosecution did not prove its case.
3. Ms Owenga, counsel for the respondent, conceded that the charge facing the accused was defective but that the same did not prejudice the appellant as the evidence against him was overwhelming.
4. I will deal with the issue of the defective charge first before I consider the evidence. **Section 2** of the Act defines "Trafficking" as follows-

Trafficking means the importation, exportation, manufacture, buying, sale, giving, 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 or making of any offer in respect thereof.

5. The Court of Appeal considered the meaning and implication of the word trafficking in the framing of charges under the **Act** in ***Madline Akoth Barasa & Another v Republic KSM CA Criminal Appeal No.193 of 2005 [2007]eKLR (Supra)***. It held 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 clearly 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 discloses the dealing with the bhang which constituted trafficking. The learned trial magistrate did not even deal with that aspect of the case.

6. In the present appeal, the charge sheet used the general word trafficking. It ought to have been added that the appellant was in fact doing any of the acts that constitute trafficking. I however note that as the Court of Appeal stated in the ***Madline Barasa Case***, this court, may if this appeal is not allowed on any other ground, invoke its powers under **section 361(4)** of the ***Criminal Procedure Code*** to convict the appellant of a lesser but cognate offence by substituting the conviction for trafficking with that of possession and sentence the appellant accordingly.
7. In order to deal with the grounds of appeal it necessary to outline the facts as they emerged from the witnesses in the subordinate court as it is the duty of the first appellate court to re-evaluate the evidence and make its own independent findings having regard to the fact that it never heard or saw the witnesses testify (see ***Okeno v Republic [1973] EA 32***).
8. Otieno John Ogutu (PW 1) testified that on 10th November 2011 at about 1.00 pm he was driving a Toyota Probox Taxi registration number KBM 295Y. Along the way he met someone he knew as a fellow driver who asked him whether he could hire the taxi to carry some passengers. He dropped the passengers then came back, picked the person and they went together to the Kehancha junction. As the stage they found a lady with a child and bag and a man. Along the way at Kwa Makara area, the person asked him to slow down and directed him to a certain home to pick some luggage. He said it was the lady's home. At the home the other man alighted and entered the compound. The lady who had the luggage requested him to open the boot. He saw the man who had requested him to carry the passengers and the other man carrying a sack each on their backs. He told his friend that his vehicle could not carry heavy loads so he locked the vehicle using the central locking system. When he went to check the kind of luggage the two had he realised it was cannabis. He got angry, got back into his car and drove off at a high speed with the lady in the car to towards Isebania Police Station. In the meantime, he called his boss and informed him what was happening. He was advised to drive to the Customs Yard which he did. He informed police what had happened. The lady was arrested and taken to the Police Station. The lady had a bag which contained cannabis. He also identified three sacks of cannabis which he had seen been at the home. In cross-examination he admitted that he had not seen the appellant and did not know him at all.
9. PC Peter Nyaga (PW 2), was one of the officers on patrol on the material day when he was called by PC Musembi (PW 4) and told proceed to a certain homestead at Kwa Makara area. PW 4 informed him that a certain driver had gone to his office and told him about the *cannabis* in a certain home. He rushed there with his colleague and found one man at door of a certain house moving three and a half sacks out of the house. He arrested the man and took the three sacks which were found to contain *cannabis*. The sacks were weighed and found to be 113Kg. He identified the man arrested as the appellant.
10. PW 3, PC Albashir Oloo, was with PW 4 when the *cannabis* was recovered from the appellant's

co-accused. He was instructed to take over the case. He took photographs of the motor vehicle. He prepared and exhibit memo form and took a sample from the recovered *cannabis*. The sample was forwarded to the Government Chemist in Kisumu and analysed. The Government Chemist prepared a report confirming that the substance *cannabis sativa*.

11. On the basis of the evidence the learned magistrate found that the substance that the appellant was caught with was proved to be *cannabis* as evidenced by the Government Chemist Report. He found that the PW 2 found the appellant at the house from where he recovered the three sacks of *cannabis*. He therefore found the accused guilty of transporting *cannabis*, as one of the modes prescribed under **section 2** of the **Act**.
12. Having evaluated the evidence, I accept that the sacks of substance found and produced in evidence were *cannabis sativa*. The main issue is whether the appellant was the person found with the *cannabis*. The testimony of the PW 2 is credible. It is corroborated by the testimony of PW 1 who was at the homestead earlier when he rebuffed attempt by his acquaintance and another person to put the sacks of *cannabis* in his car. Although he did not see the appellant, he identified the sacks of *cannabis* as the one which he had seen earlier at the home and which the appellant was subsequently found with. I therefore find that it is the appellant is the person who was found with *cannabis* by PW 2. He defence that he was a farmer and that he was arrested on the way home and was not found with the sacks of *cannabis* was a mere denial and could not withstand the weight of the prosecution evidence.
13. The charge facing appellant was defective in that it did not specify the specific form of trafficking and the same could not be cured by the learned magistrate labelling the act of the accused as transporting. The appellant had to have notice of the form of trafficking he was being accused of in the charge.
14. I therefore find that the appellant had the *cannabis sativa* in his possession. 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.’
15. The appellant was found carrying the *cannabis* by PW 2 and accordingly and within the meaning of **section 4(a)** of the **Penal Code** he was in possession of the *cannabis sativa*.
16. As the was 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.
17. As regards the sentence, the maximum sentence prescribed under **section 3(2)(1)(a)** is a maximum of 20 years imprisonment.
18. In summary the conviction and sentence are set aside and substituted with a conviction for the 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**. The sentence of 5 years imprisonment imposed on the appellant was appropriate and it is affirmed.
19. I wish to point out that this appeal was heard in the absence of the original court file which had been forwarded to Kisii for the hearing of the co-accused’s appeal. The file was further taken to the Court of Appeal after a second appeal had been preferred. The appellant requested and agreed to proceed with the appeal on the basis of the certified copies of proceedings which were available. In proceeding with the appeal, I was satisfied that the appellant was not prejudiced in

any way.

DATED and DELIVERED at MIGORI this 8th day of May 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.