IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.178 OF 2010

WILBRODA NYONGESA……..……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C. NO.856/2006 by Hon. W Korir, Senior Principal Magistrate, dated 27th May. 2010]

JUDGMENT

The appellant, **Wilbroda Nyongesa**, was sentenced to serve five (5) years imprisonment after she was found guilty and convicted of the offence of **being in possession of narcotic drugs** contrary to **section 3(1)(2)(a)** of the **Narcotic Drugs and Pyschotropic Substances Control Act (the Act)** instead of the offence charged, **trafficking in narcotic drugs** contrary to **section 4(a) of the Act.** I will turn to this matter later, suffice at this stage to state that the appellant was nonetheless aggrieved and had challenged the decision on appeal to this court. The grounds upon which this appeal is brought may be condensed as follows:

i) the defence and mitigation were disregarded;
ii) the prosecution evidence was contradictory;
iii) the burden of proof was shifted to the appellant;
iv) the trial court erred in not disclosing under what law the charges were reduced
v) the sentence was harsh

Learned counsel for the respondent supported the conviction and sentence stating that the trial magistrate took into consideration the appellant's defence and mitigation; that the conviction was based on sufficient evidence; and that the sentence of five instead of twenty years was lenient.

Being the first appeal, it is imperative that I re-evaluate the evidence on record afresh bearing in mind that I did not see or hear the witnesses first hand. The prosecution evidence was that the appellant boarded a mini bus matatu Registration No.KAU 015K from Kisumu intending to travel to Nakuru. It was not the first time the appellant was travelling on this mini bus – having done so four or five times before this occasion according to **P.W.5 Peter Mwangi Njoroge**, the conductor and **P.W.6 Ombwoge Nyakundi,** the driver.

The mini bus and the passengers set off from Kisumu at about 2.30p.m. Upon reaching the Soilo police road block, along the Eldoret-Nakuru Highway, the police stopped the vehicle and upon **P.W.4, Cpl. Joseph Kipruto** inspecting it, found the appellant holding a traveller's bag which she initially declined to reveal its contents only saying she was carrying vegetables. But when she finally opened it, Cpl. Kipruto

noticed dry leaves which he suspected to be bhang. Under the seat, there were two polythene bags also carrying the same substance.

The appellant was arrested and the substance submitted for analysis by the Government Chemist. **P.W.2, Simon Ndubi Atebe**, after analyzing the substance concluded that it was cannabis as defined in the Act. The appellant was then charged.

In her unsworn defence, the appellant admitted that indeed she was a passenger in the motor vehicle in question having boarded it in Kisumu and was travelling to Nakuru. At Londiani she changed her seat and moved to the front to avoid a bumpy ride. At Njoro, she once again moved ahead and sat. To the right there was a bag which the police found to be containing bhang. She denied ownership of the bag and its contents.

I have considered the evidence on record and submissions in this appeal. It is common ground that the appellant was in the motor vehicle where 15kg *canabis sativa* worth Kshs.15,000/- was found in bags.

The main question for determination before the court below and in this appeal is whether the bags and their contents, which were confirmed through scientific analysis to be cannabis sativa, belonged to the appellant. **Peter Mwangi Njoroge**, the conductor confirmed that while at the bus stage in Kisumu, the appellant who was well known to him as this was either 4th or 5th time she was using this vehicle, came with two green polythene bags and a blue traveller's bag. It is in these bags that the police found the bhang. **Cpl. Kipruto** and his colleague, **PW1**, **Ag. I.P. Bannito Bera** were strangers to the appellant, while the conductor had no bad blood with the appellant. They were independent and credible witnesses whose evidence placed the drugs on the appellant's lap. Her defence that she changed seats twice and sat near the bags containing the drugs is not persuasive and is illogical.. The learned trial magistrate correctly found that the prosecution evidence displaced the defence. The next question, having found that the bags belonged to the appellant is whether the learned trial magistrate erred in substituting the charges.

In his judgment the learned trial magistrate came to the conclusion that:

". . . . the accused person was found with a narcotic drug. That narcotic drug was produced in court as an exhibit. As such accused person was in possession of the same. That being so, I reduce the charge facing the accused from that of trafficking in a narcotic drug to that of being in possession of a narcotic drug."

Clearly, the learned magistrate, without stating so, was relying on the provisions of **Section 179(1)** of the **Criminal Procedure Code**.

The learned magistrate proceeded properly to convict the appellant for the offence of possession, which is a minor and cognate offence to the offence of trafficking. See **Madline Akoth Baraza & Gabriel Ojiambo Nambesi V Republic**, Criminal Appeal No.193/2005.

For the reasons stated, all the grounds raised in this appeal must fail. The appeal has no merit and is dismissed accordingly.

Dated, Delivered and Signed at Nakuru this 7th day of March, 2011.

W. OUKO
JUDGE