



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 196 OF 2012

BETWEEN

GILBERT BARASA ONDAMBA.....APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. Justice Anyara Emukule) dated 30th May 2012)

in

H.C. CR. APPEAL NO.344 OF 2010)

JUDGMENT OF THE COURT

1. The appellant, Gilbert Barasa Ondaba, was jointly with two others charged before the Chief Magistrate's Court at Nakuru in Criminal Case No.1759 of 2005 with two counts. On count 1, they were charged with trafficking in a narcotic drug 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 22nd June 2005 at Menengai Roadblock along Menengai – Nakuru road in Nakuru District they jointly trafficked in 103 kgs of cannabis sativa with a street value of Kshs.103,000/- using motor vehicle Reg. No.KAB 662T Mitsubishi Lancer in contravention of the said Act.

2. In count 2, they were charged with being in possession of a narcotic drug contrary to **section 3(1) and 3(2) of Narcotic Drugs and Psychotropic Control Act**. The particulars of the charge state that on 22nd June 2005 at Menengai - Nakuru road in Nakuru District they were jointly found being in possession of 103 kgs of cannabis sativa with a street value of Ksh.103,000/- aboard motor Reg. No. KAB 662T Mitsubishi Lancer in contravention of the Act.

3. All the accused persons pleaded not guilty. The charges against the other accused persons were withdrawn under **section 87 (a)** of the Criminal Procedure Code after the said accused persons jumped bail and could not be traced in order to face the trial. Only the appellant was tried before learned Senior

Principal Magistrate (W.K. Korir) who in a judgment delivered on 15th November 2011 convicted him and imposed a fine of Kshs. 1,000,000/= in addition to life imprisonment. It is worthy of note that the trial magistrate's conviction was premised on the offence of trafficking as set out in count 1. He considered count 2, as the alternative charge to count 1 as he passed sentence.

4. The appellant then appealed to the High Court against both conviction and sentence. The grounds of appeal were that the trial magistrate erred in convicting on the basis of inadequate evidence which did not meet the threshold burden of proof. The appellant's further ground was that a vital witness did not testify and that the sentence imposed was illegal. Supplementary grounds of appeal were introduced through supplementary memorandum of appeal filed through the firm of Wamaasa & Company Advocates for the Appellant.

5. Upon hearing the appeal, considering the written submissions filed on behalf of the appellant and submissions by Mr. Wamaasa Advocate, the learned Judge of the High Court at Nakuru (Emukule J) did not find merit in the appeal. By a judgment delivered on 30th May 2012, the appeal was dismissed and the conviction and sentence confirmed. This is what has prompted the present appeal.

6. The appellant set out three grounds of appeal in support of his appeal before this Court. First, that the charges were defective under **section 137 F** of the **Criminal Procedure Code** and **section 244** of the **Narcotic Drugs and Psychotropic Substances Act**. Second, the judge erred in upholding the conviction and sentence by failing to find that the provision of **section 67** of the **Narcotic Drugs and Psychotropic Substances Act** was not adhered to and third, the judge erred in law when he upheld the conviction and sentence on insufficient evidence. The appellant filed written submissions in support of the above grounds.

7. When the appeal came up for hearing before us, the appellant requested that the prosecution counsel, **Ms. Nyakira Kibera** for the state responds to his written submissions first whereupon the prosecution counsel opposed the appeal and discounted each of the grounds of appeal. In reply, the appellant took an interesting tangent and did not address us on the grounds of appeal. Instead, he informed us that he was illiterate and did not cross-examine witnesses at trial. The appellant conceded that he had made a mistake and would not repeat it. In essence, the appellant conceded that he had been correctly convicted and said all he needed was a reduction of the term of imprisonment and so he mitigated informing us that he had left people at home who depended on him. He urged us to reduce the sentence to enable him rejoin his family and teach them not to make the mistake he had made.

8. This is a second appeal. Our jurisdiction is set out in **Section 361 (1) (a) Criminal Procedure Code** which limits our involvement in the appeal to only matters of law. Being such a second appeal therefore our duty is to consider only issues of law and not to consider matters of fact which have been considered by the two courts below and upon which there has been concurrent findings. We are therefore bound by the concurrent findings of fact made by the lower courts unless those findings are shown not to be based on evidence as was held in **Thiongo v R [2004] 1 EA 333**.

9. As already stated, from the submissions made by the appellant, he does not contest the conviction or the sentence. He only seeks to persuade us to consider reducing his sentence based on the mitigating factors he raised. From the record, we note that the appellant mitigated before the trial court. The mitigation before the trial court was stronger than that before us and was duly noted and considered by the trial court in passing the sentence.

10. In line with our mandate as the second appellate court, we do not see the need to consider the appeal on its merits in light of the submissions by the appellant. We therefore have considered the severity of sentence as submitted by the appellant. In this respect, we point out that the issue of severity of sentence is a matter of fact for which we do not have jurisdiction in the absence of a contention that the sentence imposed was unlawful. We have previously held that there is no jurisdiction on this Court to interfere with severity of sentence in among others, **David Munyao Mulela & another v Republic [2013] 1 eKLR**.

11. The penalty for the offence of trafficking in narcotic drugs is set out in **section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**. It provides:-

“--- 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.”

12. A literal reading of that provision indicates that there are two components of the sentence to wit, a fine of one million shillings or three times the market value, whichever is higher and in addition, imprisonment for life. The trial magistrate and the High Court judge both imposed the minimum sentence prescribed by law for the offence following the conviction being the fine of Shs.1,000,000/- in addition to life imprisonment. In the circumstances, we see no legal reason to interfere with this sentence, the same being a lawful sentence.

13. Consequently, the appeal fails and is dismissed in its entirety.

Dated and delivered at Nakuru this 2nd day of August, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR