IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 292 OF 2012

BETWEEN

DAVID MUNYAO MULELA ..... 1st APPELLANT

SOUL KIMENYI …..... 2nd APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisii ,(R. Sitati J) dated 13th October, 2011

in

KISII HCCRA NO. 1 & 2 OF 2011)

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JUDGEMENT OF THE COURT

The appellants David Munyao Mulela (the first appellant) and Soul Kimenyi (the second appellant) were charged before the Chief Magistrate Court at Kisii in Criminal Case No. 1795 of 2010 of trafficking in narcotic Drugs contrary to Section 4 as read with Section 4 (a) with Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994 particulars being that on the 6th day December, 2010 at Suneka area along Kisii – Migori road in Kisii County jointly were found trafficking in narcotic drugs namely one sack of cannabis weighing 32 kilograms valued at Kshs. 16,000/= using a motor vehicle registration number KBJ 997E and trailer Number ZD 0071 make Scania. They were tried before the learned Senior Resident Magistrate (K. T. Kimutai) who in a judgement delivered on 22nd December, 2010 convicted the appellants and imposed a fine of Kshs. 1,000,000/= on each of the appellants, in default to serve 12 months imprisonment and in addition each appellant was sentenced to serve six years imprisonment.

The appellants were aggrieved by the conviction and sentence by the trial court and appealed to the High

Court of Kenya at Kisii in Criminal Appeal Nos. 1 and 2 of 2011. These appeals were consolidated when they came for hearing before the learned judge Ruth Nekoye Sitati. The learned judge after hearing the appeal found it to have no merit and dismissed it. This provoked this appeal.

Being a second appeal 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. This is indeed the essence of Section 361 (1) (a) Criminal Procedure Code which limits our jurisdiction in respect of second appeals.

On the issue of this special jurisdiction this Court has had opportunity to pronounce on the same on different occasions in such cases as **Thiongo v R [2004] 1 EA 333** where it was held

> "**On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."**

It is therefore our duty to examine the record of appeal and the Memorandum of Appeal to see whether, and, if so, which issues of law are raised calling for our determination.

The facts of the case before the trial court were fairly simple and uncomplicated. They were that on 6th December, 2010 No. 60376 PC James Munyes (PW2) of Criminal Investigations Department, Kisii, was instructed by his superior to investigate information received apparently from a police informer that a certain named motor vehicle was ferrying contraband goods.

PW2 and his colleagues PC Muriuki and a police driver drove towards Suneka on the Kisii – Migori road. They presently spotted the vehicle the informer had identified as registration mark KBJ 997 E and its trailer No. ZD 0071 which was parked on the side of the road. They introduced themselves to the driver and loader of the vehicle and proceeded to conduct a search. They recovered a sack under the chassis of the trailer which had been secured using wood planks and ropes. They arrested the crew who are the appellants before us and escorted them to Kisii Police Station. The vehicle and trailer were driven to that police station.

The contents of the recovered sack were handed over to Dennis Owino Onyango (PW1) of Government Chemist, Kisumu, for tests and analysis. PW1 confirmed that the recovered exhibit was cannabis sativa.

Benson Mutua Mutava (PW3) was the owner of the vehicle and trailer. He testified that the motor vehicle was licensed to transport goods from the Mombasa port to Tanzania. The said vehicle upon reaching its destination point should return to Mombasa empty.

PW3 identified the appellants as his employees authorised to drive and manage the said motor vehicle.

This was the case put forward by the prosecution which the trial magistrate found sufficient to call upon the appellants to answer.

The first appellant elected to give an unsworn statement while the second appellant elected to remain silent.

In the testimony in defence the first appellant stated that the motor vehicle had been checked at the border and certified to be empty. He was surprised that cannabis sativa was found underneath the same.

The trial magistrate analysed the prosecution case and the defence case and convicted the appellants as already stated.

In the first appeal the appellants raised similar grounds in the homemade Petitions of Appeal. They complained that their defence was ignored; that they did not know who had put the bhang underneath the vehicle; that the trial magistrate did not analyse evidence; that they were not given time to defend themselves; that the magistrate erred in holding that the charge had been proved beyond reasonable doubt

and that the defence was not tested.

The learned judge on first appeal found that the trial magistrates' findings were sound. The learned judge said:

> **" The evidence is clear that P. Exhibit 1 was examined for its contents by PW1 and confirmed to contain cannabis sativa. P. Exhibit 1 was found securely tied under the body of the subject motor vehicle with the use of wooden planks and ropes. PW3 confirmed that the two appellants were the ones who had the sole control of the motor vehicle, one as driver and the other as conductor. As rightly observed by the trial court, the way P. Exhibit 1 was secured under the lorry was intentional and could not have been the work of a third party who had no unlimited access to the vehicle. In my view, the intention of the Appellants was to convey the said exhibit unnoticed.**
>
> **The prosecutions evidence that the two appellants were arrested while P. Exhibit 1 was securely tied under the chassis of the lorry leaves no doubt in my mind that the two acted together in having the said exhibit in the place where it was found on the lorry."**

When the appeal came for hearing before us on 5th November, 2013 Mr. J. A. Momanyi, the learned counsel for the appellants, abandoned the homemade Memoranda of Appeal filed by the appellants and relied on Supplementary Memorandum of Appeal dated 4th November, 2013 filed in court on the day of hearing and which we admitted with leave. There are four grounds of appeal taken to wit:

> **"1. The Learned Judge erred in law and in fact in making a finding that there was common intention when there was no evidence on record to that effect.**
>
> **2.The Learned Judge failed to appreciate that fact that (sic) being in control of a Motor Vehicle did not amount to possession or conveying of the alleged cannabis sativa.**
>
> **3.The Learned Judge did not consider all the legal issues raised before her that is the issue of sentence and the value of the alleged cannabis sativa.**
>
> **4. The Learned Judge did not consider the issue of the fact that the prosecutor in influenced (sic) the trial Court in sentencing the Appellant."**

Learned counsel for the appellants submitted that there was no common intention on the part of the appellants and that in any event the prosecution did not prove where the bhang was found or who put it there.

The Learned Assistant Director of Public Prosecutions in opposing the appeal submitted that the trailer used to convey bhang was in continuous control of the appellants and there was no evidence that any third party had access to the trailer. Counsel submitted further that the appellants had a duty to explain how the bhang found its way under the trailer.

On the complaint that the sentence imposed was harsh, counsel for the respondent submitted that severity of sentence was a matter of fact which could not be ventilated before us by virtue of the provisions of Section 361 (1) (a) Criminal Procedure Code.

Section 111 of the Evidence Act Chapter 80 Laws of Kenya provides that:

> **"(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstance or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.....”

The prosecution case as already seen was that upon receiving information the police intercepted the trailer which was under the control and management of the appellants and upon conducting a search a sack full of bhang was found hidden underneath the trailer and properly secured using planks of wood and ropes. The trailer had been inspected at the border and certified to be empty. There was no evidence that a third party had access to the trailer at all. Instead it is the appellants who retained full and uninterrupted control of the same. Called upon to explain how the bhang found its way underneath the trailer the first appellant had no explanation at all save to deny the offence while the second appellant chose to remain silent. As has been seen the law requires an accused person in certain circumstances, and this was one of them, to explain the circumstances leading to existence of certain facts. The appellants did not discharge the said burden at all which it was their duty to do and the trial court was right to convict them.

The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact.

The appeal has no merit and it is accordingly dismissed.

Dated and Delivered at Kisumu this 20th day of December, 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR