



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OMOLO, O’KUBASU & GITHINJI, J.J.A.)**

**CRIMINAL APPEAL NO. 8 OF 2010**

**BETWEEN**

**EDWARD OKOTH WERE .....1<sup>ST</sup> APPELLANT**  
**GEORGE OMONDI RAGEN .....2<sup>ND</sup> APPELLANT**  
**JARED OBANDI MOSETI .....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J.) date 15<sup>th</sup> December, 2008***

**in**

**H.C.CR.A. NO. 122 OF 2007)**

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**JUDGMENT OF THE COURT**

These three men, *Edward Okoth Were*, *George Omondi Ragen* and *Jared Obandi Moseti* the appellants herein, were, on the 7<sup>th</sup> August, 2007 found guilty and convicted on their own plea to a charge of trafficking in narcotic drugs contrary to **section 4(a)** of the Narcotic Drugs and Psychotropic Substances (Control) Act of 1994. The particulars contained in the charge which they unequivocally admitted, were that on the 2<sup>nd</sup> day of August..... at Koru Junction along Awasi – Fort ternan Road in Nyando District within Nyanza Province, the three appellants were jointly found trafficking **224 stones, 1960 rolls, 52 stakes and 20 brooms of bhang** in a Motor vehicle Reg No.KAN 612J make Toyota Corolla SE 90, and the bhang, the subject of the charge had a street value of *K.Shs.500,000/=* and the trafficking was in contravention of the Act.

The year in which the offence was committed was not stated in the particulars of the offence and that formed a ground of complaint in the appeals the appellants lodged in the High Court following their conviction and sentence by the Senior Resident Magistrate at Nyando. Mwera, J. however held that the omission to state the year in which the offence was committed did not occasion to the appellants any injustice, the learned Judge pointing out that in the statement of facts in support of the charge it was specifically stated that the offence was committed on 2<sup>nd</sup> August, 2007. No challenge has been raised before us on that issue.

The facts on which the prosecution relied on were that on the 2<sup>nd</sup> August, 2007 at about 10 a.m, police officers based at Awasi Police Station came upon motor vehicle Reg. No. KAN 612J along Awasi-Muhoroni Road. The officers were suspicious about the vehicle and they chased it. When it was eventually blocked, the three appellants were found inside the vehicle and the bhang as stated in the particulars of the charge were found in the vehicle. None of the appellants claimed that he had any lawful authority to have the drug in the vehicle. The appellants were arrested and charged before the Magistrate. Each appellant unequivocally admitted the facts and thereupon the magistrate convicted them and having listened to what each of them had to say in mitigation, the magistrate sentenced each of them to **fifteen (15) years** imprisonment.

As we have said, they appealed against the conviction and sentence and in the High Court each appellant was represented by counsel. Various matters of law were raised there: the failure to specify the year in which the offence was committed; was the plea unequivocal? Were the constitutional rights of the appellants violated by their being arrested on 2<sup>nd</sup> August and being produced before the Magistrate on 7<sup>th</sup> August, 2007? Did the failure by the prosecution to produce a report from the Government Chemist to prove the substance found with appellants was bhang result in the charge not being proved? Did the facts and circumstances stated by the prosecution disclose the manner in which the appellants were said to be “trafficking” in the drug, i.e. whether by importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution, as set out in the definition section of the Act? Save for the last complaint, Mwera, J. rejected all the other complaints and no issue or complaint was raised before us about the learned Judge’s decision on that aspect of his matter.

On whether the facts stated by the prosecution proved that the appellants were found “trafficking in” the drug, the learned Judge held that the facts did not disclose the manner of trafficking. The Judge, however, had no doubt that the facts stated disclosed the offence of possession of the drug under **section 3(1)** of the Act and the Judge proceeded to set aside the conviction under **section 4(a)** and substituted it with a conviction under **section 3(1)**. Under **section 3(2)**, the Judge then sentenced each appellant to nine (9) years imprisonment.

Once again there was no challenge by the appellants on this issue. All that they pleaded for before us was that we should have mercy on them and reduce the sentence imposed on each of them. They were first offenders who had pleaded guilty. They had learned useful trades while in prison and they wish to be set free so that they can employ their newly acquired knowledge for the economic benefit of Kenya. The appellant Edward told us he has been engaged in vocational training and has achieved an artisan’s certificates Grades I and III and another certificate in upholstery.

The appellant George is now a good basketball player and trainer and because of his height, if he came out of prison now, he would help the Kenyan Basket-ball team for the benefit of the nation. Finally, the appellant, Jared told us that because of the vocational training he has acquired, if we set him free, he would contribute towards the economic take-off of Kenya.

We cannot help but admire and congratulate these appellants for their achievements while they are in prison but as far as the law is concerned, and this Court cannot depart from the law, we can only interfere with the sentence imposed on each appellant where such sentence is illegal. We must not forget that the appeals before us are second appeals and under **section 361(1)** of the Criminal Procedure Code, the Court, on a second appeal, can only interfere with the sentence where it is shown to it (i.e. the Court) that the sentence is illegal. Severity of the sentence is a question of fact, not law under the stated section. That is what Mr. Gumo, the Assistant Deputy Public Prosecutor told us when he opposed the appeals and told us that we have no legal basis for interfering with the sentence imposed on each appellant. We agree with Mr. Gumo and that being so, these appeals must fail. There is nothing illegal about the sentence imposed on each appellant. We accordingly order that these appeals be and are hereby dismissed.

***Dated and delivered at Kisumu this 17<sup>th</sup> day of March, 2011.***

**R.S.C. OMOLO**

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***JUDGE OF APPEAL***

***E.O. O'KUBASU***

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***JUDGE OF APPEAL***

***E.M. GITHINJI***

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***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***