REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CRIMINAL APPEAL 193 OF 2005

MADLINE AKOTH BARASA

GABRIEL OJIAMBO NAMBESI ……...…… APPELLANTS

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Busia (Sergon J) dated 7th May, 2003

in

H.C.CR.A. NO. 74 & 75 OF 2003)

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JUDGMENT OF THE COURT

The two appellants *MADLINE AKOTH BARASA* (first appellant) and GABRIEL OJIAMBO NAMBESI (second appellant) were convicted by the Senior Resident Magistrate, Busia for the offence of trafficking in Narcotic Drugs contrary to *section 4 (a)* of the *Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994* (Act) and each sentenced to 10 years imprisonment. Their respective appeals against conviction and sentence to the superior court (which were consolidated) were dismissed.

The particulars of the charge were that on 2nd May, 2003 at Sidindi Market along Busia – Kisumu road, the two appellants:

"***were jointly found trafficking in Narcotic Drug namely cannabis sativa to wit 290 stones weighing 45kg while using a K.B.S. Bus Reg. NO. KAN 846H in contravention of the Act."***

Three witnesses, namely, ***Geoffrey Gathango Ngugi*** (Geoffrey) (PW1); ***Eliakim Jomo Gangani*** (Eliakim) (PW2) and ***PC Benson Sindani*** (PW3)gave evidence at the trial in support of the charge. PC. Benson Sindani was attached to Division C.I.D. Busia at the material time. On 2nd May, 2003 at about 8.00 a.m. he received a telephone call from an informer that two people, a man and a woman, had boarded a bus Reg. No. KAN 864H between Matayos and Bumala and that they had loaded bhang on the bus. He and two other police officers followed the bus in a patrol vehicle. They caught up with the bus at Sidindi and stopped it. The police officers ordered Eliakim to open the boots and Eliakim, who was the bus conductor, opened the boots and after a search the police recovered two nylon bags in the left rear

boot containing dry plant material wrapped in khaki paper which was later examined by the government chemist and identified as cannabis sativa – a narcotic drug (bhang). The police officers asked Eliakim to identify the owners of the luggage and Eliakim identified the two appellants as the owners. The police officers arrested the two appellants and took them to Busia Police Station where it was ascertained that the two nylon bags contained 290 stones of bhang weighing 45 kilogrames.

The first appellant who was the second accused stated at the trial that on the material day she boarded the bus at Busia and when the bus was intercepted by the police at Sidindi, the police officers called out the conductor and the second appellant was removed from the bus. The first appellant further stated that she was thereafter called out on allegation by the conductor that she was in the company of the second appellant. Lastly, she stated that she did not know the second appellant.

On his part, the second appellant (first accused at the trial) stated at the trial, among other things, that on the material day, he went to the bus stage accompanied by two men and a woman when he boarded the bus at Matayos; that he had a bag and clothes which the conductor put in the boot; that the bus was stopped at Sidindi by police officers; that the conductor went out and talked with the police officers for about 30 minutes; that he came out of the bus and demanded that the bus leaves; that thereupon the police claimed that he was the owner of the bag and he was arrested.

A second appeal lies to this Court on a matter of law only (see ***Section 361 (1)*** of the *Criminal Procedure Code)*. As this Court held in ***M'Riunga v Republic*** [1983] KLR 455, where a right of appeal is confined to a question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the decision which would be the same thing as holding that the decision is bad in law. Moreover, the trial magistrate who has seen and heard the witnesses is in a better position than an appellate court to judge the credibility of the witnesses hence an appellate court will not interfere with a finding based on the credibility of witnesses unless no reasonable tribunal would have made such a finding (see ***Muriithi vs. Ogol*** [1985] KLR 359; ***Republic vs. Oyier*** [1985] KLR 353).

The main ground of appeal raised by the two appellants is that the superior court erred in finding that the appellants were jointly in possession of the 45 kilograms of bhang. On the question of possession, the trial magistrate analysed the evidence and concluded:

"***The luggage in the boot was placed in the boot in full view of the conductor PW2. He opened the rear boot and its (sic) the only luggage that was in the boot. The offence, took place in broad daylight and the conductor saw accused persons and identified the luggage and the accused PW3 the police officer. The bus had not even moved for more than 40 kilometres. The memory of the conductor was still fresh. The conductor kept the accused's luggage in the rear left boot which would only fit their luggage and no other luggage. Thus, the conductor's memory even as to seats the accused were sitting is overwhelming evidence. The luggage belonged to both the accused. The accused persons were also in the company of each other. Although they did not sit on the same seat, there are factors which show that they were together. One factor is that the nylon bags were similar in colour. They carried similarly wrapped bhang. The bhang in both bags was first wrapped in a khaki paper and then the nylon paper. Both accused paid the conductor the fare for Nairobi ……".***

The superior court re-evaluated the evidence as it is required to do as the first appellate court and reached its own conclusion thus:

"***I have come to the same conclusion that the plant material was in the possession of two appellants with their full knowledge in view of the glaring and unchallenged evidence of PW1, PW2 and PW3. The circumstances surrounding the case points to the guilty (sic) of the appellants".***

Thus, there were concurrent finding of fact, among other things, that the two appellants were jointly in possession of the bhang which they loaded into a Nairobi – bound public vehicle which they also

boarded. The findings of fact were amply supported by the evidence of Geoffrey and Eliakim. According to the evidence of Geoffrey, the two appellants stopped the bus near Bumala and each had a huge nylon bag and that no other passenger entered the bus after them. According to Eliakim, the two appellants stopped the bus between Matayos and Bumala and they had two pieces of luggage. He described in detail how he loaded their luggage into the left rear side of the boot. On our own analysis, we are satisfied that the concurrent findings of fact were based on ample and credible evidence. There are no grounds upon which we can interfere with the findings of the two courts below.

That notwithstanding, a question arises from the sentences meted to the appellants whether the appellants were punished for the offence of trafficking in narcotic drugs or for possession of narcotic drugs or any other offence. ***Section 4 (a)*** of the Act under which the appellants were charged and convicted provides that a person who trafficks in any narcotic drug or psychotropic substance "*shall be guilty of an offence and liable"*:

"***(a) 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 ….."***

Section 86 of the Act provides for valuation of goods for penalty, thus:

"***86 (1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of a proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by court as*** *prima facie* ***evidence of the value.***

(2) In this section "*proper officer"* ***means the officer authorized by the Minister by notification in the Gazette for purposes of this section".***

The Act creates a separate offence of possession of narcotic drugs or psychotropic substance in ***section 3 (1)*** and by ***section 3 (2) (a)*** prescribes a penalty of ten years imprisonment in respect of cannabis where the person satisfies the court that the cannabis was solely intended for his own consumption and in every other case to imprisonment for twenty years. ***Section 3 (2) (b)*** provides relatively more severe penalty for possession of narcotic drugs or psychotropic substances (other than cannabis).

It is clear that the offence of trafficking in narcotic drugs or psychotropic substances carries a composite penalty of a sentence of a fine and imprisonment. If the offence of trafficking is proved and the trial magistrate convicts an accused person for that offence, then the trial magistrate has to impose the composite sentences. In this case, the trial magistrate imposed only a sentence of 10 years imprisonment. She did not impose the sentence of a fine and did not give reasons for non compliance with the law. The superior court (Sergon J) considered the charge as defective for failure to state the value of the bhang but held that the defect was not fatal because no fine was imposed as required by law. The learned Judge of the superior court did not impose any sentence of fine to comply with the law and did not even consider whether, in the absence of any valuation, it was lawful to impose the prescribed threshold sentence of a fine of Shs.1,000,000/=. The learned Judge was apparently of the view that, the charge of trafficking was defective for omission to state the value of the bhang and that in the absence of the value, a sentence of fine could not be imposed as required by the law. In our view, the sentence imposed was more appropriate to the offence of possession of cannabis sativa contrary to ***section 3 (1)*** as read with ***section 3 (2) (a)*** of the Act and the learned Judge should have considered whether he could have convicted the appellants for the offence of possession instead of confirming the conviction for the offence of trafficking in narcotic drugs.

Moreover, although the trial magistrate considered the definition of "*trafficking"* in the Act, she did not say which act of the appellants amounted to "*trafficking"*. According to ***section 2*** of the Act "*trafficking"* means:

"***the importation, exportation, manufacture, buying, sale, 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 ……".

The superior court while considering the ingredients of the offence of "*trafficking"* stated:

"***The evidence showed that the appellants were in possession of the plant substances which were later established to be cannabis sativa. It is also shown that they had transported the same using motor vehicle registration number KAN 846H".***

It is evident from the definition of the "*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 disclosed the dealing with the bhang which constituted trafficking. The learned trial magistrate did not even deal with that aspect of the case.

The element for "*transportation"* used by the learned Judge of the superior court was not specifically relied on by the prosecution. In any case, the word *transportation* is not used in the definition of *trafficking*. In the circumstances, we are not satisfied that the offence of trafficking was proved.

We have no doubt, however, that the prosecution proved the offence of possession of cannabis sativa contrary ***to section 3 (1)*** as read with ***section 3 (2) (a)*** of the Act, which in our view, is a minor and cognate offence to the offence of trafficking. By ***section 179 (1)*** of the *Criminal Procedure Code*, the trial magistrate could have convicted the appellants for the offence of possession, although they were not charged with that offence.

By ***section 361 (4)*** of the *Criminal Procedure Code*, this Court has jurisdiction to substitute a conviction for possession of narcotic drugs for that trafficking and pass a sentence in substitution of 10 years as may be warranted in law for the offence of possession.

The sentence of 10 years imprisonment was for a more serious offence of trafficking which carries both a sentence of a fine and a maximum prison term of life imprisonment. Had the appellants been convicted for the lesser offence of possession of narcotic drugs, it is probable that the trial magistrate could not have imposed a sentence of more than 5 years imprisonment.

For the foregoing reasons, we allow the appeal to the extent that we quash the conviction for the offence of trafficking in narcotic drugs, set aside the sentence of 10 years imprisonment and substitute therefor a conviction for the offence of possession of cannabis contrary to ***section 3 (1)*** as read with ***section 3 (2) (a)*** of the Act for which we sentence each appellant to 5 years imprisonment. The sentences of imprisonment to run from the date the appellants were convicted by the trial court i.e. 28th July, 2003. We order accordingly.

Dated and delivered at Kisumu this 22nd day of June, 2007.

P. K. TUNOI

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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