



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO.47 OF 2019**

**FREDRICK OWUOR NGI'ELA.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the Conviction and Sentence from the Original*

*Lamu Criminal Case No. 22 of 2018 in a judgment delivered on 1<sup>st</sup>*

*November, 2019 by Hon. T.A.Sitati – Principal Magistrate)*

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**CORAM: Hon. Justice S.M.Githinji**

**Mr Mwangi for the state**

**Wamotsa Wangila Advocates for Appellant**

**JUDGEMENT**

**FREDRICK OWUOR NGI'ELA** was charged in the lower court with two counts, the main one being of Trafficking in Narcotic Drugs, contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The particulars of this offence are that on the **13<sup>th</sup> day of January, 2018** at Lamu channel of Mkomani location in Lamu West Sub-County, within Lamu County, the Appellant herein was found trafficking in Narcotic Drugs by way of conveying to wit **353 big rolls** of cannabis sativa with an estimated street value of **Kshs. 114,200/=** in contravention of the said Act.

The Second Count (alternative) is of being in possession of Narcotic Drugs contrary to section 3 (1) as read with section 3 (2) (9) of the Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994.

The particulars hereof are that on the **13<sup>th</sup> day of January, 2018** at Lamu channel of Mkomani location in Lamu West Sub-County within Lamu County, the Appellant herein was found in possession of Narcotic Drugs namely cannabis sativa to wit **353 big rolls** with estimated street value of **Kshs. 114,200/=** which was not meant for medical purposes.

The prosecution case is that on **13<sup>th</sup> January, 2018** of which was on a Saturday Pw-4 who is the captain of his own boat known as Nashukuru, registration number L.1750, was at Mokowe Jetty. He usually uses the boat to transport remandees and police officers but since it was on Sunday he was free on hire. He anchored the boat and went to take tea. When he finished taking tea and went back to the boat he found it full with 18 passengers. The beach boys had organized the passengers in his absence. As he was about to leave one of the beach boys whispered to him that there was a suspicious luggage on board.

They kicked off and at Tustiri Pw-4 asked the passengers to identify their luggage as one of them had cannabis sativa. They all kept quiet. He said he knew who had it and will call the police. That is when a tall dark male passenger stood up and pleaded with him for forgiveness. Pw-4 urged him to identify his luggage. He pulled it and showed it to Pw-4. It was a large carton. The passengers peeped inside and saw dry plant materials that resembled bhang. The suspect started to shake. Pw-4 called the suspect and told him the beach boys may have reported the incident to the police as they are the ones who told him about it. Pw-4 expressed that he may be arrested together with the suspect. He then called the police.

Pw-2, Pw-3 and Pw-5 are police officers who at the said time were attached to Lamu Maritime Police Unit. On **13<sup>th</sup> January, 2018** at about 11.00am. Pw-2 received a phone call from a police informer. He was told there was a boat leaving Mokowe headed for Lamu Jetty with Narcotic drugs. Pw-2 called Pw-3 and Pw-5. They got into their boat and headed to intercept the said boat. They got it one nautical mile off Manda Island. They ordered Pw-4 to stop. They searched the vessel. There was one big carton which had in it 2 empty egg crates and two orange polythene bags. One had 178 big rolls of green plant material suspected to be cannabis sativa, while the other had 175 such rolls. In total there were 353 rolls. The officers took the carton with its contents and arrested the appellant who said the carton was his. He was taken to Lamu Police Station where he was booked together with the recovered items.

Pw-5 investigated the case. He recorded witness statements. He was handed the recovered carton. There were two polythene orange bags which had 353 rolls of a dry plant material. He prepared an Exhibit memo form and took the dry green plant material to Mombasa Government Chemist for analysis. It was examined by Mr Ogutu who found that it was cannabis sativa of which is a Narcotic drug. The suspect was then charged with the offences carried in the charge sheet.

The Appellant gave unsworn statement in his defence. He denied the offences and alleged that on **13<sup>th</sup> January, 2018** he left his house at Hindi and went to Mokowe Jetty. He boarded a boat and after it got full they headed for Lamu Island. At Wiyoni beachside another boat approached them at high speed. Their boat was forcefully stopped. The captain of the boat in which the appellant was said there was bhang aboard his boat. Everyone kept quiet. The waves were strong at the moment. The Appellant urged the captain to make a choice of either steering the boat from the dangerous strong waves or continue making noise. The captain turned against the Appellant and suggested that he could be aware of the consignment. He alleged there was a time he was arrested for ferrying bhang and could not risk being arrested a second time. One passenger asked where the luggage was and the captain pointed out. The passenger suggested he calls the police. The Appellant questioned him whether he had known the owner before calling the police. The captain said the owner was the Appellant as he was asking too many questions. The Appellant complained that he was not it's owner. When one passenger checked inside the carton and noted it had bhang, the Appellant pleaded with the captain to forgive him as bhang related charges are serious. The captain however called the police. When the police arrived he pointed at the Appellant as the culprit. The Appellant did not argue with them as he had been suspected before. He was arrested and later on charged.

The trial court evaluated the evidence and found the main count proved by the prosecution beyond reasonable doubt. The Appellant was accordingly convicted of the same and fined one million shillings in default to serve 10 years imprisonment and also to a further imprisonment of 10 years.

The Appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that; -

- 1. The sentence was excessive and harsh.***
- 2. The evidence by the prosecution witnesses was contradictory.***
- 3. He was denied the chance to call witnesses.***
- 4. His mitigation was not properly weighed before sentencing.***

**5. The doubts in prosecution case were not well weighed.**

I have considered the charges preferred against the Appellant, evidence adduced by the prosecution witnesses, appellant's defence, the judgment, his mitigation, sentence meted, grounds of appeal and submissions by both sides.

The undisputed facts by both the prosecution and the defence are that on **13<sup>th</sup> January, 2018** the Appellant herein together with some other passengers were aboard a boat known as Nashukuru whose owner and captain was Pw-4, and were headed for Lamu Island from Mokowe Jetty. In the said boat there was a huge carton which had in it two empty crates of egg and two orange polythene paper bags which had in them a total of 353 huge rolls of cannabis sativa. The only question which therefore emerges for determination is whether the Appellant herein had possession of the said rolls of cannabis sativa. According to the evidence of Pw-2, 3, 4 and 5, the Appellant himself identified the impugned carton as his. He had even earlier on before the police were called in by the captain(Pw-4), pleaded with him for forgiveness, a fact which he also admitted in his defence. If actually the carton and its contents were not his he would have vehemently argued against any suggestion that it was. When the police arrived and he was pointed to as it's owner, he says that he did not argue as he had earlier on been suspected. His own stated conduct betrays him as the person who had possession of the said carton and it's contents, as was alleged by the prosecution witnesses. A later denial of the same during the trial was an afterthought and some desperate effort to exonerate himself from the serious offence.

In the case of *Hussein-Vs-R [1980] KLR 139*, the Court of Appeal made it clear that being in possession does not mean that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that possessor must have such access to and physical control over the thing that he is in possession to deal with it as an owner could to the exclusion of strangers.

Applying the foregoing test to the circumstances of this case, it's clear that the Appellant herein had possession of the 353 rolls of cannabis sativa. Pw-1 established they were of cannabis sativa, a Narcotic drug.

The Appellant was therefore rightly convicted. Despite of the minor discrepancies in the prosecution witnesses evidence, the truth is firmly well settled.

As to the sentence, the offence is serious. 353 big rolls of cannabis sativa could not have been solely for the Appellant's own consumption. The offence therefore attracts a sentence of 20 years imprisonment of which is what the trial court meted against the Appellant. Such is not harsh and excessive. The Appeal therefore lacks merit and is dismissed.

**JUDGMENT FOR GARSEN READ AND SIGNED AT MALINDI IN THE OPEN COURT TO PARTIES WHO APPEARS VIRTUALLY, WHO ARE; - THE APPELLANT AT SHIMO LA TEWA MAXIMUM PRISON AND MR MWANGI FOR THE STATE, THIS 8<sup>TH</sup> DAY OF MARCH, 2022.**

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**S.M. GITHINJI**

**JUDGE**



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