Njagi alias Uncle Sam v Republic (Criminal Appeal E064 of 2024) [2024] KEHC 13083 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E064 OF 2024

LM NJUGUNA, J

OCTOBER 30, 2024

BETWEEN

EPHANTUS MAGARA NJAGI ALIAS UNCLE SAM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of Hon. Njoki Kahara, SRM in Siakago MCCR No. E095 of 2023 Delivered on 30th October 2023)

JUDGMENT

1. The appellant has filed a petition of appeal dated 08th February 2024 seeking that the appeal be allowed, conviction be quashed, sentence of 5 years imprisonment be set aside and he be set at liberty. The grounds for appeal are that the learned trial magistrate erred in law and facts:

    a. Failing to consider that the appellant was not in possession of the said cannabis and there was no photograph of the appellant in possession of the same;

    b. By failing to consider that the appellant was a first offender and was entitled to the benefits under Articles 25(c), 27(1)(2)&(4) and 28 of the *Constitution*;

    c. Failing to consider the provisions of section 216 and 329 of the *Criminal Procedure Code* before sentencing to inform herself on the proper sentence to impose; and

    d. Failing to examine whether the charge sheet was defective under section 84 of the *Evidence Act*.

2. The appellant was charged with the offence of being in possession of cannabis sativa contrary to section 3(1) as read together with section 3(2)(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994. Particulars of the offence are that on 23rd January 2023 at Makima market, Makima location in Mbeere south subcounty within Embu County, the appellant was found in possession of

cannabis sativa to wit 800gms which was not in medicinal form street valued at Kshs 14,000/=. He pleaded not guilty and a plea of 'not guilty' was duly entered.

3. At the hearing, PW1 was PC Jessie Kareithi of Makima Police Station who stated that he got information about someone who was selling bhang and he went with his colleagues to the appellant's house and confronted him about the allegation. That he showed then the bhang that was kept under the bed in a blue carrier bag and they took it and arrested him. PW2 was Inspector Muriithi of Makima Police Station whose testimony was similar to that of PW1. He stated that the appellant voluntarily showed them the bhang that was hidden under the bed. That he took the bhang to the government chemist who analyzed it and produced a report dated 15th June 2023. He stated that they did not take photographs at the scene.

4. At the end of the prosecution's case, the appellant was placed on his defence and he opted to remain silent and await the court's judgment. The trial court found him guilty of the offence and convicted him accordingly. He was sentenced to pay a fine of Kshs 150,000/=, in default, 5 years imprisonment.

5. This appeal was canvassed by way of written submissions.

6. The appellant submitted that the prosecution witnesses gave contradictory evidence. He relied on the cases of *Bukenya & others v Uganda* [1972] E.A.549 and *Abdul Aziz Oduor & another v Republic* [2019] eKLR and urged that the court considers section 333(1)&(2) of the *Civil Procedure Code* in sentencing. He also urged the court to consider giving him a non-custodial sentence.

7. The respondent submitted that the offence was proved beyond reasonable doubt given the evidence adduced by the prosecution. That both prosecution witnesses testified that the appellant voluntarily showed then where the substance was hidden under his bed. It relied on the cases of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No 253 of 2003 and *Benard Kimani Gacheru v Republic* (2002) eKLR and urged the court to uphold the sentence imposed by the trial court. It urged the court to dismiss the appeal.

8. The issues for determination are:

   a. Whether or not the charge sheet was defective;

   b. Whether or not the prosecution proved it's case beyond reasonable doubt; and

   c. Whether the sentence is excessive.

9. On the issue of whether the charge sheet is defective, section 134 of the *Criminal Procedure Code* provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

10. In my view, the charge sheet contains all the necessary information to enable the appellant participate in his trial and the court to enter its judgment. To this end, he cross examined the prosecution witnesses, having understood the charge he was facing. In the case of *MG v Republic* (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) the court was guided by the decision of the Court of Appeal in the case of *Benard Ombuna v Republic* [2019] eKLR where it was held:

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to

the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

11. On the related issue of whether or not the conviction was based on contradictory evidence, the appellant argued that the evidence of the prosecution witnesses was contradictory. PW2 stated that when they found the Bhang under the appellant's bed, there was also a roller flag in the carrier bag. PW1 did not testify of any roller flag. This evidence is not contradictory as it simply built up the prosecution's evidence. When given a chance to cross-examine PW2, the appellant did not raise any issue with PW2's testimony about the roller flag.

12. A notable contradiction is one which would cause prejudice to the appellant. In the case of *Joseph Maina Mwangi v Republic* (2000) eKLR, the court considered this issue and held that:

> "in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the *Criminal Procedure Code* whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".

13. As to whether the prosecution proved its case beyond reasonable doubt, the offence is found under section 3(1) as read together with section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control *Act No 4 of 1994* which provide:

> "(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
>
> (2) A person guilty of an offence under subsection (1) shall be liable—
>
> a. in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a term of not more than five years or to a fine of not more than one hundred thousand shillings;"

14. PW1 and PW2 testified that they went to the home of the appellant where he voluntarily showed then where he was hiding 800gms of cannabis sativa under his bed. The appellant did not offer his defense at the trial and he was convicted and sentenced to a fine of Kshs 150,000/= and in default to a 5-years imprisonment term. From re-examination of the evidence adduced at trial, the offence was proved beyond reasonable doubt.

15. The trial court sentenced him appropriately given that the sentences prescribed under section 3(2)(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994 apply to instances where the court is satisfied that the accused person was holding the substance for his personal use. In this case, that has not been ascertained. Therefore, I find no reason to displace the findings of the trial court on both conviction and sentence.

16. In the end, I find that the appeal lacks merit and it is hereby dismissed.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant Applicant

..... for the Respondent