



REPUBLIC OF KENYA



**Kibwana v Republic (Criminal Appeal E022 of 2022)  
[2023] KEHC 21288 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E022 OF 2022  
SM GITHINJI, J  
JULY 31, 2023**

**BETWEEN**

**NORMAN NIMROD KIBWANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence from the Original  
Mariakani Criminal Case No.149 of 2020 in Judgment delivered  
on 18th March, 2022 by Hon S.K.Ngii – Principal Magistrate)*

**JUDGMENT**

Coram: Hon. Justice S. M. Githinji

Appellant in person

Ms Mutua for the State

1. Norman Nimrod Kibwana, was charged in the lower court with the offence of being in possession of Narcotic drugs (Bhang), contrary to section 3 (1) as read with section 3 (2) (a) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) No.4 of 1994 Laws of Kenya.
2. The particulars of this offence are that on the 10<sup>th</sup> day of March, 2020 at about 01:30hours at Kisumu Ndogo area in Rabai Sub-County of Kilifi County, within Coast Region, the appellant was found in possession of Narcotic drugs namely bhang to wit 20 rolls and one sachet with a street value of Kshs. 6,000/= in contravention of the said [Act](#).
3. The prosecution case is that on 10/3/2020 at about 1:20am Pw-1, Pw-2 and Pw-3 all police officers attached then to Rabai Police Station, together with another who never gave evidence Pc Kariuki, were on patrol at Mazeras area, near Kisumu Ndogo. An informer told them that Nimrod, who had been selling cannabis sativa was at the time in a palm wine selling den. According to Pw-2, the said Nimrod



was in their “wanted list” as a suspect. They proceeded to the place they were directed by the informer. When they got to the place they approached him from different directions. Pw-1 and Pw-2 arrested him. Pw-3 and the said Pc Kariuki searched him. Pc Kariuki recovered from his trouser pocket a satchet which had in it green plant material suspected to be bhang. The appellant denied that the satchet was his. The appellant turned violent. Pw-1 called the OCS, CI AG Noor. He arrived after 15 minutes using his vehicle. He directed that the officers search the suspect’s house. Pw 2 remained at the place with the OCS as the rest proceeded with the suspect to his house. The suspect directed them to a house near Mazeras Polytechnic. It was a single room. They searched therein and Pc Kariuki recovered a gunny bag under the bed. Inside the bag there were 20 sticks of dry green plant material, suspected to be cannabis sativa. The appellant did not tell them the source of the said sticks. They took the bag with its content. They went back to where the OCS and Pw-2 were. They then all went back to the police station.

4. On 27/5/2020 the 20 sticks of the dry green plant material and a clear polythene sachet containing 5gms of a similar material were received at the Government Chemist for analysis. Pw-4 examined them and found that they were of cannabis sativa which is a narcotic drug. He thus made a report.
5. The appellant was then charged. The investigating officer did not offer evidence.
6. The appellant in his defence said he was fixed by his estranged wife. He hails from Mazeras and was working for Jumbo Steel Company as a casual labourer. On 9/3/2020 his elder brother called him asking him to collect for him his shoes from a cobbler and take them home. His brother had travelled. As he walked to his brother’s home he was called. The caller’s number was unknown. The caller asked whether it was Nimrod and appellant confirmed it was. The caller said he was Pc Kariuki from Rabai Police Station. He said the wife had reported him to the police. He told the officer that they separated and he remarried. The estranged wife used to threaten him.
7. At Rabai Police Station he met his wife with four police officers. He greeted them. The officers quarreled him for allegedly oppressing the wife. They threatened to arrest him. Pc Kariuki arrested him. He took the shoes, phone and a power bank. He was held for two nights. He was given back the phone. He was then charged with trafficking. He denied the charge. It was later amended. The wife complained about it and he received a letter about a robbery with violence allegation by her.
8. The trial court evaluated the evidence and found that the offence had been proved by the prosecution beyond reasonable doubt. The accused was convicted of it and sentenced to serve 7 years imprisonment.
9. Dissatisfied with the said conviction and sentence, the appellant appealed to this Court on the grounds that; -
  1. The trial court did not comply with provisions of section 74 (A) and 75 (4) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) No.4 of 1994.
  2. There was no cogent evidence to connect him with the offence.
  3. He was not represented by an Advocate during the trial and was not informed of his right to such representation.
  4. His defence which is credible was not weighed.
10. The appeal was canvassed by way of written submissions. As an appellant court I have re-evaluated the charge, evidence adduced in its support, the appellant’s defence, judgment of the lower court and sentence meted, and the submissions.



11. The trial court record reveals that the devil is in details. The report which led to the arrest of the accused was obtained from an alleged informer. The informer told the officers on patrol that Nimrod had been selling cannabis and had been seen at Kisumu Ndogo, in a palm wine selling den. Pw-2 said they had been searching for him for a while but does not indicate it was in connection with what. Pc Dennis Kariuki is indicated as the investigating officer as on 23/7/2020 he attended court to explain a complaint by the appellant that they had taken from him a pair of shoes, power bank and his national identification card. He denied it and said they only recovered bhang. This officer, is also the one alleged by Pw-1 and Pw-3 to had recovered the sachet with bhang from the appellant pockets and also the gunny bag with 20 sticks of cannabis sativa under the bed. However, when the matter proceeded on 18/2/2021 he was not available to offer evidence and neither was he thereafter. He ended up not offering his evidence. He was the star witness for the prosecution and no reason was given as to why he could not avail himself as a witness for the prosecution. The OCS who was called at the scene where the appellant was arrested and ordered for his house to be searched was also not called as a witness. No reason was given for the failure. From the witnesses names in the charge sheet his name is not included and he may not even have been considered as a valuable witness in the case. The appellant is alleged to had been violent at the scene, causing the officers to call the OCS. He was allegedly shouting saying the sachet was not his. When the OCS arrived we are not told what calmed him down and made him voluntarily agree to take the officers to his house for a search. If he was violent about recovery of a sachet weighing 50 grams of cannabis sativa, it raises eyebrows how he agreed to lead the police to his house where he had allegedly 20 rolls of cannabis sativa hidden under the bed. If the presence of the OCS was the “magic”, the evidence of Pw-2 shows he never went to the house.
12. The foregoing lacunas in the prosecution case lends credence to the appellant’s defence. He said he had an estranged wife who was out to fix him. He produced a copy of a letter dated 20/10/2020 showing a complainant by the name of Joyce Kadzo Beja had withdrawn her complaint of robbery with violence against her husband one, Norman Nimrod Kibwana who allegedly had apologized to her. The letter seems to have been received at Mazeras Police Post as it carries a stamp for the station.
13. Given the foregoing, one wonders whether this lady could have been the informer, the one who planted the bhang in the house and used Pc Dennis Kariuki to fix the appellant.
14. The coincidence that it’s Pc Dennis Kariuki who recovered the alleged drug upon search at two different scenes, where other officers were equally involved, given the circumstances, cannot be trusted.
15. The foregoing evidence raises reasonable doubts as to whether the appellant committed the alleged offence. The said doubts should be resolved in his favour. Having done so, the appeal succeeds. The conviction and sentence are hereby quashed. The appellant is set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF JULY, 2023**

**S.M.GITHINJI**

**JUDGE**

In the Presence of; -

1. Appellant
2. Ms Mutua for the Respondent

