



REPUBLIC OF KENYA



KENYA LAW
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**Bwanahani v Republic (Criminal Appeal E022 of 2022)
[2023] KEHC 21188 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E022 OF 2022
SM GITHINJI, J
JULY 26, 2023**

BETWEEN

ATHMAN BWANAHANI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Hon M.M.Wachira – Principal Magistrate Lamu in Criminal Case Number 331 of 2021 Republic-vs-Athman Bwanahani & Abdul Aziz Somoe delivered on 13th June, 2022 and Sentence delivered on 17th June, 2022 at Lamu)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. In the lower court, Athman Bwanahani the appellant herein, together with another called Abdul Aziz Somoe, were charged in the main count with the offence of trafficking of narcotic drugs contrary to section 4 (a) as read with 5 (1) (c) of the [Narcotic drugs and Psychotropic Substance Control Act](#) No 4 of 1994 by means of storing.
2. The particulars of this offence are that on 6th day of July, 2021 at around 1300hours in Kwaguyo area of Matondani Location in Lamu Central Sub-Location within Lamu County, the accused jointly were found trafficking narcotic drugs to wit 30 rolls of cannabis sativa (bhang) weighing 1.518kgs of street value Kshs 15,000/= in contravention of the said Act.
3. In the alternative, the two were charged with being in possession of Narcotic drugs contrary to section 3 (1) as read with section 3 (2) (b) of [Narcotic Drugs and Psychotropic Substances Control Act](#) No 4 of 1994.



4. The particulars for this offence being that on the 6th day of July, 2021 at around 1300hours in Kwaguyo area of Matondoni Location in Lamu Central Sub-Location within Lamu County, the accused jointly were found in possession of narcotic drugs to wit thirty (30) rolls of cannabis sativa (bhang) weighing 1.518Kgs of street value Kshs 15,000/= in contravention of the said Act.
5. In this case the prosecution called 6 witnesses. Their case is that on 6/7/2021 PW-1, PW-2, PW-3, PW-4 and PC Shikuri all attached then at Lamu Police Station, were on patrol at Matondani area. Members of the public informed them of a certain house where bhang was sold. They went to the said house for investigations of the allegation. They found two men at a verandah preparing a meal. The police officers identified themselves and requested to carry out a search. The two men agreed. There was a bedroom or a room which had a bed. Under the bed there was a 20 litres jerrican, yellow in colour. Inside the jerrican was a white bag which had a khaki paper in which there were 30 rolls a substance suspected to be bhang. The two men were asked about it and said they were visitors there. No one else was in the house. They were arrested and taken to the police station with the recovered substance. Pw-6 investigated the case. He forwarded the recovered substance to the government chemist for examination. It was examined by Pw-5, a government analyst who found it to be cannabis sativa, a narcotic drug under the Act. He thus made a report of which he produced as Pexhibit -3, it was in 30 big rolls weighing 1.518kgs. The two men were then charged with the offences in the charge sheet.
6. The defence case is that the first accused, now the appellant herein, on 6/7/2021 while he was cooking for his children was called by Bwana Kai to go and help him harvest mangoes and coconuts. They went together to the land of Hassan. Hassan was not there. The 2nd accused was at around 1.00pm going through farms in Matondoni selling prawns. He got to the land of Hassan. He found the first accused and Bwana Kai cooking ugali after they had harvested mangoes. They requested for prawns. The second accused gave them. They cooked. Before they could eat police officers entered. They searched the three of them and recovered nothing. They requested to search the house. They did so and emerged with a jerrican of which they alleged contained bhang. The officers alleged the bhang was for the three of them as the owner of the home was absent and so should carry the burden. They were taken to the police station. Kai was released for reasons they did not understand. The accused were charged. The house did not belong to them but to Hassan.
7. The trial court evaluated the evidence and found the appellant herein guilty of the offence in the alternative count and was sentenced to serve 5 years imprisonment. The second accused was however acquitted on both counts. The appellant herein dissatisfied with the said conviction and sentence, appealed to this court on seven grounds. He challenged the evidence that he had possession of the alleged bhang.
8. I have considered the charge, the evidence adduced by the prosecution witnesses, the defence, judgment of the lower court and sentence meted; grounds of the appeal and submissions by both sides.
9. The only issue for consideration is whether the evidence on record establishes beyond reasonable doubt that the appellant herein had possession of the 30 rolls of cannabis sativa.

“Possession” in relation to crime is defined under section 4 of the *Penal Code* as;-

- a. be in possession of “or” “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything



in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other persons

- b. If there are two or more persons and anyone or most of them with the knowledge and consent of the rest has or have anything in his or their custody or possession. It shall be deemed and taken to be in the custody and possession of each and all of them; -"

10. In this case, what would apply is part (b) as the appellant was not alone at the time of his arrest. To most of the crimes there are two elements which need be established by the prosecution, that is *actus reus*, or rather the "guilty act" and *mens rea* or rather the guilty mind. The guilty act in this matter is that the appellant herein was found with another cooking in a house, at a corridor, and within the said house, under a bed in one of the rooms, 30 rolls of cannabis sativa were recovered. Part (a) of the definition of possession indicates that the suspect must knowingly have possession of the alleged goods either in person or in custody of another person or in a place. Part (b) indicates if the item or goods are in custody or possession of another, where there is more than one person, if any one of them has knowledge of it's possession by the other and consents to it, has it's possession. "Possession" therefore in it's definition in part (a) and (b) carries the element of mens rea in the word "knowingly" in part (a), and "with knowledge and consent" in part (b).
10. The trial court in its finding against the appellant herein on the two elements stated that the 2nd accused's statement of which he recorded with the police disclosed that the police officers found keys which they tried on the door but did not open. They got the keys which appellant herein had hanging on the neck and used them to open the door. The court then concluded out of that, that the appellant herein was either living in the said house or had the owner's consent to be therein. The court further considered that the two suspects were cooking at the place and guests do not ordinarily cook in houses that do not belong to them. Also that the alleged owner of the house, one Hassan, was not called by the appellant as a witness.
11. I wish to state that all these findings are wrong. The statement recorded by the 2nd accused, was not part of the prosecution evidence. It actually contradicted their evidence as the four eye witnesses never alleged the room from which the cannabis sativa was got was locked. The appellant herein was also prejudiced by it's consideration given that there is no evidence that he had been supplied with it, knew at any given time what it stated, and was not given a chance to cross-examine the 2nd accused person on it. It was simply produced by 2nd accused as evidence without disclosing it contents. The court should not have weighed it against a co-accused person. (appellant herein).
12. If it's not common for visitors to cook in houses not belonging to them, it does not mean that it cannot happen. The burden of proof was upon the prosecution to establish beyond reasonable doubt that the house belonged to the appellant herein. Save for that, the prosecution was also duty bound to establish that the appellant had actual possession of the cannabis sativa or it's presence at the place was with his knowledge and consent. The appellant and the 2nd accused person did not resist the police search. They did not attempt to escape. They told the police that the house did not belong to them but to one Hassan. The police never got the said Hassan. They never adduced any evidence found in the house that connects the appellant to it's occupancy or ownership. One would wonder whether any of his personal belongings were therein. The police did not even try to establish where the appellant actually lived if that was



not his house as he claimed. It's possible for one to live in a house or be a guest or worker or even an owner and not know or have consent to some of the items which may be found in it; given the size of the house, one's mostly occupied space, and the number of persons living in the place.

13. This is a matter that was not properly investigated. There is no reliable evidence that the appellant had possession of the 30 rolls of cannabis sativa. He deserved an acquittal. The appeal therefore succeeds. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF JULY, 2023

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S.M.GITHINJI

JUDGE

In the Presence of: -

The Appellant in Person

Ms Mkongo for the Prosecution/Ms Mutua holding her brief

