



**Abdirahman v Republic (Criminal Appeal E001 of 2023)
[2023] KEHC 24608 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E001 OF 2023
JN ONYIEGO, J
SEPTEMBER 29, 2023**

BETWEEN

MUSA MOHAMED ABDIRAHMAN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R. Aganyo delivered on 31.03.2022 in Criminal Case No. E011 of 2022 at PM'S court in Wajir)

JUDGMENT

1. The appellant herein was charged with the offence of being in possession of cannabis sativa (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) No. 3 of 1994. The particulars of the offence were that on 13.01.2022 at Wajir Township in Wajir East Sub County within Wajir County, he was found in possession of cannabis sativa (bhang) to wit 5 (five) rolls of a street value of Kes. 500 which was not prepared for medicinal use
2. Upon returning a plea of not guilty, the matter proceeded to full trial. Consequently, he was convicted of the offence and sentenced to serve 10 years' imprisonment. Aggrieved by the said conviction and sentence, he preferred the instant appeal via a Petition of Appeal filed in court on 08.12.2022, citing grounds that; the prosecution had failed to prove its case to the required degree and that the sentence meted out was harsh and excessive. He further contended that his rights were violated as he was not brought before a court of law within the provided period of time.
3. When the appeal came up for hearing, the court directed that the appeal be canvassed by way of written submissions. On his part, the appellant faulted the trial court for convicting and thereafter sentencing him on evidence that did not meet the required standard. He submitted that the sentence by the trial magistrate was harsh and to that end relied on the case of [Omar v Republic](#) App No. 17. of 2020 where



the court revised a 10-year sentence to five years. He urged this court to quash his conviction and set aside the sentence by the trial court.

4. Mr. Kihara for the respondent stated that the prosecution had proved the offence herein beyond reasonable doubt and that the appeal was without any merit. It was his case that the sentence meted out by the court was appropriate in regard to the circumstances of the case herein. He urged this court to dismiss the appeal as the same was devoid of merit.
5. This being the first appellate court, I have a duty to subject the evidence adduced before the trial court to a fresh evaluation and analysis and draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. In that regard, I draw guidance on the duties of a first appellate court from the Court of Appeal decision in the case of *Kilu & Another vs Republic* [2005]1 Klr 174 where it was stated that;
 - i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
 - ii. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.
6. Brief facts of the case were that, on 13.01.2022 at around 9.00 a.m., Pw1 PC Washington Okech together with his colleagues, David Mutua (pw2) and Suleiman Twaha, were on routine patrol in a hired taxi. That upon reaching Baraza Park, they spotted the appellant together with four other people standing in front of a shop. It was his evidence that the appellant in his right hand was holding a yellow envelope while the left hand held Kes. 100/-.
7. It was further his case that from the tinted car, they could see the appellant exchange the yellow envelope for money. That they proceeded with their patrol but upon returning, they saw the appellant in the same spot and so they desired to find out what was happening. He stated that the appellant together with the other people who were there upon spotting them, ran away and only the appellant was arrested. That upon searching his pockets, they recovered five wrapped rolls of what they suspected to be cannabis sativa.
8. PW2, David Mutua the investigating officer corroborated the evidence of pw1. He stated that on the material day, while on patrol duties with his colleague, they managed to find the appellant together with others at a shop where upon being arrested, they found in his pockets five wrapped rolls of what they suspected as cannabis sativa. That he organized for the said five wrapped rolls to be taken to the government chemist where via a report produced as Pex3, the same were confirmed to be cannabis sativa. It was his case that the appellant is a known peddler who has been arrested in several occasions.
9. The appellant in his defence stated that he was a loader and that the people who had the bhang ran away.
10. From the above facts, this court has the duty to determine whether the elements of the offence herein were proven beyond any reasonable doubt and if so, whether the sentence meted out by the trial court was appropriate? The key question is, whether he was found in possession of the plant material suspected to be cannabis sativa. From the government chemist's report, the plant material presented for analysis was cannabis sativa. Was the same in form of medicinal preparation? The answer was no hence whoever was found in possession had it unlawfully.



11. The appellant stated that the people who had the bhang ran away. From the statement, the appellant confirms that indeed, he was at the scene where the business of bhang was being transacted. It equally shows that the business that was being undertaken at that specific time was that of peddling bhang. The appellant conceded that indeed there was bhang in as much as he was not the one who had the same.
12. Possession is defined under Section 4 of the penal code in the following terms:
 - 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 in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;
 - b. if there are two or more persons and any one or more 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 taken to be in the custody and possession of each and all of them”.
13. From the above definition, it follows that possession may be actual or constructive. Actual possession denotes physical custody or control of an item or object. In that case, the person in possession has immediate contact and control over the item. From the evidence of pw1 and pw2, their testimony was quite consistent and well corroborated. The same was to some degree supported by the appellant in his defence by admitting that at the point of his arrest, he was in company of some people who had bhang but they fled. Why would the police officers fabricate this case against him if indeed he was not found in possession?
14. Although the Appellant contended in his defence that he was a loader and that the people who had the bhang ran away, he never raised the same during cross examination and the same could only be taken as an afterthought. Contrary to the appellant’s contention that the judgment was against the weight of the evidence, the evidence in this case was to say the least overwhelming to sustain a conviction. Accordingly, I do not find merit on the appeal against conviction.
15. Concerning sentence, it was contended that the same was manifestly harsh and excessive. Section 3 (1) as read with Section 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 3 of 1994 prescribes sentence in the following terms;

Penalty for possession of narcotic drugs, etc.

 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 for ten years and in every other case to imprisonment for twenty years; and...
16. It is trite that sentence is at the discretion of the trial court and that an appellate court can only intervene if the same is excessive or that the trial court applied wrong principles or it took into consideration extraneous factors. See Abolfathi Mohamed & another v Republic (2018) eKLR. In the instant case, the appellant was sentenced to 10 years’ imprisonment for being in possession of 5 rolls of bhang worth 500/=. In my considered view, the sentence meted out on the appellant was harsh and excessive considering that he was a first offender. Accordingly, am inclined to substitute the sentence of 10 years to the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

ROA 14 days



DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER 2023

J. N. ONYIEGO

JUDGE

