



REPUBLIC OF KENYA



**Ochieng v Republic (Criminal Appeal E004 of 2021)
[2022] KEHC 15637 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E004 OF 2021
SM GITHINJI, J
NOVEMBER 28, 2022**

BETWEEN

NELSON OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence of eight 8 years imprisonment
by Hon S.K.Ngii – Pm dated 4th February, 2021 at Mariakani)*

JUDGMENT

1. Nelson Ochieng, the appellant herein was charged in the lower court with the offence of being in possession of narcotic drugs, contrary to section 3 (1) (a) 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 being that on July 28, 2019 at Mazeras Open Market, in Rabai Sub-County of Kilifi County within Coast region, the appellant was found in possession of a narcotic drug namely (bhang) to wit 54 sticks with street value of Kshs 12,000/= which was not in medical preparation form.
3. The prosecution called 3 witnesses in their case, all police officers. Their case is briefly that on July 28, 2019 at about 4.00pm, PW1 and PW2 in this case who were at the time attached to Rabai Police Station, were on patrol within Mazeras Open Market. They met a person who directed them to a person who was allegedly selling cannabis sativa at the place. The said (bhang) cannabis sativa, was allegedly kept in a black bag. They went to the stall of Ochieng as were directed. Both knew him before then. He was selling tomatoes and omena fish. They found him at his stall.
4. Below the table on which he had displayed his tomatoes and omena fish there was a black bag. They searched it and recovered from therein 54 sticks of a substance they suspected to be cannabis sativa. They arrested the appellant and took him to the police station with the bag and it's content.



5. The OCS Rabai Police Station, on the very same day assigned the case to PW3 for investigations. He was handed a black bag which had 54 rolls of a substance suspected to be cannabis sativa. He prepared an exhibit memo form and using it forwarded the 54 rolls to Mombasa Government Chemist for analysis. It was examined and a report made to the effect that the rolls were of cannabis sativa of which is a narcotic drug. The black bag, 54 rolls of bhang, exhibit memo form and the Government Chemist Analyst Report were all produced as exhibits 1 to 4 respectively.
6. At the closure of the prosecution case, the court found that the appellant had a case to answer and accordingly placed him on his defence.
7. The appellant offered a sworn statement in his defence in which he claimed that on the material day he was at his kiosk where he sells omena fish in mazeras. At about 4pm two officers approached him and said they were sent to collect a black bag. They searched his kiosk and got nothing. They proceeded to another kiosk where they got the black bag. He was asked whether he knew it's owner and said he did not. They said they will arrest him over it. He was arrested. A friend of his intervened and was slapped. At the station the bag was searched. Bhang was recovered from therein. He suspects he was framed by the other traders in the marker. The bhang produced in court is not the one that was recovered at the scene. The kiosk owner in which the bhang was recovered has since gone underground.
8. The trial court evaluated the evidence and found the appellant guilty of the offence. He was consequently convicted of it and sentenced to serve 8 years imprisonment.
9. Dissatisfied with the conviction and the sentence, he appealed to this court on the grounds that; -
 1. The charge is defective.
 2. The narcotic drug was not found in the appellant's house.
 3. The offence was not proved beyond reasonable doubt.
 4. There is no evidence that the recovered substance was narcotic drug.
 5. The evidence was not properly evaluated in arriving at a conviction.
 6. Mitigation was not considered in sentencing and the meted sentence is harsh.
10. The appeal was canvassed by way of written submissions. I have considered the charge preferred against the appellant, evidence adduced by the 3 prosecution witnesses, the appellant's defence, judgment entered and the sentence, grounds of appeal and submissions by both parties. The issues for determination in this appeal are;-
 1. Whether the appellant had possession of the alleged 54 rolls of cannabis sativa.
 2. Whether the rolls are of cannnabis sativa.
 3. Whether the sentence meted is harsh given the circumstances of the offence and the mitigation offered.
11. As was submitted by the prosecution, and rightly in *Stephen's Digest of the Criminal Law* "A moveable thing is said to be in the possession of a person when he is situated with respect to it, that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances as such are that he may be presumed to intend to do so in the case of need."
12. Section 4 of the [Penal Code](#) acknowledges the said definition in it's definition of possession 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 in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;
13. In *Hussein v Republic KLR 139*, the Court of Appeal made it vivid when it observed, “in this definition of possession, it 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 a possessor must have such access to and physical control over the thing that he is in a position to deal with it as an owner could to the exclusion of strangers.”
14. PW1 and PW2 were firm and consistent in their evidence that the black bag was found under a table where the appellant was selling tomatoes and omena fish. That is in his market stall, in his presence though he denies it and claims it was recovered in someone else stall after a search at his stall revealed nothing. The defence is not logical given the circumstances. After his stall was searched and nothing was recovered he had no business accompanying the two officers to any other stall for a search. Though he works in the said market, he was not clear on whose stall it was recovered from. The prosecution case is strong and believable unlike the defence case.
15. I do agree with the findings of the trial court that the 54 rolls of cannabis sativa were recovered from the appellant’s stall at Mazeras Open Market.
16. The 54 rolls were forwarded to the Government Chemist for analysis and there is a report indicating they were examined and found to be of cannabis sativa of which is a narcotic drug. Though the appellant denies it and alleges what was examined is not what was recovered, he does not explain how that happened or where the exchange was done. His allegation cannot be true. The officers had no cause to fix him.
17. The offence under the act can carry up to a sentence of 20 years imprisonment. The trial court acknowledged that, and considering the mitigating factors jailed the appellant to 8 years imprisonment. Mitigation was therefore weighed and a lenient sentence meted. This court finds no reasonable cause to interfere with it.
18. The upshot is that the appeal is in want of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF NOVEMBER, 2022.

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S M GITHINJI

JUDGE

