



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 47 OF 2019

ISAYA MBOYI MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Garissa Chief Magistrate's Court

Criminal Case No. 767 of 2016 delivered by Hon. Cosmas Maundu (CM)

on 12th November, 2019)

JUDGEMENT

- 1.** The Appellant **Isayah Mboyi Musyoka** appealed to this court following his conviction and sentence in Chief Magistrate's Criminal Case No. 767 of 2016 where he had been charged with the offence of trafficking narcotic and psychotropic substance. Having been found guilty and convicted he was jailed for 10 years.
- 2.** Being dissatisfied with the conviction and sentence the Appellant appealed to this court on grounds as follows;
 - a.** **The prosecution case was not proved beyond reasonable doubt.**
 - b.** **There was no receipt connecting the Appellant to the drugs.**
 - c.** **Prosecution evidence was inconsistent and contradictory.**
 - d.** **The sentence meted out is severe.**
- 3.** In his written submissions the Appellant raised the issue of ownership of the vehicle and the cannabis sativa. He argued that no concrete evidence was placed before court on ownership of the two items.
- 4.** Secondly, he took issue with the exhibits which he states ought to have had a mark and produced by either the arresting officer or the investigating officer.
- 5.** He argued further that no police diary or Occurrence book were produced in court.
- 6.** Further he claimed that the trial was conducted in English and though he did not raise an objection at the time he did not understand the language being used in court.
- 7.** The Appellant took issue with the expert opinion and doubted whether the items taken to the Government chemist were ever examined.
- 8.** Further he contended that there were no independent witnesses.
- 9.** On its part the State supported both the conviction and sentence. It argued that the motor vehicle in which the Appellant was travelling in was not subject of the trial but the substance in the box that allegedly belonged to the Appellant.

10. As relates to the language used at the trial, the State appears to concede that PW2 and 3 spoke in English. Though it is further urged on behalf of the state, that as the Appellant cross-examined the said witnesses, he must have understood and followed the proceedings.
11. The expert witness was qualified and a co-author of the report.
12. As for the defence the same was considered by the trial court in arriving at its judgment.
13. This being the first appellate court it has a duty to consider the evidence afresh examine and analyse the same in order to arrive at its own independent opinion, bearing in mind that the trial court interacted with the witnesses first hand.
14. **PW1** and **PW4** were initially arrested alongside the Appellant. **PW1** was the owner and driver of motor vehicle KCG 440J while **PW4** was a passenger. **PW1** and **PW4** had travelled together from Nairobi. Both stated in their evidence that they arrived in Mwingi at 7 pm on the material day and it is at the point when they picked the Appellant who had a black box as a fare paying passenger. They were stopped by KDF officers at Shabaha, and the box which at the time was in the boot of the car opened and bhang found therein.
15. **PW2** Lieutenant Dima Said Bilal who in the company of another officer stopped the vehicle the appellant was travelling in searched the same. He corroborates the evidence of **PW1** and **PW4** as he too confirmed that the Appellant admitted being the owner of the black bag. He further stated that they arrested the trio and took them to Garissa police station
16. **PW5** Inspector Samuel Kamau was the duty officer on the 21st of September 2016 when two vehicles pulled up at the Garissa Police Station in the company of **PW1**, **PW2**, **PW4**, **PW5** and the Appellant. He too confirmed that upon interrogating the trio the Appellant admitted the box was his.
17. In as much as **PW1** and **PW4** may be defending themselves, it cannot be a coincidence that **PW2** and **PW5** officers working at different locations and for different defence units be of a similar position that on interrogation the Appellant did admit as having been the owner of the black box. I am therefore convinced that evidence to the required standard was adduced as to ownership of the black box and the substance therein.
18. I do agree with the State that with the evidence of ownership of the box having been established the issue of who owned the vehicle was not an issue before court.
19. As for the substance in the box **PW3** produced a report from the Government Chemist following a request by CID Garissa to examine the substance sent from the said Police. The report marked as exhibit B8 indicates that the substance was examined and found to be cannabis sp which falls within the 1st Schedule of the Narcotic Drugs and Psychotropic Substances (Control) No. 3 of 1994. The said report was signed by P.O. Nyoike whom **PW3** said he had worked with for 20 years and knew his handwriting and signature. The witness further informed the court that his colleague Nyoike had been transferred to man the Mombasa office.
- The production of the report was within the law.
20. As to the language of the court clearly all court sessions were conducting in English and proceedings translated to Kiswahili so that it mattered not whether the witnesses spoke English or Kiswahili. In addition, the Appellant fully participated in the proceedings which is an indication that he understood and followed the proceedings.
21. On being found to have a case to answer the Appellant gave a sworn defence where he admitted having gotten a lift at the price of Kshs 400. He corroborated the details given by **PW1** and **PW4** as to travel but denied being the owner of the black box.
22. The trial court did consider the defence. This, court has equally considered the defence and finds it to be a mere denial which has not dislodged the overwhelming evidence of the prosecution.
23. In the circumstances this court therefore finds that the conviction was safe and declines to set the same aside.
24. As regards the sentence the offence under Section 4(a) of The Narcotic and Psychotropic Substance Control Act, No. 4 of 1994 Act carries a fine of one million shillings or three times the value of the substance whichever is greater and in addition life imprisonment. The Appellant received a sentence of 10 years which by law is extremely lenient.
25. For the reasons stated above the conviction and sentence are hereby sustained and the appeal is dismissed.

DELIVERED AND SIGNED AT GARISSA THIS 11th DAY OF FEBRUARY, 2021.

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ALI ARONI

JUDGE