



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.6 OF 2020

DANIEL DENA MWARINGA.....1ST APPELLANT

SAMMY CHOME MWENDA.....2ND APPELLANT

JOHN OMOLO.....3RD APPELLANT

ABBAS YUSUF BOY.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 529 of 2018

of the Senior Principal Magistrate's Court at Mariakani Law Court-

Hon. S. K Ngii SRM dated 23rd January 2020)

CORAM: Hon. Justice R. Nyakundi

1st appellant in person

2nd appellant in person

3rd appellant in person

Mr.Kaburu for 4th Appellant

Alenga for the State

JUDGMENT

The Appellants were jointly charged with the offence of being in possession of narcotic drugs 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. The particulars of the offence were that on 2nd July 2018 at Mazeras township Rabai location in Rabai Sub county within Kilifi county or coast region, the appellants were found in possession of 17 sticks of cannabis sativa of street value of Kshs. 3,400/= not prepared in medicinal form.

Aggrieved by the conviction and sentence of the trial court, the appellants lodged an appeal on the following grounds;

1st Appellant

1. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering that the 1st appellant was not found with the said psychotropic substance

2. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering that the officer from the government chemist who tested the alleged substance was not called to testify as to the authenticity of the document produced in court pursuant to section 33 of the evidence act.
3. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the prosecution was not proved beyond reasonable doubt.
4. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the case was poorly investigated which led to miscarriage of justice.
5. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering his reasonable defence evidence.

2nd appellant

1. The learned trial magistrate erred in law and fact by convicting him without sufficient evidence.
2. The learned trial magistrate misdirected himself in law and fact when he held that the contradiction in the prosecution were not fatal to the prosecution's case.
3. The learned trial magistrate having held that the premises in which the accused persons were allegedly found was not premises used for smoking *cannabis sativa* (bang); ought to have noted the same in the main judgement.
4. The learned trial magistrate failed to appreciate that the four (4) persons before him were not having a joint intention, each having explained how they came to be arrested.
5. The learned trial magistrate acknowledge that it was dark and at the same time failed to note that the police might have arrested the appellant (who was the 4th accused) from a foot path.
6. The learned trial magistrate misdirected himself on the law in case of joint possession.
7. The learned trial magistrate completely failed to note the contradiction in the five (5) prosecution witnesses and only considered one which he dismissed as inconsequential by trying to fill in the gaps created therein.
8. The learned trial magistrate considered the quantity of evidence instead of the quality of evidence.
9. The learned trial magistrate failed to appreciate the defence of the appellant that he was an innocent passerby and bumped into a police raid and he was lumped together with strangers, one who the police admitted possessed part of *cannabis sativa* but was released.
10. The learned trial magistrate to appreciate that the offence of possession of a few rolls of cannabis sativa (bang) which has been legalized in several jurisdictions; has been diluted in seriousness and hence imposed a long custodial sentence.
11. The learned trial magistrate failed to record & consider the mitigation of the Appellant and instead dwelt on the fact that the appellant did not attempt to show the 'purpose for which he possessed the bhang' a fact he had denied throughout the trial.
12. The learned trial magistrate conducted this trial unprocedurally by not giving a chance to the Appellant's counsel (or even the unrepresented accused) a chance to submit at the close of prosecutions.
13. The learned trial magistrate erred in law and fact by admitting a report of the forensic examiner without calling the maker and yet this could not cause any unnecessary delay.
14. The learned trial magistrate failed to make a finding to the effect that some witnesses denied that there was a foot path for public use (in order to discredit the value of the appellant's evidence) while others admitted that there was one contradiction ought to have created doubt in respect of the case against the appellant followed by acquittal.
15. The learned trial magistrate failed to notice an obvious fact that the evidence of an investigating officer (who was deliberately left out) was necessary to shed light on ownership of those houses from which *cannabis sativa* (bhang) was found.
16. The conviction of the appellant was against the weight of evidence.
17. The sentence of seven (7) years imprisonment without an option of fine was manifestly excessive in all circumstances of this case.

3rd appellant

1. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering that the 1st appellant was not found with the said psychotropic substance
2. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering that the officer from the government chemist who tested the alleged substance was not called to testify as to the authenticity of the document produced in court pursuant to section 33 of the evidence act.
3. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the prosecution was not proved beyond reasonable doubt.
4. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the case was poorly investigated which led to miscarriage of justice.
5. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering his reasonable defence evidence

6. 4th Appellant

1. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering that the 1st appellant was not found with the said psychotropic substance
2. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering that the officer from the government chemist who tested the alleged substance was not called to testify as to the authenticity of the document produced in court pursuant to section 33 of the evidence act.
3. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the prosecution was not proved beyond reasonable doubt.
4. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without considering that the case was poorly investigated which led to miscarriage of justice.
5. That the learned trial magistrate erred in law and fact by finding his conviction and sentence without humbly considering his reasonable defence evidence

Background

In building up it's case, the prosecution called 5 witnesses whose evidence is summarized below.

PW1 no 232686 CIP Philip Lucheveleli who was the Ocs Rabai Police station stated that together with his colleagues on 2/7/2018 the assistant county commissioner, area chief and other police officers from Rabai police station had gotten information that the appellants were gathered in Makonde Township in Rabai village with *cannabis* which they were smoking and selling. They went to the area where they found 5 people smoking bhang. They had lit a fire with which they were keeping themselves warm. The appellants noticed them and tried to escape but they were unsuccessful as the area had been well covered. The appellants threw the bhang they had into the fire. They were however, arrested and the area searched where they found 17 sticks of the bang hidden under the sofa. The recovered sticks were then sent to the government chemist for analysis. He stated that 5 people had been arrested during the whole operation but one of them was released over medical grounds.

Upon cross examination by Mr. Kaburu advocate for the 4th accused, he stated that the operation took place at around 7.30 pm and it was slightly dark though there was fire that had been lit at the scene. He denied that the 4th accused had been arrested on the way from a cyber café.

PW2 no. 100451 PC Zaiharria Ndicho who was attached to Rabai police station at the time stated that on 2/7/2018 at about 7.30pm they received information from a member of the public that at Mazeras in an estate, there were people smoking bang. Together with PW1 and other police officers, they went to the place and found a house that appeared to have been abandoned. There, they found 5 men some were seated on a sofa and others on the corridor.

Upon reaching there they identified themselves and arrested five people. They searched the area where they recovered 17 sticks of bhang which were then sent to the government chemist for analysis. He also denied that the 4th accused had been arrested on his way from a cyber café.

PW 3 number 112927 PC Shivok Isaac who was attached to Rabai Police Station at the time recounted that on 22/7/2018 that at around 1730 hours together with his colleagues under the command of Assistant County Commander, Chief and Ocs Rabai, they raided a residence at Mazeras following a tip off that there was cannabis sativa which was being smoked and sold there. At the house they arrested five people and recovered 17 sticks of cannabis sativa hidden underneath a sofa. On cross examination by the 2nd accused, he clarified that they had attacked the scene at about 7.30pm.

PW4 number 113399 PC Philip Mayani who was attached to Rabai Police Station at the time stated that on 2/7/2018 they received information that at Mazeras there was a house where people were smoking cannabis sativa. Together with the others aforementioned they

raided the house and arrested 5 people and recovered 17 sticks of the cannabis underneath a sofa.

On cross examination by Mr. Kaburu advocate for the 4th accused he stated that he saw the 4th appellant with a bag and he did not see him throw cannabis sativa to the fire like the other four had done.

PW5 **Marryane Nduati** the assistant county commissioner Rabai sub county stated that on 2/7/2018 at around 7.30pm they received information that there were people using narcotics drugs at Mazeras area. That together with the aforementioned people they proceeded to the house where they arrested five people and recovered 17 sticks of cannabis sativa under a sofa.

Defence case

John Omolo the 1st accused who elected to give unsworn evidence told the trial court that on the said date and time he was walking home when it started raining. He took shelter at the referenced premises and not long after, the police raided the area arresting him. That he was searched and nothing was found on him. The police then broke into a house where they recovered bang. He was arrested alongside 4 others. It was his contention that unlike one person who was released, he could not raise the bribe that the police were asking for.

Abbas Yusuf Boy the 2nd accused in sworn evidence told the court that on the said date he took a customer on his on motorcycle to collect some money from another person whom he would later know as Haji. According to him the customer got into the house while he sheltered at the verandah since it was raining. While he was waiting, the police arrived and he was arrested alongside four other people. He was searched by the police and nothing was recovered on him. It was his evidence that the OCS demanded for Ksh. 50,000 to set him free which he could not raise.

Daniel Dena the 3rd accused told the court that on the said date he had gone to collect some money from one Haji and it was the 2nd accused who had taken him there on his motorcycle. He found Haji rolling bhang inside the house. Shortly the police came and arrested the five of them. It was his evidence that a bag containing cannabis was recovered from another house and Haji was asked to disclose the owner of the house to which he refused. Later a sum of Kshs. 50,000 was demanded to secure his release which he refused but Haji gave the bribe and was released.

On cross examination he told the court that the police found him conversing with haji outside the house on the corridor and Haji threw the bhang he was rolling into the fire. He also admitted he did not see haji pay a bribe.

Sammy Chone Mwenda the 4th accused told the trial court that on 2/7/2018 at about 7.30pm he was on his way home from a cyber café when he passed by an area where unbeknown to him there was a police raid ongoing. He was stopped and arrested by the OCS. The OCS then took him to a verandah outside a house where he was sat down with others. The police searched his bag and found nothing. The police then broke into three houses and it was in one of the houses that they recovered 17 sticks of cannabis. It was also his evidence that the OCS had demanded for Kshs. 50,000 from each of them in order to set them free and that only one Abdalla was able to raise the said money. He maintained that he had been arrested while passing by a path near the houses.

Submissions

Defence counsel for the 4th accused submitted to the effect that there was no proof that the 4th accused was in physical possession of the cannabis. He submitted that there were contradictions as to where the cannabis was found and that the investigating officer did not testify to shed light on the issues raised as to the recovery of the cannabis.

The 1st accused filed written submission which centered on inconsistencies of how the arrests and recovery were made. Also there was no evidence that he had been examined by a doctor to be certified a narcotics user.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR**.

Further in Pandya Versus Republic 1957 EA 336 and Ruwalla Versus Republic 1957 570: "it is the duty of the first appellate court to weigh the evidence of the trial court to draw its own inferences and conclusions bearing in mind that it has neither seen nor heard the witnesses and to make due allowances in this respect". This is the approach I will apply in determining this appeal.

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is;

a). whether the prosecution proved joint possession of cannabis sativa by the appellants to warrant the arrests

Section 3 (1) of the Act codifies the offence of possession of any narcotic drug which includes *cannabis sativa* or possession of psychotropic substances.

Section 3 (2) (a) of the Act prescribes the sentence for possession of *cannabis sativa* while **Section 3 (2) (b)** prescribes the sentence for possession of other narcotic drugs and psychotropic substances. We are concerned here with punishment for possession of *cannabis sativa*.

Section 3 (2) (a) provides:

“Any 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;

From the evidence on record, I shall place the accused appellants on the scene of crime and their consequent arrests. It is not contested that all the five prosecution witnesses placed all the appellants at the scene of crime. Their evidences are consistent in so far as this regards. Also noteworthy is the fact that the 1st, 2nd and 3rd accused persons do not in their defenses deny that they were found and arrested at the scene to which they all offered different explanations that there were at the material place on the material date and time.

The 4th appellant however, does contest that he was arrested at the scene as his co accused. He stated that there was a path that was near the said house where his co accused had been found and he was arrested on his way from a cyber café. All the prosecution witnesses denied that he had been arrested on his way home from the cyber café.

It is important to note that all the prosecution witnesses gave the same account of events that some of the accused persons were arrested inside the house while others were arrested along the verandah which I would believe connects to the house.

On the issue of possession, it is clear from the prosecution witnesses recount that 17 sticks of bang were recovered from the sofa. They also testified that the rolled cannabis sativa that they had been smoking was thrown into the fire. However, since none of the sachets of bhang was recovered from the fire, it is inconceivable to state conclusively what exactly did the appellants throw into the fire as alleged by the witnesses. There ought to be sufficient matching evidence to convince the court that indeed the appellants were found with smokable rolls of cannabis sativa.

This bring us to the second point whether the evidence of possessions was uncertain to the extent that there is a doubt of the appellants being in possession of a narcotic drug.

The law

Possession is defined under Section 4 of the penal code in the following languages:

Section 4 of the Penal Code defines 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;

(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.

Similarly in **Stephen’s digest of the criminal law** possession is defined as **“A moveable thing 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 that he may be presumed to intend to do so in the case of need”.**

Further in **Hussein V R (1980) KLR 139** the court of Appeal stated that,

“in this definition on 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 possession must have such access to and physical control over the thing that he is in a possession to deal with it as an owner could to the exclusion of strangers”.

From the above element’s 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.

Whereas, in constructive possession, the prosecution ought to prove that the appellants were aware of the presence of the 17 sticks of cannabis sativa hidden under the sofa set. That the cannabis sativa subject matter of the trial was in the dominion and control of the appellants jointly and severally. There is no dispute as to the characteristics on constructive possession, as set out above, but in respect to this, cogent and credible circumstantial evidence must be presented by the prosecution beyond reasonable doubt that the appellant had knowledge of its existence at the scene where it was recovered. In **Ali v R (1990) klr 154**. The court stated that,

“for a conviction based on circumstantial evidence to be deemed proper, the inculpatory facts relied on as circumstantial evidence must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary to be sure that there are no other co-existing circumstances which could weaken or destroy the inferences of an accused person’s guilt, derived from circumstantial evidence”

In this case pw1 -pw4 presented two variances of the recovery of the narcotic drug thereafter analyzed and confirmed to be Cannabis Sativa.

The first variance being the time when they confronted the applicants smoking it seated around the fire place. Second incident, which followed immediately being when they entered into a house with a sofa set. It was at this stage alleged that the 17 sticks were recovered stuck underneath.

I will address myself to the incident of recovery which is the fundamental aspect of this appeal. According to pw1, CIP Lucheveli, he led an operation with pw2, pw3 and pw4 at Pipeline area. On arrival, all the witnesses are categorical that the appellants were found smoking bhang around the lit fire to keep them warm. In their evidence pw1 – pw4 told the court that each one of them on noticing their presence threw the cannabis sativa manipulated for smoking into the fire. A search was conducted and the suspected drugs were recovered as such. The place was cordoned off, but each witness admits that there is a foot path from the main road leading to the scene. The witnesses further confirmed that the house in question was also surrounded with other various house units whose owners or tenants were never positively identified at the close of the investigation of this crime. Its crystal clear that the exhibited narcotic drugs tendered in court were retrieved from a house. By its nature and furnishings is presumably occupied by either the owner or a tenant. The failure to investigate or call the landlord or tenants to testify the trial was fatal to prosecution case. It's my view that once the above evidence is accepted without knowing the owner of the sofa set or the house unit where the recovery was made it creates an adequate situation for a benefit of doubt to be resolved in favour of the appellants. I come to this conclusion on the basis that the criminal act against the appellant is that of constructive possession accompanied with common intention under **Section 21** of the penal code. There is also a missing link on the evidence as to the owner of the premises which each of the witnesses confirmed that it's a buildup area with houses. It was quite clear from the evidence of pw1 – pw4 that none of them bothered to establish the owner/landlord or tenants of the housing units. It appears to me that this was a rentable and occupied house by virtue of the furnishings found therein. It was incumbent upon the prosecution to lead evidence as to the ownership or the person with a beneficial interest at the time of the operation on suspected Narcotic drugs. It's interesting that the evidence that was relied upon by the prosecution was full of inconsistencies and contradictions, which indeed go to the root of the problem in this appeal.

The characteristics of the evidence as deduced from the record is that from PW1 perspective the 17 sticks were recovered under the sofa set in a house with no occupant. Including, pw1 confirmed that the applicants were outside that house in which the recovery was made.

Its intriguing that from the evidence of the prosecution witnesses the scene comprised of several houses, and yet the four witnesses gave different versions on arrest and recovery of the exhibit which form the basis of the prosecution.

On the alleged recovery and the apparent presence of the appellants in pw2's testimony appellants divided themselves in two groups with one on the corridor and the other seated on the sofa set. Unfortunately, none of the witnesses positively identified distinctively whom between the four appellants was seated inside the house or found around the fire place. As for pw3 he told the trial court that on arrival at the scene all the five (5) appellants were seated outside the house. However, be that as it may be, being a case of constructive possession, it was necessary that those inconsistencies and contradictions do not create a major differential on the features of the same scene. That variance on details of the recovery of the cannabis sativa in constructive possession appears after all to negatively impact the chain in link on circumstantial evidence.

It is also worthy to note that in the instant case, As a matter of great concern pw1-pw4 did not find it fit to prepare an inventory of the recovered exhibits at the scene in the presence of the appellants and to seek their signatures before effecting arrest. That omission did prejudice the appellants as to whether the recovered exhibits had a causal connection with their physical presence at the aforesaid scene for the suspected narcotic drugs.

It was the duty of the prosecution to proof that each of the appellant had control and dominion of the 17 sticks of cannabis sativa.

It is my considered view that besides the glaring contradictions, the prosecution should have investigated and provided evidence to support its allegation on constructive possession. The supporting evidence has been impaired by the fatal features of inconsistencies and contradictions to render it untenable to proof the charge beyond reasonable doubt.

As it is evident from my summary of the law, I find no circumstantial evidence that the appellant had knowledge of the narcotic drug and each had some measure of control over its location which could be easily accessed on demand. To prove joint possession, the prosecution must prove the additional element of consent. It must be shown that the appellants consented with one another or another person possessing the item. Knowledge and control is key in constructive possession. **Section 21** of the Penal Code sets out the law in Kenya with respect to parties to offences. The prosecution therefore had an additional task to show that the appellants aided or abetted another's possession or that the particular possession offence was a probable consequence of carrying out a common criminal purpose agreed to between the parties.

Keeping in mind that inference must be carefully distinguished from conjecture or speculation, and there can be no inferences, unless there are objective facts from which to infer other facts which the case seeks to establish. That duty is entirely vested with the prosecution.

Reading the trial Magistrate's decision as a whole, I am persuaded that there are inherent defects in the circumstantial evidence that implicitly does not establish the prosecution case beyond reasonable doubt against the appellant. The criminal law requires a very high degree of proof especially for inferences to be drawn which are consistent with the guilty of the accused persons. That was not the case here.

The upshot of what I have said is that the appeal succeeds, convictions quashed and sentences set aside. The Appellants shall be set at liberty unless otherwise Lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF MAY, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

J. S Kaburu for the 2nd Appellant

1st, 3rd, and 4th Appellant present

Mr Mwangi for the state

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

(jskaburu@yahoo.com and info@odpp.go.ke)