



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL APPEAL 41 OF 2018**

**(From original conviction and sentence in Cr. 203 of 2016 of the**

**Principal Magistrate's Court at Baricho – E. H. KEAGO -PM)**

**BETH WANGECI NDUATI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

1. The appellant, Beth Wangechi Nduati alias Kabubu was convicted of the offence of being in possession of Bhang contrary to **Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic substance Control Act No. 4/1994** and ordered to serve 20 years imprisonment.

2. The appellant was also convicted of the offence of resisting lawful arrest by police officers in due execution of their duties contrary to **Section 103(a) of the National Police Service Act** and sentenced to serve Five years imprisonment.

3. Finally, she was charged with assaulting a police officer while in due execution of police duties contrary to **Section 103(a) of the National Police Service Act No. 11/2011** and sentenced to serve Five Years imprisonment.

The sentences were ordered to run consecutively.

4. Being dissatisfied with the conviction and sentence the appellant filed this petition of Appeal dated 16/7/2018 and raised the following grounds:-

**a. That the learned Magistrate erred in law and in fact in overlooking the contradictions and inconsistencies in the prosecution's case.**

**b. That the learned Magistrate erred in law and in fact by not taking into account that other people were arrested on the same compound and were charged in court and admitted the charges and were sentenced.**

**c. That the learned Magistrate erred in not considering the defence tendered by the defence and making a general conclusion that the testimony of the prosecution witness was credible since the accused was known to them and that there was constructive possession of cannabis within Kangaru Area.**

**d. That the learned Magistrate erred in law and in fact in failing to record and consider the mitigation tendered by the accused who has partial disability.**

**e. That the learned Magistrate erred in law by convicting the accused to serve the maximum sentence on all three counts.**

5. The State opposed the appeal through Director of Public Prosecutions who filed submissions dated 7/3/19 and urged the court to dismiss the appeal.

6. The court gave directions that the appeal be disposed off by way of written submissions. For the appellant, submissions were filed by R. Muthike Makworo, Advocate while those for the State were filed by Mr. Obiri, the prosecution's counsel.

7. The brief facts of the case are that on 16/2/2016 at 7.30 Pm police officers who were attached to Kagio Police Station under the command of I.P Obadia proceeded to the house of the appellant who was suspected to be in possession of cannabis which was meant for sale. On arrival they conducted a search and recovered Five stones of Cannabis from under the table which was in her kitchen. The police officers recovered the Five stones of cannabis which were in a black paper. They were produced in court as exhibit 1(1) -(5). The Officers also arrested the appellant.

8. Upon arrest the appellant resisted and bit one of the officers by name Stephen Wanjohi (PW-3-) on the left hand and he sustained an injury. The appellant also splashed the officers with faeces. She was however overpowered and escorted to Kagio Police Station where she was charged with these offences.

The appellant denied the charge and stated that the Police Officers did not go to her house nor did she bite anybody.

9. I have considered the evidence tendered before the trial Magistrate and the submissions. This is a 1<sup>st</sup> appellate court and the law is now well settled that the 1<sup>st</sup> appellate court has a duty to consider the evidence tendered before the trial court, evaluate it and give its own independent finding.

However, I have to consider that I never had the opportunity to see the witnesses when they testified and assess their demeanor then leave room for that. The leading authority is **Okeno –v- R (1972) E.A** though there are various decisions emphasizing this like **Macharia –v- R Court of Appeal No. 23/08 and Mwangi –v- R 2 KLR** to mention but a few.

10. I have considered and evaluated the evidence but I will first address the grounds of appeal. The appellant in the submissions filed by learned counsel Mrs. Makworo argued grounds 1, 2 and 3 together. The grounds are mainly stating that the trial Magistrate erred by relying on evidence which was contradictory and had inconsistencies. It is also argued that the trial Magistrate erred by not considering the defence of the appellant.

11. It is submitted that the contradictions and inconsistencies can only lead to the conclusion that the cannabis which was produced in court was not in possession of the accused. That the witnesses were evasive as to what happened to other people who were found in their homestead.

12. The appellant denied that the police officers entered the compound. I have considered the contradiction pointed out in the submissions. It is stated that PW-1- stated that they found the appellant outside her house and that there were other people at the accused's home. That the cannabis was recovered by CPL Langat. That other suspects disappeared and they never looked for them.

13. That PW-3- stated that they arrested other suspects who were in the compound and charged them in court which contradicts the evidence of PW-1-. That none of the witnesses gave evidence that led to the conclusion that the kitchen where the cannabis was recovered belonged to the appellant. PW-5- told the court that the appellant was in the kitchen while all other witnesses testified that she was outside her house.

14. For the State it was submitted that the evidence against the appellant was overwhelming and that there were no contradictions on the prosecution's case.

15. Not all contradictions in the evidence will lead to an acquittal. The court will ignore minor contradictions if they do raise doubts in the prosecution's case. Where the contradictions are grave and cast doubt in the prosecution case, the court will give the accused the benefit of doubts. The Court of Appeal while addressing the issue of contradictions in the case of **Ondeng –v- Republic (2014) eKLR** while stating that –

**“Nor do we think much turns on the alleged contradictions on the time of the commission of the offence. The trial court after hearing the evidence accepted that the offence was committed at about 7.00 Pm in accordance with evidence of PW-2-.”**

Quoted with approval the holding in the Ugandan case of **Twehangane Alfred –v- Uganda Cr. Appeal No. 139/2001, 3002 UGCA 6**. In the case the court stated:-

**“with regard to contradictions in the prosecution's case the law is set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main subject of the prosecution's case”.**

16. I will proceed to consider the evidence tendered by the witnesses. PW-1- P.C Pius Mutuku Wambua testified that on 16/2/2016at 7.30 Pm he was called by the OCS and told to proceed to a scene where cannabis was being sold. He proceeded there in the command of IP. Obadiah and Cpl Langat using a station vehicle driven by P.C. Wanjohi. They went to the homestead of Beth Wangechi alias Kabubu who is the appellant it was at night. They conducted a search in the kitchen, Under the table, Cpl Langat saw a polythene bag which had Five stones of cannabis. He further stated that the house belonged to the appellant. We ordered the suspect under arrest but she resisted. The appellant bit P.C Wanjohi on his hand. The accused excreted and splashed them with faeces. PW-2- P.C Stephene Wanjohi who testified that he was the driver who took the officers to the scene. He told the court that when they arrived at the scene he remained in the vehicle by the road side. He said he saw about three structures in the homestead. The appellant was later taken to the vehicle and the officers had recovered Five (5) stones of cannabis. The appellant was put in the vehicle. She grabbed his hand and bit him. PW-3- Ester Chebus on her part said they found the appellant in the kitchen where they recovered Five (5) stones of cannabis. The appellant resisted but they used force. The appellant bit P.C Wanjohi on the hand and smeared faeces on the vehicle and on the police officers.

17. In cross-examination this witness said there were other suspects arrested on that day for being drunk. They were charged before court.

18. PW-5- Cpl David Langat testified that they went to the kitchen where the appellant was and recovered Five (5) stones of cannabis. He testified that the home was known to him and he is the one who recovered the cannabis.

19. In Cross examination, PW-5- testified that they had information that cannabis had been delivered to the home of appellant.

20. The trial Magistrate considered the evidence and stated as follows:-

**“The cannabis was found in the compound where the accused was staying with her family. There was no one arrested at the scene as except the accused. The accused in her defence only said that the police didn’t enter the compound. The arresting officer here clearly stated that the accused was found in the kitchen within her compound which was well known to them before and having acted on information. I find that the testimony of the prosecution witnesses credible in that the accused was known to them before arrest. I find that indeed there was constructive possession of cannabis within Kangaru area”.**

21. I find that the trial Magistrate made a finding of fact which is supported by the evidence. I find no reason to interfere with the finding. The evidence by PW1, 2, 3 & 5 was cogent and did not cast doubts on their testimony. It is only PW-1- who stated that they found the appellant outside. He however confirmed that the house belonged to the appellant and the drugs were recovered in her presence. There is no material contradiction which is grave as to raise doubts in the prosecution case. The evidence that the appellant was present when the drug was recovered from her house is overwhelming and does not raise any doubts. I find that the finding by the trial Magistrate was based on cogent evidence and he cannot be faulted for arriving at that finding. From the evidence of the witnesses they were acting on an information of an informer that drugs had been delivered to the house of the appellant. The information was contradicted as cannabis was recovered. The information received by the police was acted upon. The police acts on the information to confirm whether it is true or not. In this case the police acting on information managed to arrest and also made recoveries. In Kigecha Njuga –v- Republic (1965) E.A 773 the Court stated:-

**“Informants play a useful part no doubt in the detection and prevention of crime.”**

22. Informers are not normally called as witnesses unless the prosecution desire to call them for the court to hear their information depending on the circumstances of the case. The informers are protected as a matter of public interest as to ensure that they continue with their role which would be compromised if their identities are exposed. I find that there was overwhelming evidence tendered by the prosecution to prove that the appellant is the one who was in possession of the drugs. The court was right in ignoring the minor inconsistencies.

23. On the issue that the appellant was arrested with other people. This issue was not raised before the trial Magistrate and so it was not considered in the judgment. All the witnesses testified that it is only the appellant who was arrested in connection with this offence. I have looked at the allegation that there were other people who were arrested in the compound. If I can quote what PW-3- stated at Page 15, line 1-2 of the proceedings he stated – **“There were other suspects arrested on that day for being drunk. They were charged before court.”**

24. The simple interpretation of this statement is that the officers had arrested other suspects who were arrested for other offences but not in connection with this case. The suspects had nothing to do with the case. The submission does not change the finding by the trial Magistrate that the appellant is the one who was in possession. I don’t agree with the appellant’s contention that the witnesses were evasive as to what to other people in the compound. The witnesses did give candid answers as to what happened. PW-1- said there were about -3- who came from their houses. PW-2- who was the driver and who never went to the compound said he could not see the people who were with the appellant. I have quoted what PW-5- stated. PW-5- stated that appellant lives with other people in the compound It was denied that the appellant lives with other people in the compound. It has not come out clearly what other people had to do with the drugs when there was overwhelming evidence that the appellant was the one in possession.

25. The appellant in her submissions stated that the arrest came barely a few weeks after she had been charged and later convicted. This put credence to the evidence by the witnesses and the information they had received from a police informer. The ground is a sham. The trial Magistrate established the ingredients of possession. The law recognizes actual and constructive possession. Section 4 of the Penal Code defines possession. It states:-

**a. any office the holder of which is appointed or removed by the President or by any public commission;**

**b. any office the holder of which is appointed, elected or otherwise selected in pursuance of some written law;**

26. The evidence tendered was that the drugs were in the house of the appellant. The Narcotic Drugs does not define the term possession and so where the person is charged with possession the definition which applies is the one defined under the Penal Code. The trial Magistrate considered the issue whether the appellant was in possession. At page 34 of the record which I have quoted above the trial Magistrate found that the appellant was in constructive possession. I find that the finding was based on cogent evidence. The contention is a sham.

27. On the issue as to whether the appellant resisted arrest, the witnesses gave well corroborated evidence that she resisted arrest. Though no exhibit was produced, the trial Magistrate found no reason to doubt the witnesses and it is not a must that a case can only be proved with an exhibit. Where sufficient, cogent and credible evidence is tendered, the court will proceed to convict even in the absence of an exhibit. The ground is without merits.

28. The appellant has faulted the sentence of Twenty (20) years imposed by the trial Magistrate. It is argued that the trial Magistrate did not consider the mitigation.

29. I have considered the record. Sentencing is the discretion of the trial Magistrate. An appellate court will not interfere with the discretion unless it is proved that the trial Magistrate acted on wrong principles, ignored some relevant matters or failed to consider some relevant

matters or that the sentence was manifestly harsh.

30. The record shows that the trial Magistrate did consider the mitigation and stated as follows:-

**“Mitigation by the accused is considered but she is a repeat offender and still has another case pending before court -2-. The previous sentence has not deterred her conduct she is sentence to serve 20 Years in Count 1, Count II & III she will serve Five Years imprisonment each the sentence to run consecutively.”**

The record shows that she had two previous convictions for the same offence.

31. The contention by the appellant that the trial Magistrate did not consider the mitigation is not supported by the record. The trial Magistrate did consider the mitigation and properly addressed the relevant issue which was that the appellant was a repeat offender who had two previous relevant convictions and had a pending case of a similar nature.

32. The Judiciary sentencing Policy Guidelines Para 4(1) states that the sentence imposed should be geared towards achieving the following objectives:-

**i. Retribution**

**ii. Deterrent**

**iii. Rehabilitation**

**iv. Restorative Justice**

**v. Incapacitating the offender**

**vi. Denouncing the offence on behalf of the community.**

33. Proportionality is also a general principle which the court must observe. It is a principle that the sentence imposed must match the offence committed.

34. The appellant relies on the case of **Daniel Kyalo Muema –v- R (2009) eKLR, Court of Appeal** where the court stated that the sentence of 10 years and 20 years imprisonment prescribed in **Section 3(2)(a) of the Narcotic Drugs Act** for possession of cannabis are maximum sentences and that the court can lawfully impose a sentence any shorter of imprisonment. The court further stated that although **Section 3(2)(a) of the Act** does not expressly provide for a fine the court can lawfully in accordance with **Section 26(3) of the Penal Code** impose a reasonable fine. The appellant has also relied on a persuasive decision in **Alfred Kinyua Kariithi –v- Republic (2017) eKLR** where the court reduced a sentence of Ten (10) years to Two (2) years.

35. I have considered the submissions by the appellant. There is every indication that the appellant was a vowed peddler of cannabis who had not reformed despite having been imprisoned twice. Though the sentence may not have been proportionate in view of the value of the drugs, the trial court properly took into consideration other principles like deterrent, public interests. The case cited by the Judge in **Alfred Kinyua –v- R**, that in Court of Appeal Mombasa in **Caroline Auma Majabu –v- Republic (2014) eKLR** - the Appeal Court held that the gravity of sentence for drugs trafficking was maximum sentence intended for drug barons and serious worth Thousands of Shillings and not small timers such as the appellant who had few sachets. By extension, and this is clear from **Section 3(2) of the Act**, peddlers – that is those who possess the drug for any other purpose other than their own consumption are supposed to get a more severe sentence which is Twenty years. In this case in view of the previous convictions, this current conviction and the appellant had a pending case, the maximum sentence was deserved. I will therefore not interfere with the sentence. The only bit of the sentence I will interfere with is to order that the sentences will run concurrently.

36. The upshot is that this appeal is without merits and is dismissed.

**Dated at Kerugoya this 25<sup>th</sup> day of February 2020.**

**L. W. GITARI**

**JUDGE**