



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 38 OF 2019

ROSE WANJIRU WAMBUGU.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal arising from the judgment of the Hon. H.Adika (PM)

delivered on 22/05/2019 in Nyeri C.M.Cr.Case No. 825 of 2014)

JUDGMENT

1. The appellant, **Rose Wanjiru Wambugu**, was charged with being in possession of narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the charge on are that on the 21/08/2014 at Kamuyu Location within Nyeri County the appellant was found trafficking by storage one hundred and forty one (141) rolls of bhang approximately 513 grams valued at Kshs.2,820/- which was also not in medicinal preparation form in contravention of the said Act;

2. The appellant was subsequently charged at the Principal Magistrates Court at Nyeri and was convicted and sentenced to serve a term of thirty (30) years imprisonment;

3. Being aggrieved by both conviction and sentence, the appellant personally filed a Petition of Appeal and a second petition was filed on her behalf by her previous counsel; both appeals were abandoned and the appellant through the firm of Njuguna Kimani Advocates filed a third Petition of Appeal on the 3rd June, 2019; therein she listed three (3) grounds of appeal as summarized hereunder;

(i) The appellant was convicted on a charge that was fatally and incurably defective;

(ii) The appellant was convicted on insufficient, inconsistent and contradictory evidence;

(iii) The trial court failed to weigh the appellant's defence against the prosecution's case hence arrived at an erroneous conclusion.

4. At the hearing hereof the appellant was represented by learned counsel Mr.Njuguna Kimani with Ms. Gicheha appearing for the State; both counsel made oral presentations; hereunder is a brief summary of the submissions.

APPELLANT'S SUBMISSIONS

5. The appellant submitted that the trial magistrate erred in convicting the appellant on a charge that was incurably defective; the charge was for trafficking by storage 141 rolls of "**bhang**"; that there was nothing called "**bhang**" in the 1st Schedule; the appellant was convicted of the trafficking of a substance unknown in law; hence the conviction cannot stand;

6. The Government Analyst as per his Report stated that the substance was '**cannabis sativa**'; the particulars of the Charge Sheet states that the substance was '**bhang**'; it was incumbent upon the Government Analyst to state that '**bhang**' is also '**cannabis sativa**' and also vice versa; the evidence of **PW1** is silent on this issue; the judgment of the trial court is also silent on the issue as to whether '**bhang**' is '**cannabis sativa**' or the reverse;

7. Case law referred to **Peterson Njogu Gikandi vs Republic HCRA No. 259/2007 (Unreported); Peterson Njogu Gikandi HCRA No.43/2007(Unreported)** in both cases similar findings were made on the issue of "**bhang**" being a substance unknown in law as psychotropic substance;

8. That on this ground alone is sufficient to allow the appeal and set the appellant at liberty;

9. The second ground of appeal was there was inconsistent, insufficient and contradictory evidence; upon the appellant's arrest and seizure of the "**bhang substance**" there is a mandatory procedure to be followed as set out under the provisions of section 74A (1) of the Act; the mandatory procedure is as set out hereunder;

(i) Upon arrest Seizure Notice must be issued to the person being arrested; case law referred to **Peterson Njogu Gikandi (supra)** this was captured in this authority;

(ii) An Inventory ought to have been prepared;

(iii) Weighing of the substance must be done;

(iv) A Certificate of Valuation must be issued by a Gazetted Officer as provided under Section 86(1) of the Act;

10. None of the mandatory requirements were followed; the question posed was who was the officer who gave the value of the substance as Kshs.2,820/-; No evidence was adduced on the weight of the substance; there was no evidence on the weight of the substance being 513 grams as per the Charge Sheet or was it 142 grams as per the evidence;

11. On the third ground of appeal counsel submitted that the trial court failed to consider the appellant's defence and considered the prosecution's case entirely; it failed to consider where the appellant was residing whether at Kamakwa or at Kamuyu; and whether she had a landlord;

12. In conclusion Counsel submitted that many issues were left hanging; if the evidence been adduced or looked at carefully this court will arrive at a different conclusion; the upshot is that the sentence of thirty (30) years is overly excessive and is not warranted;

13. The appellant urged the court to allow the appeal and to quash the conviction and the appellant be set at liberty.

RESPONDENTS SUBMISSIONS

14. In response counsel stated that the appellant was a repeat offender and committed the offence whilst out on probation for a similar offence;

15. Counsel submitted that the Government Analyst erred in giving a blanket statement that the drug was '**cannabis sativa**'; that he ought to have analyzed the substance to establish whether it fell within Schedule 2 of the Act; counsel concurred with the appellant's counsel that Section 74 (A) of the Act was not complied with;

16. There was no Inventory as required; and it could not be established from the evidence whether the officers conducted a search as the appellant ran away;

17. In essence counsel conceded the appeal on the grounds that there was no psychotropic substance called '**bhang**';

ISSUES FOR DETERMINATION

18. After hearing the oral submissions made by the respective counsel this court has framed the following issues for determination;

(i) Whether the Charge Sheet was incurably defective;

(ii) Whether the prosecution proved its case to the desired threshold.

(iii) Whether the trial court disregarded the appellants defence;

(iv) Whether the sentence was excessive in the circumstances.

ANALYSIS

19. This being the first appellate court it is incumbent upon it to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses; case reference **Njoroge vs Republic [1989] KLR 313** where the duties on appellate court were set out;

Whether the Charge Sheet was incurably defective;

20. The appellant complaint is that the charge sheet was incurably defective and contends that the trial magistrate erred in convicting her on a substance unknown in law; on the Charge Sheet the appellant was charged with trafficking by storage of 141 rolls of "**bhang**"; she maintains that there was nothing called "**bhang**" in the 1st Schedule and therefore she was convicted of the trafficking of a substance unknown in law and hence the conviction cannot stand;

21. The Court of Appeal in the case of **Obedi Kilonzo Kevevo vs Republic [2015] eKLR** set out the applicable test for an appellate court in determining when a defect in the charge can render a conviction invalid; it held as follows;

“The test applicable by an appellate court when determining firstly the existence of a defective charge and secondly its effect on the appellant’s conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.”

22. It is trite law that a defect detected in a Charge does not in itself render the conviction invalid on appeal; it must be discerned that the defect ***‘occasioned a miscarriage of justice resulting in great prejudice to the appellant’***; and this position is bolstered by the provisions of Section 382 of the Criminal Procedure Code;

23. In determining whether the irregularity referred to by the appellant occasioned any miscarriage of justice or prejudice, this court has perused the court record to assess whether any objection was raised at any stage of the trial; the record reflects that the Charge and the particulars were clearly read out to the appellant and her response of ***‘Not true’*** was duly noted by the trial court; this court notes that the appellant was ably represented throughout the hearing of the case in the lower court;

24. Indeed the Charge Sheet and the particulars thereof describe the substance therein is described as ***“bhang”***; this court notes from the proceedings that throughout the trial from the calling of the prosecution evidence upto when the defence case was closed the appellant’s counsel never raised any objection either at the early stages of the proceedings or at any other stage; the appellant and her counsel cross-examined the prosecution witnesses and defended the case; even when invited to cross examine the witnesses counsel for the appellant never questioned the mis-description of the substance;

25. Also in the case of **Geoffrey Kariuki Machira vs Republic [2017] eKLR** the Hon. Justice Kasango made the following observation;

“14... ..does a Charge fail if prosecution witnesses referred to bhang. The Oxford Dictionary defines bhang as:

“The leaves and flower top of cannabis, used as a narcotic.”

15. Further this court is entitled under section 59 and 60 of the Evidence Act Cap 80 to take judicial notice that cannabis is referred to in Kenyan local dialect as bhang.

16. It therefore follows that the prosecution’s witnesses did not err to refer to the narcotic as bhang because bhang is another name of cannabis sativa.”

26. This court is persuaded by the holding in Geoffrey Kariuki (supra) and is satisfied that the inclusion of the word ***“bhang”*** did not render the charge incurably defective as the differing names of the narcotic substance vary from ***‘cannabis’*** to ***‘cannabis sativa’*** but otherwise refer to one and the same substance;

27. this court reiterates that no objection was raised at any stage of the proceedings and the record reflects that the appellant was well aware of the offence she was facing and also had no doubts as what was to be defended;

28. This ground of appeal is found lacking in merit and is hereby disallowed;

Whether the prosecution proved its case to the desired threshold.

29. The appellant contends that upon the appellant’s arrest and seizure of the ***“bhang substance”*** there mandatory procedure as set out under the provisions of Section 74A (1) of the Act was not followed resulting in inconsistent, insufficient and contradictory evidence;

30. Section 74 A sets down an elaborate and complex procedure that is to be adopted upon seizure of the narcotic drugs; after the elaborate process only a sample of the substance together with a certificate are then produced exhibits at the trial court;

31. The Court of Appeal interpretation of the abovesection is found in the case of **Moses Banda Daniel vs Republic [2016] eKLR**; which was as follows;

‘The provision, in our view will be more relevant where a large haul drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible.

The matter before us involved only 23 sachets carried in the appellant’s trouser pocket and whose value according to the Charge Sheet was only Kshs.2,300/-. Although that may be immaterial we find, for the purpose of Section 74 A that it would not have been practicable to subject the drugs recovered from the appellant to that complex procedure involving a magistrate, prosecutor, two analysts and an advocate. We come to conclusion that Section 74A was not violated.”

32. The appellant was charged with trafficking narcotic drugs whose value as set out in the Charge Sheet as Kshs.2,820/-; the value is more or less similar to the amount in the above case of **Moses Banda Daniel (supra)** and this court is guided by the holding in the same case that the procedure as set out in Section 74 A would be more relevant for a large haul of drugs to ensure the exhibits are not interfered with before the trial; in this instance it would not have been practical in the circumstances for compliance with such a rigorous procedure for such a quantity;

33. Needless to say the issue of non-compliance was never raised at the trial and therefore this court can rightly conclude that no prejudice was occasioned;

34. This court is satisfied and finds that the prosecution proved its case to the desired threshold; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court disregarded the appellants defence:

35. Counsel submitted that the trial court failed to consider the appellant's defence and considered the prosecution's case entirely; that one of the many issues left hanging is that it failed to consider where the appellant was residing whether it was at Kamakwa or at Kamuyu;

36. Upon perusal of the trial court's judgment this court notes the observations on this ground of appeal and the findings it arrived at; it stated as follows;

“10. The accused in her defence stated that she has no house in Kamuyu and that at the time of recovery she was working in a bar at Ihua. It was her evidence that she has built a house in Githuthini where she lives with her son but would leave the son in the house and go for work.

12. She denied any knowledge of the bhang or the areas where the bhang was found. DW2 Kevin Ndungu Wanjiru is the son of the accused. He says that the police broke into their house at 1an in the morning. He confirmed that among the people who entered the house was PW2, 3 and 4. He confirms that a search took place and a black paper bag was found but he did not know what was inside. He did not report the incident anywhere.

13. Interestingly the said DW did not mention which house was searched but says they did not stay in Kamakwa.....

14. So what we now know is that a search was done in a certain house where the exhibits were found. Also found in that house was a bond paper which the accused not her son addressed. We also know that the accused was arrested when she attended to the case that was indicated in the bond paper found in the house.

15. All the prosecution witnesses said that at the time of the search there was no young man in the house as alleged by DW2 who says he was present when the police came. He is the only one who puts himself at the scene.....

16.the accused states that the house where the exhibits were found does not belong to her.....

20.She was seen by her cousin PW2 and she disappeared into a maize plantation. When a search was conducted a bond paper was found. This is such a personal and confidential document and that it is unthinkable and highly unlikely to be found in a house one claims they don't know. The question would be how did a personal document find its way into a house you have never entered into?”

37. The trial court was satisfied that this defence when weighed against that of the prosecutions witnesses did not raise any doubts in the prosecution's case; and the trial court reached the conclusion that the appellant was positively identified by way of recognition by her cousin PW2 and that the Bond Document found at the house sealed her fate; and it correctly found that the appellant was indeed guilty of the offence as charged.

38. The defence raised by the appellant on her residence can only be described as a poor attempt to remove herself from the place the narcotic substance was found; the trial court is satisfied that the trial court considered the appellants defence and gave good reasons for rejecting it; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the sentence was excessive in the circumstances.

39. With regard with sentence the appellant contends that it was severe and unwarranted; the trial court it is noted when meting out the sentence took into consideration the fact that the appellant had been convicted on a similar offence and had committed the instant offence whilst on probation;

40. This court has taken into consideration the value of the narcotic substance found in her storage which was valued at Kshs.2,820/- and is satisfied that sentence imposed of thirty (30) years is not proportionate to the offence; and finds that there is good reason to interfere with the sentence imposed as it is excessive in the given circumstances.

41. This ground of appeal is found to have merit and it is hereby allowed.

FINDINGS AND DETERMINATION

42. For those reasons stated above this court makes the following findings and determinations;

- (i) The use of the word “**bhang**” did not render the Charge sheet as incurably defective;
- (ii) The prosecution is found to have proved its case to the desired threshold;

(iii) The trial court is found to have properly considered the appellants' defence and gave good reasons for rejecting it.

(iv) The appeal on conviction is found lacking in merit and is disallowed; the conviction is upheld;

(v) The appeal on sentence is found to have merit; the sentence imposed of thirty (30) years is found to be excessive and it is hereby set aside and substituted with a term of ten (10) years;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 18th day of June, 2020.

HON.A. MSHILA

JUDGE.