



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 101 OF 2019

EVANS ONSONGO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. **Evans Onsongo** the appellant herein and 3 others namely **Daniel Obwaya Ongubo, Josephat Machuki and Samson Ongaki** were charged with the offence of, being in possession of narcotic drugs contrary to section 3 (1) as read with section 2 (a) of the Narcotic Drugs and Psychotropic Substance Control Act of 1994 Laws of Kenya. The particulars of the offence are that, on the 28th day of July 2019 at around 1230 hours within the township area in Kisii Central Sub-county in Kisii County were jointly found in possession of narcotic drugs namely bhang to wit 1 kg (one kilogram) of street value Kshs. 5,000/-

2. The appellant and his co-accused persons plead guilty and were each convicted on their own plea of guilty and sentenced to pay a fine of Kshs. 20,000/- in default to serve 2 years imprisonment. His co-accused persons have paid the fine and have been released from custody.

2. The appellant seeks that the conviction and sentence imposed by the trial court be quashed. His plea is that the court should consider that he was a first offender.

4. This court being the first appellate court is required to analyze the trial court's evidence and come up with its own finding bearing in mind that this court has not seen or heard witnesses who testified. See the case **OKENO –V- REPUBLIC (1972) EA 32**.

5. From the court record after the charge was read to each accused person each responded in Kiswahili, "Ni kweli". The facts were read to them on the 31st July 2019, as follows;

“On 28.7.2019 the area chief of Kisii Township Ongera received information from a member of public that there were four men at Kisii dumpsite who were peddling drugs. The chief together with community policing members went to the scene. They managed to corner the four accused person upon search they found 1kg of bhang wrapped in polythene bag. They were arrested and charged. The bhang is in court. It is produced as Pexh.1. The street value is Kshs. 5,000/-.

6. Each accused responded, 'Ukweli'. The court then stated, *'The four accused persons are hereby sentenced on their own plea of guilt.*

7. The appellant did not file any submission. He relied on his petition. Mr. Otieno for the State submitted as follows; that the plea was equivocal as after they pleaded to the charge there was no evidence that the substance they had was bhang.

8. Section 74 the Narcotic Drugs and Psychotropic Substance Control Act of 1994 ('the Act') states what to be done with the narcotic drug when a person is arrested with it. It provides that the seized narcotic drug intended to be used in evidence by the police or medical officer should be weighed and take a sample *"in the presence of, where practicable"* of the person intended to be charged, designated analyst, the advocate (if any) presenting the accused or analyst (if any) appointed by the accused. After the sample is analyzed the sample is returned to the authorized police officer together with certificate certifying the same to be narcotic drug. Section 74 A (4) provides that once the certificate is produced certifying the sample to be narcotic drug, the narcotic drug shall be destroyed. The authorized police officer is required to produce the sample and the analyst certificate at the trial. This was not done in this case. This was a big lapse on the part of the prosecution. The trial court failed to note that there was no analyst certificate to certify that the substance was bang as alleged. There was non-compliance with the mandatory terms of section 74 of the Act.

9. I therefore find that the conviction unsafe. I quash the conviction and sentence imposed against all the accused persons, one of them being the appellant. Any fine paid by the appellant's co-accused persons shall be refunded to each one of them. The appellant **Evans Onsongo** is

free to go unless lawfully held.

Dated, signed and delivered at KISII this 11th day of June 2020

**R.E.OUGO
JUDGE**

In the presence of:

Appellant Evans Onsongo In Person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Ms. Rael Court Assistant