



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 36 OF 2019

MUSEMBI NDAMBUKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate Hon. E. M. Muiro dated 27/02/2019 in Kilungu SRM Criminal Case No. 670 of 2018.)

JUDGMENT

1. Musembi Ndambuki the Appellant herein was charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that the Appellant on the 11th day of September 2018 at Emali town in Nzau sub-county within Makueni county was found trafficking narcotic drugs namely cannabis to wit 873 rolls, 16 Kgs of stones and 18kgs of plant material suspected to be cannabis of street value worth Kshs.357,460 by storing the same in his house in contravention of the said Act.

2. He denied the charge and the matter proceeded to full hearing with the prosecution calling two (2) witnesses while the defence called three (3) witnesses the Appellant included. The Appellant was found guilty, convicted and sentenced to fifteen (15) years imprisonment.

3. Being aggrieved the Appellant filed this appeal which was later amended by the firm of Maanzo & Co. advocates. They cite the following grounds:

a. That, the learned Magistrate erred in law and in fact in not finding that the prosecution had not proved their case beyond and reasonable doubt.

b. That, the learned trial Magistrate erred in law and in fact in convicting the Appellant on the evidence of Pw1 and Pw2, whose evidence was different and amounted to contradiction.

c. That, the sentence of the court against the Appellant is manifestly excessive considering all the circumstances of the case.

d. That, the learned trial Magistrate erred in both law and fact in convicting the Appellant when the crucial ingredients of the offence were never established and the

e. That, the learned trial Magistrate erred in both law and fact in convicting the Appellant when the weight of the evidence does not support the conviction.

f. That, the learned trial Magistrate erred in both law and fact in convicting the Appellant on the face of material contradiction and inconsistency of the evidence by the prosecution.

g. That, the learned trial Magistrate erred in law and in fact in convicting the Appellant without considering extenuating circumstances of the case.

h. That, the learned trial Magistrate erred in law and in fact in convicting the Appellant when a valuation report was not produced in court.

i. **That**, the learned trial Magistrate erred in law and in fact in not giving the Appellant the benefit of doubt.

j. That the learned Magistrate erred in law and in fact in treating the Appellant's defence perfunctorily.

4. Basically the evidence by the two prosecution witnesses Pw1 Peter **Mutua Mulwa** and Pw2 **No. 80728 PC Mutunei Joshua** is that following a tip they raided the Appellant's home on 11th September 2018 at around 10:00 am. They searched two houses belonging to the Appellant.

5. In the first house they found fifty (50) rolls of bhang under his bed and also in the cupboard. They went to another separate house which they had to break as it had a locked padlock on it. Inside they found the Appellant's wife and besides her were sacks whose contents were suspected to be bhang.

6. According to Pw1 they in total recovered a total of 100 stones of bhang, 773 rolls of bhang and 25 Kgs of plant seeds. On the **other** hand, Pw2 said what was recovered was 195 stones of bhang, around 25 Kgs of plant substance and 773 rolls of bhang. These items were produced in court as EXB1 – 3 plus a grey bag with packaging material EXB4, Government chemist report and EXB memo (EXB5 and 6) respectfully.

7. The Appellant in his unsworn defence denied the charge saying he is a taxi driver and does not deal in bhang. He said he only has one house so there is no 2nd house. That he was arrested because of his wife whom the chief was after. He wondered why none of his neighbors was called to testify.

8. It was his evidence that on 11th September 2018 at 2:00 pm, the chief and Government officers came to his house and told him and his wife to wait outside. They came out after ten (10) minutes, and they were carrying nothing.

9. His wife **Regina Musembi** testified as Dw1. She gave similar evidence to that of the Appellant but added that when the officers came they found them with one lady who had brought a child to be looked after. They were all arrested on allegations of possessing bhang. The other lady was released on the way. She said she knew nothing about the bhang in court and they live in a one roomed house made of iron sheets. She claimed the chief (Pw1) wants her as a lover, hence the fabrication.

10. Dw2 **Carol Masisa** a neighbor to the Appellant said she was at the Appellant's house when him and the wife were arrested. She had taken her child there for their care as she was going to the market. She was arrested with the Appellant and Dw1 but was later released.

11. The appeal was canvassed by written submissions. Mr. Maanzo for the Appellant argued grounds **1, 2, 4, 5** and **6** together saying there was a disparity in the evidence and exhibits produced as to the quantity of the recoveries made. Counsel also submits that failure to prepare an inventory was fatal to the case, as this prejudiced the Appellant. He quoted at length section 74A and section 86 of the Act saying the procedure upon seizure of narcotic drugs was not adhered to. Further that what was produced in court was never ascertained.

12. He argues that there was no proof that the 2nd house belonged to the Appellant and that it was broken into. To support this, he cited the case of **Bukenya –vs- Uganda (1972) E.A 549**.

13. Counsel continued to argue that the charge was defective because it was not clear whether the cannabis was found in the Appellant's house or on his person. That the facts did not disclose the commission of the offence of trafficking in narcotic drugs or had stored them for dealing.

14. On grounds **7, 9** and **10** he submits that the Appellant raised an *alibi* and the evidence by the defence was never disproved by the prosecution. It's his submission that there was a discrepancy as to what was recovered, what the Appellant was charged with and the handling of the exhibits to the Government chemist. It all paints a picture of a frameu, he argues.

15. In a brief response the Respondent through learned counsel Mr. J. Kihara submits that all the ingredients of the offence were proved to the required standard. That it was proved that the substance netted was cannabis and it's the Appellant who was in possession thereof. There was no prejudice suffered by the Appellant where there was failure to indicate the street value.

16. He argues that the prosecution evidence was well corroborated and the prosecution case remained unshaken. Further that the amount netted was large and his defence was a mere denial with no concrete proof.

17. On the sentence he submits that the same was lenient as he was a first offender, but the offence committed is serious. He prayed for the dismissal of the appeal.

Analysis and determination

18. This is a first appeal and this court has the duty to re-examine and re-consider the evidence afresh and arrive its own conclusion. The court should not lose sight of the fact that it did not see or hear the witnesses. The said principle was laid down in the case of **Okeno –vs- Republic 1972 E.A 32** where the Court of Appeal stated thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424.”

19. I have considered the evidence on record, the grounds of appeal both submissions and cases cited. The main issue for determination is whether the charge of trafficking in narcotic drugs was proved against the Appellant.

Before I deal with the main issue, I would wish to address something fundamental which I came across as I read the Record of Appeal. The same was not raised in the appeal. The record shows that the Appellant and his wife were first arraigned in court on 12th September 2018. The 1st hearing was to be on 8th October 2018. The matter did not proceed because the prosecution did not have exhibits in court. A fresh date was given for 31st October 2018.

20. On the said date, the charge was substituted and the Appellant’s wife was discharged. At the same time Mr. Mbullo was coming on record for the Appellant for the first time. He requested for an adjournment for the reason that witness statements were yet to be served. The prosecution had two (2) witnesses present in court but the matter was adjourned to 27th November 2018.

21. On 27th November, 2018 the case did not proceed as the Appellant who was present in court was unwell. In adjourning the matter this is what the court said at page 9 lines 19 – page 10 lines 1 and 2 of the record of appeal

“I note from the record that the matter has never proceeded due to the prosecution not being ready. Hence since it is first application for adjournment by defence, accused is indulged on account of illness.”

The court further granted a last adjournment to both parties. A hearing date for 19th December 2018 was given.

22. I do note that upto this point the Appellant was in prison custody. His advocate Mr. Mbullo was not present in court when the new date of 19th December 2018 was taken. The trial court did not indicate in the record how this date was arrived at in counsel’s absence and how counsel was to know about it.

23. Come the 19th December 2018, the coram does not have Mr. Mbullo’s name or any counsel holding his brief. This is what transpired.

Prosecution: I have two witnesses.

Accused: I have an advocate and I cannot see him.

Court: Matter to proceed as on 27/11/2018 I gave clear directions that both parties had been granted a last adjournment.

24. After the above direction, the next thing was Pw1 being sworn and testifying in the case.

25. Article 50(2) of the constitution provides:

Every accused person has the right to a fair trial, which includes the right –

(c) to have adequate time and facilities to prepare a defence;

(g) to choose, and be represented by an advocate and to be informed of this right promptly;

Article 25(c) of the constitution provides:

Despite any other provision in this constitution the following rights and fundamental freedoms shall not be limited -

c. The right to a fair trial; and

26. It is therefore a fundamental right for an accused person to go through a fair trial and this right cannot be limited. The record shows that as at the time the Appellant was directed to proceed in the absence of his advocate the matter had been in court for three (3) months only. Was that a good reason to deny the Appellant his right of representation by an advocate of his choice? Secondly Mr. Mbullo was not notified of the hearing date

that was taken exparte.

27. There is nothing on record to show any efforts that were made to have the Appellant contact his advocate or even have him given time to have his relatives contact his advocate. The offence that the Appellant was charged with is a very serious offence which carries a maximum sentence of life imprisonment plus a fine of Kshs.1 million or an amount three (3) times the street value of the narcotic drug, whichever is greater.

28. In this case the prosecution called only two witnesses and closed its case on the same day. The unpreparedness of the Appellant can be seen in his manner of cross examination. He only asked Pw1 two questions and had no question for Pw2 yet the two witnesses gave damning evidence against him.

29. From the foregoing, I do find that there was a violation of the Appellant's right to fair trial when:

- i. He was denied an opportunity to be represented by an advocate of his choice.
- ii. An exparte hearing date was taken in the absence of his advocate.
- iii. When his advocate failed to appear he was not given time to prepare his defence.

30. What the learned trial Magistrate ought to have done on 19/12/2019 was to give the Appellant time to contact his advocate OR adjourn the case and give a mention date for the advocate to come and take a suitable hearing date. Fixing a hearing date for counsel in his absence or without his participation is unfair to his/her client. I will not therefore consider the other grounds of the appeal.

31. In the circumstances, I do find that the conviction is unsafe and cannot be allowed to stand.

32. The next issue is whether to order for a retrial or acquit the Appellant. In the case of **Elirema & Anor –vs- Republic 2003 KLR 537** this is what the Court of Appeal said of the consideration of a retrial:

(4) Taking into consideration the question of jurisdiction of the Kenyan courts, the fact that it is unknown whether the witnesses were still available and the fact that the prosecution was entirely responsible for the mistakes that led to the quashing of the convictions, it would not be just to subject the Appellants to a fresh trial.

33. Later in **Ekimat –vs- Republic (2005) I KLR 182** the same court had this to say:

(5) It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered.

(6) A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

I am duly guided by the two decisions.

34. In the instant case the conviction is vitiated by a mistake of the trial court. It does not follow that a retrial should be ordered. This court must look at the circumstances of the case before making its decision.

35. It is admitted that there is a disparity in the quantities of what was recovered from the Appellant's house. There is also an issue as to whether the 2nd house from which the bulk of the bhang was recovered belonged to the Appellant.

36. The Appellant has been in prison from 12th Sep 2018 since he was never released on bond. i.e. a period of almost two (2) years imprisonment. He must have learnt his lesson and realized the seriousness of the offence. I find that taking him through another full trial for no mistake of his would be an injustice to him. I will therefore not order for a retrial.

37. The upshot is that the appeal has merit and I allow it. The conviction is quashed and sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge