



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 21 OF 2018

ANTONY NJERU NJURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *Antony Njeru Njura Alias Kitaferi* was charged and convicted of 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*.
2. The particulars of the charge alleged that on 18th December 2017 at Dallas Estate within Embu County, he was found trafficking in 1.385kgs and 93 rolls of cannabis sativa valued at KShs.12,690 which was not in medical preparation form.
3. Upon conviction, the appellant was sentenced to pay a fine of KShs.36,000 and in addition to serve 10 years imprisonment.
4. Being dissatisfied with his conviction and sentence, the appellant proffered this appeal in which he complained that the learned trial magistrate erred in law and fact by; relying on contradictory prosecution evidence regarding the quantity of bhang allegedly recovered; failing to appreciate that the charge was defective considering the amount of recovered bhang; relying on the evidence of the arresting officers without the evidence of an independent witness or an inventory documenting recovery of the alleged bhang; and; failing to consider his defence. The appellant also averred that the sentence meted on him was very harsh.
5. At the hearing, both the appellant and the respondent chose to prosecute the appeal by way of oral submissions. In his submissions, the appellant denied having committed the offence and claimed that the prosecution witnesses framed him with the offence to prevent him from following up on a murder complaint he had earlier made at Embu Police Station which the police had failed to pursue. He also submitted that the charge was not proved as the substance allegedly recovered from him was not certified by the government analyst to be bhang. To support his appeal against sentence, he claimed that he was unwell and was due for abdominal surgery on an undisclosed date.
6. The appeal is contested by the respondent. Learned prosecuting counsel *Ms. Mati* in her submissions supported the appellant's conviction arguing that it was based on credible and consistent evidence which proved the charge beyond reasonable doubt. Counsel further submitted that given the nature of the offence charged, the evidence of an independent witness was not necessary and that the evidence of the arresting officers was sufficient to prove the charge to the required standard.
7. On sentence, *Ms. Mati* submitted that the sentence was fair considering that the penalty prescribed by the law for the offence was life imprisonment. She also urged the court to find that the appellant did not produce any medical evidence to prove that he was unwell as alleged.
8. I am alive to the fact that this is a first appeal to the High Court and I am thus enjoined to revisit all the evidence presented to the trial court to arrive at my own independent conclusion regarding whether the appellant was rightly or wrongly convicted. In doing so, I should bear in mind that unlike the trial court, I do not have the benefit of having seen or heard the witnesses and give due allowance to that disadvantage. See: *Njoroge V Republic, [1987] KLR 99; Kinyanjui V Republic, [2004] 2 KLR 364*.
9. I have carefully considered the grounds of appeal, the submissions made by both parties and the evidence on record. I have also read the judgment of the learned trial magistrate. Having done so, I find that three issues emerge for my determination. These are:
 - i. Whether the charge as framed is defective.
 - ii. Whether the prosecution proved the charge against the appellant beyond reasonable doubt.
 - iii. If the answer to issue (ii) is in the affirmative, whether the sentence imposed on the appellant was unlawful, harsh or manifestly

excessive.

10. On the first issue, the appellant did not state in his submissions why he thought the charge as framed was defective. I have examined the charge sheet and, on my part, I do not find any anomaly or defect in either the statement of the charge or the particulars supporting the same. The charge sheet properly discloses the offence charged and the facts supporting the same. I therefore find no merit in the appellant's claim that the charge was defective.

11. Turning to the evidence adduced by the prosecution, I agree with *Ms. Mati's* submissions that the prosecution was within the law and cannot be faulted for choosing to rely on the evidence of the arresting officers without calling an independent witness. I say so because under *Section 143* of the *Evidence Act*, the law is clear that no number of witnesses are required to prove a fact. See: **Joseph Njuguna Mwaura & Others V Republic, [2013] eKLR.**

12. The appellant has claimed that he was convicted on the basis of contradictory evidence regarding the quantity of bhang allegedly recovered from him. My appraisal of the evidence adduced by the prosecution shows that while PW1 and PW2 testified that the appellant was arrested in possession of a stone of bhang approximately weighing 2kgs in addition to 93 rolls recovered from his pockets, PW3 who was in their company claimed that only 93 rolls of bhang were recovered from the appellant. Unlike PW1 and PW2, PW3 did not say that he witnessed recovery of 2kgs of plant material suspected to be bhang.

13. On his part, PW4 who re-arrested the appellant from PW1, PW2 and PW3 recalled that when handing over the appellant, the witnesses only handed over to him an undisclosed quantity of rolls of suspected bhang weighing about 1.385kgs and KShs.240 suspected to be proceeds of sale of the bhang. He did not say that in addition to the undisclosed number of rolls, suspected bhang in the form of plant material was handed over to him together with the appellant.

14. When analysing the evidence presented before the court, the learned trial magistrate did not appreciate the material contradictions evident in the prosecution case and wrongly held that the three prosecution witnesses gave similar evidence regarding what was recovered from the appellant. The fact that PW3 gave a different version of what was recovered from the appellant from the one given by PW1 and PW2 casts aspersions on their credibility because having arrested the appellant together, they ideally ought to have witnessed recovery of the same form and quantity of the alleged bhang.

15. In my view, the learned trial magistrate failed to thoroughly scrutinize the evidence adduced by the prosecution and thereby arrived at the wrong conclusion that it was consistent and reliable and that it consequently proved the charges preferred against the appellant beyond any reasonable doubt.

16. Another ground advanced by the appellant is that the trial court rejected his defence without good reasons. In his judgment, the learned trial magistrate found that the appellant's defence amounted to a mere denial which did not shake the strong case presented by the prosecution.

17. As I have noted earlier, there were material contradictions in the prosecution's case and it did not therefore fit the description of a strong case. Secondly, the appellant's defence viewed against the aforesaid contradictions cannot be said to have been a mere denial. It was a strong defence which in my view, raised a reasonable doubt in the prosecution case.

In the premises, I agree with the appellant's submissions that the learned trial magistrate erred in disregarding his defence.

18. In view of the foregoing, I have come to the conclusion that the prosecution in this case failed to prove the charges against the appellant beyond any reasonable doubt. It is thus my finding that the appellant's conviction was unsafe and cannot be sustained.

19. I consequently find merit in the appellant's appeal against conviction and it is hereby allowed. The conviction is accordingly quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2020.

C. W. GITHUA

JUDGE

In the presence of:

The appellant

Ms. Mati for the respondent

Mr. Wambugu Court Assistant