



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 10 OF 2017**

**GEORGE KULANZA MUNYAO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against the conviction and sentence of E. Agade (RM) in Kangundo Senior Principal Magistrate's Court Criminal Case No. 356 of 2016 on 24<sup>th</sup> January, 2017)***

**JUDGEMENT**

1. The appellant has filed this appeal on grounds that:

- a) *That the prosecution case was not proved beyond reasonable doubt.*
- b) *That the prosecution evidence was not corroborated.*
- c) *That the prosecution evidence was full of conspiracy, malice, contradictions and inconsistencies.*
- d) *That the trial court rejected his defence of alibi without cogent reasons contrary to section 169 (1) of the CPC.*

2. The appellant was charged with being in possession of cannabis contrary to section 3 (1) as read with section 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that the appellant on 14<sup>th</sup> April, 2016 at about 10:40 at Tala Police Post in Matungulu Sub-County within Machakos County was found in possession of bhang to wit 11 rolls with a street value of KShs. 110/= which is not in any medication conformity.

3. The appellant was put to trial for having given an equivocal plea. APC Griffin Mukuna (PW1) testified that on 14<sup>th</sup> April, 2016 at around 10:30 am, he and Sergeant Munga and two area assistant chiefs got a tip off from members of the public of a person who was suspected to be colluding with robbers in Tala. They proceeded to the area and entered a homestead where they found the appellant in his farm. He was arrested and questioned on where he was working with robbers and was taken to Tala Police Post. He was searched and found to be in possession of 11 rolls of green substance in black plastic bag that was suspected to be bhang. He was booked and put in custody. He stated that the members of the public informed the police that the appellant may know the whereabouts of robbers who had stolen from a neighbour. The substance was taken to Government Chemist and was identified as Cannabis.

4. Police Constable Samson Mwendwa (PW2) stated that the appellant was brought to the police station on 14<sup>th</sup> April, 2016 booked and handed over to him. He searched the appellant and recovered 11 rolls of green substance that was suspected to be cannabis. It was said to have been recovered from the appellant's right-hand side pocket of his trouser. PW2 handed over the rolls to the crime officer for necessary action and the appellant was charged. On cross examination, PW2 stated that he was not aware that a search was done on the appellant at his home and that nothing was found on the appellant then. He however maintained that he recovered the 11 rolls in the appellant's pocket.

5. Police Constable Mathew Mbithi (PW3) stated that he was assigned to investigate the appellant's case on 14<sup>th</sup> April, 2016. He interrogated the arresting officer who informed him that the appellant was found with cannabis. He took the 11 rolls to Government Chemist and a report was done. He produced the substance and report as P. Exhibit 1 and 2.

6. Placed on his defence, the appellant stated that the charge was fabricated due to a boundary dispute. That his neighbour, Yusuf had been attacked by robbers on 14<sup>th</sup> April, 2016, that his neighbour brought police who found him in his farm planting trees. They surrounded and inspected him. They went to his bedroom and searched but did not find anything in the form of bhang. They then proceeded to Tala Police Post where in the process of pushing him here and there, PW2 removed bhang from his clothes yet it had not been there when he was searched earlier. That Sergeant Munga threatened that there was a plan B even if the appellant had not been involved in the robbery. He maintained that the bhang was planted on him.

7. In his submissions, the appellant contended that the bhang was planted on him since it was not found the first time he was searched at his home. He faulted the trial magistrate for finding that his said allegation was not corroborated since his evidence was unsworn. He submitted that adverse comment should not be made in an unsworn statement in the manner the trial court did and cited **Johnson Muiruri v. Republic [1983] KLR 445**. He further submitted that he pleaded guilty due to the threats by Sergeant Munga. The appellant also took issue with the fact that Sergeant Sigei and Munga were not called to give evidence.

8. The respondent's submission was that the prosecution case was consistent and well collaborated to support the charge beyond reasonable doubt. That the existence of contradictions is based on evidence as to who searched the appellant. That the said was elaborated by PW2 who testified that he searched the appellant and recovered the bhang and that due to the same, the discrepancy cannot be said to prejudice the appellant. To support the argument as to the effect of contradiction, the respondent cited **Joseph Maina Mwangi v. Republic, Criminal Appeal No. 73 of 1993**. It was further submitted that the section 143 of the Evidence Act does not obligate the prosecution to call a particular number of witnesses. In this regard the respondent further relied on **Julius Kalewa Mutunga v. Republic, Criminal Appeal No. 31 of 2005** and **Bukenya & Others v. Uganda [1972] EA 549**.

9. I have given due consideration to the appeal herein bearing in mind this court's duty as a first appellate court. Although the appellant laments that there are contradictions on the prosecution evidence, I note that the contradiction as to who searched him and found the 11 rolls of cannabis, is not a contradiction that gets to the material substance of the case. It clearly emerged from PW2 and PW3 that PW2 found him with cannabis upon searching him at the police station. Secondly, the appellant's contention that the prosecution failed to call Sergeant Sigei and Munga does not hold water considering the circumstances of this case. The Evidence Act, as correctly submitted by the prosecution, does not obligate the prosecution to call a particular number of witnesses to prove a particular fact. The witnesses called by the prosecution proved the case to the required standard. The appellant in his defence did not water down or rather cast doubt the prosecution case. Besides it is noted that the police had visited the appellant's area following a robbery incident and in the process of carrying out investigations came across the Appellant who upon being searched the Cannabis Sativa were recovered from his pockets. Indeed the police officers who visited the area had not known him before so as to suggest a frame up. The Appellant's alibi did not shake the evidence of the Prosecution since he was arrested while in possession of narcotic drugs. The trial court's rejection of the Appellant's unsworn statement cannot be faulted since it sought to claim that he had been framed and same was weighed against the evidence of the witnesses who actually arrested the Appellant who was then in possession of narcotic drugs.

10. In the circumstances, I find no merit in this appeal and is hereby dismissed. The trial court's conviction is upheld and the sentence confirmed.

Orders accordingly.

**Dated and delivered at Machakos this 21<sup>st</sup> day of March, 2018.**

**D.K.EMEI**

**JUDGE**

**In the presence of:**

George Kalanza Munyao - for the Appellant

Machogu - for the Respondent

Kituva - Court Assistant