REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 49 OF 2015

(From original conviction and sentence in Criminal Case

No. 20 of 2015 of the Principal Magistrate's Court at Gichugu.).

JOHN MUGAMBI GACHOKI .....APPELLANT

VERSUS

REPUBLIC .....ACCUSED

JUDGMENT

The appellant John Mugambi Gachoki was charged before the Principal Magistrate's court at Gichugu in Cr. Case No. 20/2015 with the offence of being in possession of cannabis sativa contrary to ***Section 3(1) as read with Sub-Section 2(a) of the Narcotic Drugs and Psychotropic substances control Act No. 4/1994***. It was alleged that on 14/1/2015 at Kamboru Village Gatu Sub-location Rwathia Location Kirinyaga County was found in possession of cannabis to wit 22 rolls of plant material which was not in any form of medical preparation.

The appellant denied the charge but after a full trial he was found guilty and convicted then sentenced to serve five years imprisonment.

Aggrieved by that conviction and sentence he filed an appeal based on five grounds. However after the appeal was admitted he filed amended grounds of appeal and raised the following grounds:-

1. The learned Magistrate erred in law and fact by convicting the appellant relying on a chemical analysis report whose content were not collaborated. The analyst tested the bhang without the bag while the chief in a sworn in statement said that the bhang was inside the bag.

2. The learned Magistrate erred in law and fact by making a ruling to the prima facie case which had been established before the accused made his defence submissions. This in turn implicated the accused prematurely as the declaration of the case 'prima facie' could not have been overruled at Judgment, whatever the defence had been adduced.

3. The trial Magistrate erred in facts and law by sustaining the evidence of PWI, PW2 and PW3 whose evidence had some striking similarities rendering it contaminated and it follows that it was only cooked evidence.

4. The learned trial Magistrate erred in both law and facts by not considering the appellant defence at the trial court.

5. The learned Magistrate erred in law and fact when she was misguided by herself when he convicted the appellant on hearsay evidence adduced by the witness who appeared to have been coached.

6. The learned Magistrate erred in law and fact when he ignored the procedure where the case belonged to the state through Kenya Police as the interested party to the accused and failing to consider that there was no any Police Officer who could testify that he arrested the appellant being in possession of cannabis.

7. The learned trial Magistrate erred in law and facts when he convicted the appellant to a five years imprisonment which on the face was harsh and excessive.

The appellant prays that the conviction be quashed, the sentence be dismissed and he be set at liberty.

The State opposed the appeal and filed submissions through the prosecution counsel.

This being a first appeal this court has a duty to consider the evidence tendered before the trial court, evaluate it and come up with its finding but bearing in mind that it did not have the benefit of seeing the witnesses and leave room for that. This was the decision in the case of ***Okeno –v- R (1972) E. A 32***.

The brief facts of the case are that on 14/1/15 PW-I- Justin Nyaga Githinji who is the Assistant Chief Gatu Sub-Location was attending a funeral when he received information that one of the mourners who he later learnt was the appellant in this case, was having a paper bag which members of the public suspected to be containing cannabis. PW-1- went to where appellant was accompanied by John Mburu (PW.2). PW-1- demanded to inspect the paper bag which the appellant was having. He recovered a packet of Dunhill cigarettes which contained 22 Rolls of cannabis. PWI called the Chief and they took the appellant to Kianyaga Police Station where he was charged. PW-4- PC Mathew Mugambi the Investigating Officer received the 22 rolls of cannabis and escorted it to the Government Chemist for analysis. He received a report which confirmed that the plant material in the 22 rolls was cannabis which is under the 1st schedule of the ***Narcotic Drugs and Psychotropic Substances Control Act.***

The appellant claimed that he was framed by PW-I- for refusing to disclose the drug peddlers in the area.

I have considered these facts as tendered before the trial Magistrate by the four prosecution witnesses. I find that the evidence was overwhelming and consistent and left no doubt on the guilty of the appellant.

This not withstanding the appellant defaulted the conviction on various grounds which I will now consider.

1. Gross violation of fundamental rights to privacy and freedom.

The appellant claims that the chief violated **Article 31(a) of the Constitution** on the right to privacy. That he did not produce certificate of search and conducted the search without being accompanied by law enforcement officer. The Article provides:

> **"Every person has the right to privacy, which includes the right not have –**
>
> **"their person, home or property searched."**
>
> **This has to be considered with other provisions of law in view of the circumstances of this case."**

Section 34(1) Criminal Procedure Code provides:-

A private person may arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony.

Section 35(1) Criminal Procedure Code

A private person arresting another person without a warrant shall without unnecessary delay make over the person so arrested to a police officer, or in the absence of a police officer shall take that person to the nearest police station.

The appellant was arrested by PW-1- who is an Assistant Chief who was in company of PW-2- who said he is a member of Nyumba Kumi on suspicion of having committed a cognizable offence. The arrest was lawful. The appellant was handed over to the police immediately. As submitted the appellant has not demonstrated how he was prejudiced by the manner of arrest or what miscarriage of justice was occasioned.

In **Faizal Kweya Amasa v Republic of Kenya [2013] eKLR**

The High Court held;

> **"Section 34 of the Criminal Procedure Code Cap 75 the laws of Kenya, permits a private person to arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony. Section 35 regulates the disposal of persons so arrested; the arresting private person shall without unnecessary delay hand over the person arrested to a Police Officer, or in the absence of a Police Officer take the person arrested to the nearest Police Station. We find manner of the Appellant's arrest to have been lawful and in conformity with these provisions".**

The appellant was in a public gathering. There was no violation of his privacy. In any case violation of rights does not entitle the appellant to an acquittal. It can entitle him to damages if proved in the appropriate forum as provided under ***Article 23 of the Constitution.*** This ground is without merits and must fail.

2. Insufficient evidence.

The appellant claims that the chief searched the bag containing the 22 rolls of cannabis therefore he tampered with exhibit and the bhang did not come from his bag. In addition, the nyumba kumi member John Mbura Kamita did not accompany the chief to the police station on the

same day to record statement and the statements to prosecute him were framed and tailor made at the police station.

I have analysed the evidence tendered by the prosecution above. PWI & 2 gave direct evidence which proved that after being searched 22 rolls of cannabis were recovered from the appellant. This was in a public place where many members of the public were attending a burial. Their testimony was corroborated by that of PW-3-. PW-4- was handed over 22 rolls which were confirmed to be cannabis. An offence of this nature is proved by the evidence of possession of the drug on the suspect's person at the time of arrest and confirmation that the substance in this case the plant material is a narcotic drug cannabis. The evidence tendered proved the ingredients' of the charge beyond any reasonable doubts. The evidence tendered was therefore sufficient. The ground must fail.

The appellant abandoned grounds No. 1,2,& 4. With regard to ground No. 4 the Judgment of the trial Magistrate is clear that she considered the defence of the appellant and she reject the allegation that he was framed as there was strong evidence on record that he committed the offence and therefore he was not framed.

On the Government analyst report (ground -9-), it clearly states that 22 rolls of plant material was examined and found to be cannabis S.P. The accused was John Mugambi Gachoki. I see no fault in the manner the exhibit was examined and report made.

Section 48(1) of the Evidence Act provides:

> **"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions."**

The court relied on the opinion of the analyst which was tendered before it. This was a case where the opinion of the expert was necessary. The report was produced by the Investigating Officer. The appellant did not object and no miscarriage of justice was occasioned.

Section 77 of the Evidence Act provides:

> **"(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> **(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."**

The Government analyst report could be relied on as the section allows the court to presume that the signature is genuine and the person making the report was possessed of the necessary qualifications.

On the issue of the ruling that a prima facie case had been established, the ruling by the trial Magistrate was lawful. **Section 2010 C.P.C** provides:-

> **"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."**

The section requires that a ruling or a finding be made as to whether the accused has a case to answer. Where the law allows the ruling to be made, no prejudice or miscarriage of justice can be alleged. The ruling was short and precise with no reasons given and in line with the requirement to make a determination as to whether a prima facie case has been established by the prosecution. The determination is necessary as it moves the trial to the next stage, that of defence. The trial Magistrate did not give reasons for the ruling and so it cannot be stated that she had made up her mind before hearing the defence. The trial Magistrate was perfectly in order to have informed the appellant that he had a case to answer in a brief ruling to enable him decide on how to give his defence.

The Court of Appeal in ***Anthony Njue Njeru –v- R C. A Nairobi Cr. Appeal No. 77/2006*** stated that where a court makes a determination that a prima facie case has been established, it should not give reasons as that would prejudice the defence as it would appear as if the court has made up its mind before hearing the defence. The trial Magistrate was perfectly in order to have informed the appellant that he had a case to answer in a brief ruling to enable him decide on how to give his defence.

This ground is therefore without merits and must fail.

In Conclusion:

Section 3(1) provides:

Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

Section 3(2) (a) provides:

A person guilty of an offence under subsection (1) shall be liable— in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;

The appellant was sentenced to five years imprisonment which in my view was reasonable and within the law. Sentencing is the discretion of the trial Magistrate. I find no reason to interfere with the sentence.

The charge was proved beyond any reasonable doubts. The sentence imposed was lawful. I find that the appeal is without merits and is dismissed.

Dated at Kerugoya this 25th Day of October 2018.

L. W. GITARI

JUDGE