



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 49 OF 2016

ABDALLA HAMISI SALIM.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence of Hon. N.S LUTTA (SRM) at

Mariakani Law Courts in CR. CASE No. 624 of 2014 on 15/01/2016)

JUDGMENT

1. The Appellant was convicted with the offence of being in possession of Narcotic Drugs contrary to section 3 (1) (a) as read with section 3 (2) (c) of the Narcotic Drugs and psychotropic substances control Act No. 4 of 1994 and he was sentenced to 3 years imprisonment.
2. The particulars of the charge were that on 10/10/2014 at KAKUNAA Estate Mariakani Township in Kaloleni District within Kilifi County of Coast Region, the Appellant was found being in possession of three hundred and twelve (312) rolls of cannabis sativa valued at Ksh. 31,200 to contravention of the Narcotic Drugs and psychotropic substances (control) Act No. 4 of 1994.
3. The PROSECUTION EVIDENCE WAS THAT FOLLOWING A TIP OFF, PW1 and PW2 went to the house of the Appellant and recovered 312 rolls of bhang. They arrested the Appellant and caused him to be charged with this offence. PW3 took the plant material to the Government analyst and confirmed it was cannabis sativa.
4. The Appellant denied the charge. He said on 10/10/2015 while asleep at his home police forced the door open and did a search but did not recover anything. He was arrested and taken to the police station where he was shocked when the charges were read to him.
5. The trial court found the Appellant guilty as charged and sentenced him to 3 years imprisonment. The Appellant has appealed against both conviction and sentence on the following grounds:-

(i) That the Learned Trial Magistrate erred in law and in fact by failing to find and rule that the prosecution never proved their case beyond all reasonable doubt.

(ii) That the Learned Trial Magistrate erred in law and in fact by proceeding with the hearing of the Appellant's case in the absence of his advocate contrary to Article 50 [2] [g] of the Constitution of Kenya, 2010 which gives every accused person a right to be represented by an advocate of their choice.

(iii) That the Learned Trial Magistrate erred in law and in fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the Appellant.

(iv) That the Learned trial Magistrate erred in law by accepting and relying on highly contradictory, misleading, inconsistent and unreliable evidence that lacked credibility to base and sustain the conviction and sentence of the Appellant.

(v) That the Learned Trial Magistrate erred in law and fact in allowing a report from the government analyst to be adduced in evidence by a police officer instead of the maker of the report who was not called upon to testify and was the only person with the capability to interpret and produce the report.

(vi) That the Learned Trial Magistrate erred in law by allowing an expert's report to be produced by a police officer without explaining to the accused person the contents of the report.

(vii) That the Learned Trial Magistrate erred in law and in fact in failing to find and hold that a weighing certificate was not produced in court by the prosecution as evidence which is a mandatory requirement in offences to do with narcotic drugs.

(viii) That the Learned Trial Magistrate erred in law by failing to find that the identification of the accused person was questionable.

(ix) That in any event, the Learned Trial Magistrate erred in law and fact in meting out a sentence that was grave and excessive in the circumstances. That the difference in the sentence meted against the appellant who was the first accused and that of the second accused in the lower court was big yet the two were charged with the same offence.

(x) That the Learned Trial Magistrate erred in law and in fact in failing to acquit the Appellant for failure of the Prosecution to prove the charge against the Appellant beyond all reasonable doubt.

6. The Appellant filed written submissions as follows:-

(i) That **section 3) (a) of the Act** provides-that:-

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

(ii) The Prosecution ought to have proved beyond any reasonable doubt that the appellant was found in possession of the alleged Cannabis Sativa. However it is the humble submissions of the appellant that the prosecution failed to do so for the following reasons:-

(iii) PW1 -Chief Inspector Geoffrey Muchui testified that the date of the offence was 10th January, 2014 while PW2 Police Constable John Gachui and PW3 sergeant Stephen Savale said it was on 10th October, 2014 yet the appellant in his defence said it was 10th October, 2015. The learned trial magistrate did not address the issue of the contradictory dates and he made no finding on it. Was it 10th January, 2014, 10th October, 2014 or 10th October, 2015? No proper evidence was presented such as a copy of the Occurrence Book that has the O.B number to ascertain the dates.

(iv) Further PW 1» testified that they recovered the Cannabis Sativa in Majengo Mariakani while PW2 said it was recovered at Makaburini area near Mariakani Secondary School, while the charge sheet says it was at Kakuma Estate.

The trial learned magistrate did not make any finding whether the Cannabis Sativa was recovered at Majengo, Makaburini or Kakuma area this failure is fatal to the charges against the appellant.

(v) PW1 informed the court that the cannabis sativa had been hidden in the ceiling. PW2 did not mention this .Therefore there was no corroboration. Instead PW2 says in cross examination that the cannabis was found in the sitting room and the appellant was in the bedroom.

(vi) The aforesaid are glaring contradictions that casts doubt into the veracity of PW1 and PW2'S testimony.

(vii) PW 1 said they were sacks which had the rolls (212 or 312] and identified them as MF1 2 (a) (b) and (c) .PW2 says they found a gunny bag and an ordinary bag that had bhanga which he identified as MF1 2 (b) and (c). However both did not tell the court how many rolls were in each bag. This is vital to establish the truth. Were there 2 sacks or a gunny bag and an ordinary bag?

(viii) In any event, PW2 testified that they found the Appellant with the family. No Inventory was prepared by the Police and signed by the Appellant and witnessed by a member of the family. This renders PW2's testimony doubt full. No copy of the register recordings of the exhibit was produced in Court.

(ix) Further, it was submitted that ordinarily having received a tip off, the police would have prepared a warrant of arrest and search. They did not do. **Section 118 of the Criminal Procedure Code** provides that:-

"Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may be written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building ship, aircraft, vehicle, box or receptacle, (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."

(x) The said provision therefore makes it mandatory for the police to have obtained a search Warrant. Failure to do so makes any evidence obtained illegal and by virtue of **article 50 (4) of the Constitution of Kenya, 2010** the said evidence ought to be excluded.

(xi) PW2 who was not the Government Analyst procedurally produced the Analyst Report. He was an incompetent witness and the Report ought not to have been admitted in evidence under **section 48 of the Evidence Act**.

(xii) The proceedings were defective and unfair to the appellant. He was not asked to cross-examine PW1. This is a violation of the right to a fair hearing under **article 50 (2) (c) and (k) of the Constitution, 2010**. It renders the whole proceedings unfair.

(xiii) Coupled with the fact that the Appellant was made to proceed with his defence in the absence of his advocates renders the entire proceedings unfair and therefore a nullity as they violate **article 50 (2) (3) of the Constitution of Kenya, 2010**.

(xiv) For the aforesaid reasons the Appellant urged the court to allow the appeal and set aside the conviction.

7. The Respondent opposed the Appeal and submitted as follows:-

(i) That under section 67 (1) of the Narcotic Drugs and psychotropic substances (control) Act, a report can be produced without calling the maker and section 77 of Cap. 80 can also be produced without calling the maker but when the contents are contested, then the maker can be called.

(ii) That the Appellant was represented and he did not object to production of the report.

(iii) That the Appellant's rights were not violated and that it is not mandatory for the police to prepare an inventory.

(iv) Finally, the Respondent submitted that the police officers who arrested the Appellant testified in court and they produced the exhibit.

8. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 courts findings and conclusions; 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”.

9. My findings are as follows:-

(i) There is a discrepancy on the date the bhang was recovered. PW1 said it was on 10/01/2014 while PW2 said it was 10/10/2014. It is not clear who is telling the court the truth.

(ii) PW1 said they recovered the bhang at Majengo area in Mariakani while PW2 said it was at Mariakani area near Mariakani Secondary School. What was the exact place the bhang was found?

(iii) PW1 said the 312 rolls were found hidden in the ceiling. He said there were sacks which had the rolls while PW2 said it was found in the sitting room in a sack and gunny bag. Again it is not clear how or where the bhang was recovered.

(iv) In the circumstances I find that the conviction herein is not safe.

(v) I accordingly quash the conviction and set aside the sentence.

(vi) I direct that the Appellant be set free unless lawfully held for any other reason.

Delivered, Dated and Signed at Mombasa this 19th day of June 2017.

ASENATH ONGERI

JUDGE.