



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 16 OF 2017

FRED CHARO RUMBA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 507 of 2016 in the Senior Principal Magistrate's court in Voi delivered by Hon M. ONKOBA (SRM) on 10th March 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Fred Charo Rumba, was charged on two (2) Counts of being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994. The particulars of the charge were that on the 22nd day of June 2016 at about 1508 hours at Sagalla Area Voi Township within Taita Taveta County, was found being (sic) found in possession of cannabis (bhang) to wit eight (8) stones with a street value of Ten Thousand Shillings.

2. The Learned Trial Magistrate Hon M. Onkoba, Senior Resident Magistrate, convicted him and sentenced him to three (3) years imprisonment. Being dissatisfied with the said judgment, on 16th March 2017 he lodged his Appeal herein. He relied on two (2) Grounds of Appeal.

LEGAL ANALYSIS

3. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

4. It appeared to this court that the only issue that was before it for determination was really whether or not the Prosecution had proven its case beyond reasonable doubt. It was the Appellant's argument that the Prosecution's case was full of contradictions and inconsistencies.

5. He pointed out that Number 60035 PC Paul Ouma (hereinafter referred to as “PW 1”) told the Trial

Court that he acted on information from an informer about someone dealing with bhang and he notified his colleagues Number 2003060910 CPL Jack Ochieng (hereinafter referred to as “PW 2”) and Number 73423 PC Joshua Kefa (hereinafter referred to as “PW 3”).

6. It was his submission that this contradicted PW 2’s evidence that he was on routine patrol with PW 1 and PW 3 when they received information that someone was dealing with bhang at Msambweni en route to Voi township. He also stated that PW 1 and PW 2 contradicted each other on the amount of money that was paid to the informer, the amount of bhang that was recovered after a search, the bag the bhang was said to have been carried as well as who or the number of people who were found in the building he was arrested from. He argued that this raised doubt as to who between PW 1 and PW 2 was speaking the truth and that benefit of doubt should be given to him.

7. It was his further contention that the Learned Trial Magistrate never considered his defence contrary to the holding in the case of **Okale vs Republic [1965] EA 555** that however weak a defence is, the same has to be considered.

8. He was emphatic that the Learned Trial Magistrate erred for not having given him a fine in the alternative of the three (3) years sentence. He therefore urged this court to allow his Appeal.

9. On its part, the State asked this court to ignore the inconsistencies the Appellant had raised as they were not material and did not weaken the Prosecution’s case and thus urged it to dismiss the Appeal herein. It stated that it is not always that contradictions warrant rejection of evidence as was held by the Uganda Court of Appeal in **Twehangane Alfred vs Uganda Criminal App No 139 of 2001 [2003] UGCA, 6.**

10. It stated that eight (8) stone of bhang and a woman were found in the Appellant’s house and consequently his defence lacked probative value because he placed himself at the scene. It added that he did not demonstrate that there existed grudge between him and PW 1, PW 2 and PW 3.

11. A perusal of the proceedings shows that PW 1, PW 2 and PW 3 went to the Appellant’s homestead after being tipped off by an informer that he was dealing with bhang. The informer was given money to purchase the bhang and PW 1, PW 2 and PW 3 followed him from behind. When the Appellant saw them, he denied selling bhang. However, when they conducted a search in his house, they found a sack of bhang. The Appellant was then arrested and taken to Voi Police Station.

12. This court agreed with the State that there were no material contradictions in PW 1’s and PW 2’s evidence. They were agreed that they were tipped off by an informer who was given money to purchase the bhang. It was immaterial whether the informer gave them the information while they were at the office or while they were on routine patrol as had been contended by PW 1 and PW 2 respectively.

13. In view of the fact that PW 2 was the one who gave the informer the money, he was in a better position to explain how much it was. This court therefore found that there was no material difference in PW 1 having said that “they” gave the informer Kshs 150/=, PW 2 saying that “he” gave the informer Kshs 200/= and PW 3 saying that “they” gave the informer Kshs 100/= to go and purchase bhang from the Appellant. It was also immaterial that PW 1 did not mention a woman in his house as did PW 2 and PW 3. PW 2 stated that he was not present when the actual recovery of the bhang was made. It was therefore immaterial whether the bhang was recovered in a gunny bag or sack.

14. What was material was that eight (8) stone of bhang was found recovered in the Appellant’s house after a search and the same was adduced in evidence by the Investigation Officer Number 228117 APC Juma Hassan Kutsola (hereinafter referred to as “PW 4”) . The Appellant did not call any witness to testify that he stayed at Mwakingali and not at the premises he was arrested from and he did not proffer any plausible reason to explain why PW 1, PW 2, PW 3 and PW 4 would have wanted to frame him by contending that they recovered bhang in his house, a fact that was raised by both the State and the Learned Trial Magistrate. The Learned Trial Magistrate acted correctly when he dismissed the Appellant’s defence.

15. It was the view of this court that the Prosecution proved its case against the Appellant beyond reasonable doubt and that the Learned Trial Magistrate was right in having convicted and sentenced him accordingly. In this regard, the State relied on the cases of **Francis Mbogua M'ringera vs Republic [2014] eKLR** where Lesiit J affirmed a sentence of three (3) years where the appellant therein was found in possession of 3,000 stems with a street value of 16,960/=.

16. Appreciably, Section 3 of the Narcotic Drugs and Psychotropic Substance Control Act provides that a trial court can convict an accused person upto ten (10) years if the drugs are for his own consumption and in all other cases to twenty (20) years imprisonment. Section 3(2)(a) of the said Act stipulates as follows:-

“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.”

17. It is therefore clear that the sentence to be imposed upon conviction is not the mandatory sentence. Rather, it is the maximum sentence that a trial court can impose on a convicted person under that Section. This court agreed with the State's submissions that although Section 3(2) (a) of the Narcotics and Psychotropic Substances Control Act did not provide for a fine, Section 26(3) of the Penal Code Cap 63 (Laws of Kenya) stipulated that an offender could pay a reasonable fine in substitution for imprisonment.

18. This court could therefore exercise its discretion to reduce the sentence that was meted upon him or impose a fine because the penalty provided under Section 3(2)(b) of the Narcotics and Psychotropic Substances Control Act was the maximum and not the mandatory sentence and a convicted person ought not to be sentenced to the maximum number of years in the first instance.

19. It was apparent that the Appellant herein did not intend to consume the eight (8) stones of cannabis all by himself. In any event, he was arrested after an informant tried to purchase some bhang. Nonetheless, bearing in mind that the value of the bhang was Kshs 10,000/=, it was the view of this court that a sentence of three (3) years imprisonment was harsh, severe and manifestly excessive in the circumstances.

20. In the case of **Lawrence Mitelian Ngaluma vs Republic [2017] eKLR**, this very court upheld a sentence of five (5) years where the appellant therein was convicted of trafficking 360kgs with a street value of Kshs 360,000/=(three hundred and sixty thousand.

21. Although this court came to the firm conclusion that this was not a suitable case to substitute the sentence with a fine as the cannabis was not intended for own consumption but rather it was intended for commercial purposes, it could nonetheless reduce the sentence to eighteen (18) months.

22. This court is apprehensive that additional punishment than he has already served vis-à-vis the said value of bhang would only be counter-productive as it has the potential of hardening him to commit more serious crimes in future.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 16th March 2017 was successful only on the extent of sentence. Accordingly, this court hereby sets aside and/or vacates the sentence of three (3) years imprisonment that was imposed upon the Appellant by the Learned Trial Magistrate and replaces the same with eighteen (18) months imprisonment that is to run from the date of conviction, which is hereby upheld as the same was lawful and fitting.

24. It is so ordered.

DATED and DELIVERED at VOI this 30th Day of November 2017

J. KAMAU

JUDGE

In the presence of:-

Fred Charo Rumba - Appellant

Miss Anyumba- for State

Susan Sarikoki- Court Clerk