



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 42 OF 2015**

**MORONYA RIOBA alias YAFUNA .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. **MORONYA RIOBA** alias **YAFUNA**, the appellant herein, faced the charge of being in possession of narcotic drugs. The particulars were that:-

***“On the 15<sup>th</sup> day of September, 2013, at about 18:00 hours at Isebania Bus Terminus in Kuria West District within Migori County was found being in possession of twenty rolls of cannabis sativa of street value of Kshs. 1,000/= in contravention of the provision of the said Act.”***

2. On denying the charge the prosecution availed two witnesses being one Laban Ombati Mogere, a Government Analyst based in Kisumu who confirmed that the twenty cigarette-like rolls were actually rolls of cannabis sativa. He was PW1.

3. PW2 was PC Edwin Cherotich who informed the trial court that the police arrested the appellant in connection with another offence and upon carrying out a search recovered a total of the said twenty cigarette-like rolls which turned out to be cannabis sativa. He prepared an Exhibit Memo Form and took the contents to the Government Analyst for examination. He confirmed to have been the one who arrested and searched the appellant and recovered the cannabis sativa on the appellant.

4. On being placed on his defence, the appellant alleged that the cannabis sativa had been planted on him and wondered why the prosecution had not taken photographs during the time the police conducted the search.

5. The appellant was found guilty and accordingly convicted. He was sentenced to a fine of Kshs. 50,000/= and in default to serve nine months in jail.

6. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal and at the hearing he challenged the lower court findings on three grounds. First, he contended that the learned trial magistrate erred in finding the definition of the record “possession” from the Encyclopedia Britannica given that the Narcotic Drugs and Psychotropic Substances Control Act (***the Act***) did not define the said word. Second, the appellant contended that the trial court erred in dismissing his defence as a mere sham while the reality remained that the drugs were planted on him by the police. The last ground was that trial court erred on relying of the evidence of a single witness which was misleading and that since no any

other police officer testified that evidence cannot stand. The decision in **Bulunya & Another vs Uganda (1972) EA 549** was cited in buttressing that submission.

7. As this is the appellant's first appeal, the duty of this court is well settled. It was so held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. I have carefully perused the lower court record including the judgment. Having realized that the Act did not define the word "**possession**" the learned trial magistrate in order to satisfy himself the act of possession was proved consulted the Encyclopedia Britannica. I find that there is nothing wrong with the learned Magistrate doing that. He simply wanted to get the precise definition of the key word. Infact the description of the word 'possession' as was availed in the encyclopedia builds upon how **Section 4** of the Penal Code, Chapter 63 of the Laws of Kenya defines 'possession'. The Code defines 'possession' as follows:-

**"Possession" -**

***(a) "being in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***

***(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them"***

The first ground therefore fails.

9. The trial court rightly considered the appellant's defence and upon analysing it, the court came to the finding that the same could not outweigh the prosecution's evidence. In reaching that decision the trial court dealt with the aspect of the credibility of the prosecution witnesses and it was satisfied that they were truthful. Given that this court did not have the advantage of seeing the demeanour of the witnesses, it will be without any legal basis for me to attack such a finding of the trial court. I however wish to state that in dismissing the defence the trial court shifted the burden of proof by requiring the appellant to adduce evidence in support of his defence. It is well settled in law that the burden of proof in criminal cases rests with the prosecution throughout except in very clear exceptions. However, that observation does not lessen the credibility of the witnesses as determined by the court. I therefore find that the second ground has to fail and I so hold.

10. The third ground of appeal dealt with evidence of a single witness. In such circumstances a court is usually called to treat such evidence with caution and to warn itself on relying on such evidence. Under **Section 124** of the Evidence Act, Chapter 80 of the Laws of Kenya such evidence ought to be corroborated.

11. In this matter, there was indeed corroboration by PW1.

12. Although the trial court did not expressly warn itself in the judgment, I have noted that the court so rightly and carefully analysed the evidence before it and as such this court cannot fault it on its findings.

13. Having analysed the evidence afresh, I come to the conclusion that the appellant was rightly found guilty and convicted. The decision of the trial court is hereby affirmed.

14. Since there is no appeal on the sentence by either party, I come to the final finding that the appeal is

devoid of any merits and is hereby dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED at MIGORI this 28<sup>th</sup> day of January, .2016**

**A. C. MRIMA**

**JUDGE**