



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 30 OF 2015

JEREMIAH NGALUMA MWARABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 698 of 2011 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The appellant was charged with the offence of trafficking in Narcotic Drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994. The particulars of the offence are that on 23rd October 2011 at around 3.30 pm at Migingo area in Malindi District within Kilifi County the appellant together with other persons herein were jointly found trafficking in narcotic drug namely cannabis to wit 15 big rolls with a street value of Kshs.15,000/= by storing and selling in contravention of the said Act.

The trial court convicted the appellant and sentenced him to serve five (5) years imprisonment. The grounds of appeal are that the charge was defective, that the case was not proved beyond reasonable doubt and that the appellant's defence was not considered. The appellant filed written submissions. The only issue being raised in the two page submissions relates to the sentence. The appellant would like the sentence to be reduced given the circumstances of the case.

Mr. Fedha, prosecution counsel, opposed the appeal. Counsel relied on the record of the trial court. Counsel maintain that the drugs were analysed by the Government analyst and found to be narcotic drugs (cannabis).

The record of the trial court shows that five (5) witnesses testified for the prosecution. PW1, PW2, PW3 and PW4 gave similar evidence. PW1 P.C. TOBIAS MWITA, PW2 CORPORAL JANE CHIRCHIR, PW3 P.C. CYRUS WAMBUA and PW4 P.C. VERONICA WAITHERA were all based at the Malindi police station's Anti-narcotic Unit. On 23rd October 2011 they were in their office when they got information that there were three people selling drugs at Migingo area in Malindi.

All the four witnesses testified that they went to the area and their informer pointed out the house in question which was isolated. The four officers entered the house and found three people seated on a mat. They identified themselves as police officers. They conducted a search in the house and recovered 15 big rolls of dry plant material which they suspected to be cannabis. One of the appellant's co-accused was

found with Kshs.3,600/=. An inventory was prepared.

PW4 was the investigating officer. She learnt that the appellant and his other co-accused (3rd accused) who passed on during the pendency of the suit, had transported the drugs from Taita Taveta to Malindi. They had also rented the house where they were arrested.

PW5 GEORGE LAWRENCE OGUDA is a Government analyst based in Mombasa. On 4th November 2011 he received two rolls of dry plant material from PW4. He analysed it and found it to be cannabis.

In his sworn defence, the appellant testified that he is a farmer living in Taveta. His friend Kahindi Kazungu lost his auntie and he came for the burial. His friend was working at the Taveta Lands office. He came with his friend to Malindi and they went to Kisumu Ndogo area. They joined people who were going to pick the body at the mortuary. He was then taken somewhere to charge his phone. On their way back they saw a Probox vehicle number KBA 139V. It had police officers. He was arrested and later charged with the offence.

The appellant contends that the prosecution did not prove its case beyond reasonable doubt. The main issue to be determined is whether the prosecution proved its case to the required standard and whether the sentence is excessive. The record of the trial court shows that two of the appellant's co-accused died before the case was concluded.

It is established by the prosecution evidence that four police officers, two men and two police women went to a house in Migingo area on the material day at about 3.30 pm. They found three people inside a house, searched the house and recovered the narcotic drugs. They arrested all the three people. One of those arrested is the appellant. The narcotic drugs were analysed by PW5 and found to be cannabis. The appellant's defence is that he was arrested on the road while coming from charging his phone. He confirms that he is from Taita Taveta and was not a resident in the area. PW4 established that the appellant and his co-accused had transported the drugs from Taita Taveta.

Given the evidence on record, I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellant was arrested in the house where the drugs were found. The defence evidence did not displace the prosecution evidence. The charge sheet was not defective and the trial court considered the appellant's defence.

The record of the trial court show that the appellant and his co-accused were arrested on 23rd October 2011. They were charged in court the following day 24th October 2011. Since then the appellant remained in custody until 27th March 2013 when one Stephen Haji Mathole, a teacher, stood surety for him. The appellant was therefore in custody for almost one and a half years. He was sentenced to serve 5 years imprisonment on 15th June 2015. He has now served one year in prison. It is also clear from the record that two of the appellant's co-accused passed on.

The evidence herein shows that the appellant was indeed trafficking in the drugs. The five year imprisonment is slightly excessive in the circumstances. The appellant had already spent 1 ½ years in remand. That period was not taken into account when passing the sentence. The trial court took into account the fact that the appellant is a first offender. I do set aside the five year sentence and replace it with three (3) years imprisonment from the date of conviction.

In the end, the appeal on conviction is disallowed. The five years imprisonment sentence is set aside and replaced with three (3) years imprisonment.

Dated and delivered in Malindi this 28th day of July, 2016.

S.J. CHITEMBWE

JUDGE