



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL 143 OF 2014

SAMWEL MUTUKUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of D.G Karani PM in Criminal [Case No. 658](#) of 2013 delivered on 15th July 2014 at the Principal Magistrate’s Court at Kithimani)

JUDGMENT

Samwel Mutuku (hereinafter “the Appellant”), was convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act of 1994. The particulars of the offence were that on the 19th September 2013 at Matuu town in Yatta sub-county, within Machakos County, the Appellant was found trafficking narcotic drugs by storing 44 rolls of cannabis sativa valued at Kshs. 720/= in his pocket trouser.

The Appellant was arraigned in the trial court on 5th November 2013, when he pleaded not guilty to the charges. He was tried, convicted of the offence, and fined Kshs. 500,000/= and additionally sentenced to ten (10) years in prison.

The Appellant was aggrieved by the judgment of the trial magistrate and preferred this appeal on grounds that he was an orphan and had since been reformed through the prison service. He asked for a reduced sentence in his Amended Grounds of Appeal availed to the Court.

The Appellant also availed written submissions during the hearing of his appeal, wherein he urged he was a first offender and was raised in the streets and had never committed or convicted of crime. In mitigation he stated that he was repentant of his actions and had only been trying to fend for his siblings as the sole bread winner. He claimed to have been rehabilitated and reformed during his period of incarceration, and that he had been in custody since 2013, and asked the Court to reduce his sentence to time served.

Mr. Cliff Machogu, the learned prosecution Counsel conceded the appeal in written submissions filed in Court dated 26th February 2016. It was submitted therein that the charge sheet under which the Appellant was tried and convicted did not disclose an offence in law, because *cannabis sativa* the drug he is accused of trafficking is not a narcotic drug under the Narcotic and Psychotropic Substance Control Act making the charge sheet defective. Reliance was placed on the decision in **Daniel Nderitu Wachira V R (2005) eKLR.**

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have

regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that they raise two issues. These are firstly, whether the charge sheet under which the Appellant was convicted was defective; and secondly whether the sentence imposed upon the Appellant was lawful.

On the first issue, 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 of 1994 which provides as follows;

“Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or

(b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years..

Section 2 of the Act defines a “narcotic drug” as any substance specified in the First Schedule or anything that contains any substance specified in that Schedule; and “psychotropic substance” as any substance specified in the Second Schedule or anything that contains any substance specified in that Schedule.

I have perused Schedule I of the said Act and Cannabis (Indian Hemp) and Cannabis resin (Resin of Indian Hemp) are among the narcotic drugs listed therein. Section 2 of the Act in addition defines “cannabis” as means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted, by whatever name they may be designated; and “cannabis plant” as any plant of the genus cannabis by whatever name called and includes any part of that plant. *Cannabis Sativa* is a plant in the cannabis genus and is therefore a narcotic drug and is mainly used to refer to cannabis hemp. Therefore the ground raised and conceded by the prosecution has no merit since *cannabis sativa* is clearly a narcotic drug.

However, having perused the record of the trial court, I am of the opinion that the evidence adduced could not have sustained a charge of trafficking of a narcotic drug contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. The prosecution called four witnesses during the trial. PW1 who was Inspector Geddi Wanjala stated that on 19th September 2013 at about 2.30 pm he was on patrol with APC George Maina within Matuu town when they came across seven street boys. He stated that there had been reports of loss of chicken through the street boys. A smell of bhang was wafting from the group. They conducted a search on them and recovered 44 rolls of bhang from the Appellant’s right hand pocket trouser. The Appellant was arrested and booked at the police station. PW1 produced the bhang as exhibit in court. APC George Maina who was PW2 reiterated these facts in his testimony.

PC George Odero was PW3 and he stated that the Appellant was brought to the station by PW1 and PW2 for being in possession of 44 rolls of bhang recovered from his pocket. He arrested him and charged him with the offence. He produced the bhang as exhibit in court. Dennis Owino Onyango (PW4), the government analyst at the Government Chemist Nairobi, testified that he received a sample from Johnson Njonjo of Matuu Police station on 7th October 2013 to ascertain whether it was *cannabis sativa*. He analysed the same and confirmed it was *cannabis sativa*. He prepared a report which was produced as an exhibit in court.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his

defence. The Appellant gave unsworn testimony and did not call any witnesses. He claimed that he was framed, and the bhang was planted on him because the police took his money which was the proceeds of sale of goats.

I have perused the judgment by the trial magistrate and note that the learned magistrate completely neglected and failed to consider the issue whether the evidence adduced by the prosecution had established a charge of trafficking a narcotic charge, and instead only considered the defence of the Appellant. He framed the issue as follows in this regard:

“The question I am called to answer is whether the two officers planted the bhang on him after taking his money which he said was the proceeds of sale of some goats”

The trial magistrate went on to find that the Appellants statement could not be true and was an afterthought. There was also no basis for the finding that the charge had been proved to the required standard, other than the statement that the Appellant admitted to have been arrested within Matuu town.

“Trafficking” is defined in section 2 of the Narcotic Drugs and Psychotropic Substances Control Act to mean:

“the importation, exportation, sale, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance...”

The Court of Appeal addressed the establishment of the element of “trafficking” of a narcotic drug in the case of **Madline Akoth Barasa and Gabriel Ojiambo Nambesi –vs- Republic C.R. Appeal No. 193 of 2005** as follows:

“It is evident from the definition of “trafficking” that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance. In our view, for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking. In this case, neither the charge sheet nor the evidence disclosed the dealing with the bhang which constituted trafficking.”

In the present appeal, the charge sheet specifies one of the ingredients of trafficking which is that of storing, and it is stated that the Appellant was charged with storing 44 rolls of cannabis sativa valued at Kshs. 720/= in his pocket trouser. To store or storing according to the **Collins English Dictionary** is “to keep, set aside or accumulate for future use”, and “to place in a warehouse, depository etc for future use”. According to PW1 and PW2 the *cannabis sativa* was found in the Appellant’s pocket and person, after they searched him and not in a storage place. It could not therefore have been said to be stored by the Appellant, and to this extent the charge was defective.

This finding notwithstanding, I have no doubt that the evidence tendered by the prosecution proved the offence of possession of *cannabis sativa* contrary to section 3(1) as read with Section 3(2) (a) of the Act which provides as follows:

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

2. A person guilty of an offence under subsection (1) shall be liable—

(a) 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; and...”

Possession can be either actual or constructive under **section 4 (a)** of the *Penal Code* which defines possession as follows:

‘be in possession’ or ‘have in possession’ includes not only having one’s 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.’

Although I have found the charge defective, I reduce the charge to one of possession of being in possession of *cannabis sativa* contrary to **section 3(1)** as read with **section 3(2)** of the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*, and convict the Appellant accordingly under Section 361(4) of the Criminal Procedure Code. The sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of *cannabis sativa* are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, Section 3 (2) (a) of the Act does not expressly provide for a fine.

For the above reasons I allow the appeal to the extent that I quash the conviction for the offence of trafficking in narcotic drugs, set aside the sentence of 10 years’ imprisonment and substitute thereof a conviction for the offence of possession of *cannabis Sativa* contrary to section 3(1) as read with Section 3(2) (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*, for which I sentence the Appellant to three (3) years imprisonment . This sentence shall take into account the time the Appellant spent in custody from the date of his arrest. The order imposing a fine of Kshs.500,000/- on the Appellant is set aside and I direct that any fines that may have been paid by the Appellant should be refunded forthwith.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE