



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 15 OF 2015

JOSEPH MAINA KIHUMBU.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.476 of 2014 of the Principal Magistrate's Court at Kangema by Hon. E.M Kagoni – Ag. Senior Resident Magistrate)

JUDGMENT

The appellant, **JOSEPH MAINA KIHUMBU**, was convicted for the offence of being in possession of narcotic drugs contrary to section 3(1)(2) (sic) of the Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994.

The particulars of the offence were that on 15th December 2014 at Kiriti location, Mathioya Sub county of Murang'a County, he was found in possession of 167 rolls of cannabis (bhang) valued at Kshs.3,340/=which were not in medicinal preparation form.

He was sentenced to 15 years imprisonment.

He now appeals against both conviction and sentence.

The appellant was represented by Mr. Mwangi Kamau, learned counsel. He raised two grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact in convicting the appellant when there was no sufficient evidence.
2. That the learned trial magistrate arrived at the wrong conclusion upon a wrong analysis of the evidence.

The state opposed the appeal through Mr. Njeru, the learned counsel.

Briefly the facts of this case are as follows:

After the local administrators received information about the appellant who was said to be trading in cannabis, they went and searched his kiosk from where they recovered the complained of rolls of bhang.

In his defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VS. REPUBLIC 1972 EA 32**.

I have observed elsewhere that the first duty of the trial court is to ensure that the charge is correctly drafted in all aspects. in the instant case the charge ought to have read:

" ... contrary to section 3(1) as read with section 3(2)....."

Since the appellant was not prejudiced, this flaw is curable under section 382 of the Criminal Procedure Code but it is important for the magistrate to note the same.

In addressing the court the appellant's counsel invited me to make a finding that there were contradictions. The evidence of **Simon Chege Njuguna (PW1)** was that **APC Karogi** recovered two small rolls of bhang in a cigarette packet and three bundles of transparent polythene papers with 165 rolls. **Douglas Ngeteta Kihara (PW2)** on his part said **APC Muroki** recovered a paper bag which contained three other polythene paper bags with rolls of bhang. He never testified of the recovery of the other two rolls. In his evidence **APC Muroki (PW3)** testified that he recovered something wrapped in a newspaper. Inside he found three bundles wrapped in a transparent paper. His colleague **APC Karogi** recovered two rolls in a cigarette packet.

These are three versions of the same transaction. the contradictions raise a credibility issue of the prosecution witnesses. The court of appeal in the case of **NDUNGU KIMANYI V REPUBLIC (1979) KLR 282** held:-

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

In the instant case, due to the three different versions, I find that the conviction was unsafe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at MURANG'A this 19th day of July 2016

KIARIE WAWERU KIARIE

JUDGE