



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO.13 OF 2016**

**PAUL MUTHIE MUNENE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in CR 475 of 2015 at the Kerugoya Chief Magistrate's Court by Hon. J.A. Kasam - SRM on 1<sup>st</sup> December, 2015)*

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of 11 years imprisonment in respect of being found conveying bhang technically known as cannabis sativa contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substance Control Act No 4 of 1994. Additionally, he has also appealed against a forfeiture order in respect of his motor vehicle registration No KCA 106C Toyota Fielder and cash money in the sum of Kshs 33,300/-. The judgement appealed against is that of the Senior Resident Magistrate at Kerugoya dated 1<sup>st</sup> December 2015.
2. Ms Mbae for the state supported both the conviction, the sentence of imprisonment and the order of forfeiture of both the motor vehicle and the money.
3. The appellant was convicted on the eye witness evidence of No. 53906 PC Nicholas Chigiri (PW 1), No. 83446 PC Moses Mwongera (PW 2) and No. 71324 PC Joseph Mutesa (PW 3). The evidence of these police officers was that acting on information they laid an ambush at Kutus centre and blocked the motor vehicle driven by the appellant. After conducting a search, they found a sack containing cannabis sativa (bhang) weighing 10 stones in the boot of the said motor vehicle. It is also their evidence that the appellant was violent and members of the public were very angry and wanted to burn his motor vehicle. They stated that “*they were crying out 'wacha tuhome' let us burn the motor vehicle. He drove off the scene.*” They arrested the appellant and charged him with this offence.
4. Upon being placed on his defence, the appellant gave sworn testimony and called no witnesses in his defence. He testified that he had gone to Mbeere market to deliver kales (sukuma wiki) for sale. After delivering the kales, he returned at about 7.30 a.m and was stopped by police at Kutus town. He was driving his motor vehicle KCA 106C. His further evidence was that the police blocked him and ordered him out of the motor vehicle. He further testified that he refused to surrender his car and the ignition key. As a result he was forcefully taken out of the car and the police then took control of his motor vehicle and drove it to Kerugoya Police Station. It was also his evidence that no search was conducted on his motor vehicle at Kutus town which he further testified was deserted as there was no presence of members of public around there. He was then taken to the CID office at Kerugoya and finally was charged with this offence.

5. It was also his evidence that an inventory was prepared at the police station, which included the 10 stones of bhang, a knife, a panga, a telephone and cash money of Kshs 33,000/-, which he refused to sign because the cannabis sativa (bhang) was not his property. As regards the cash money, his evidence was that these money were not the proceeds of sale of the cannabis sativa (bhang). He concluded his evidence that the case against him was fabricated and that at some stage his motor vehicle was released. After its release there was a political statement made by the MP of Kirinyaga Central concerning the release of his motor vehicle.

6. The appellant has raised 13 grounds of appeal. In ground 1, he has faulted the trial court both in law and fact for convicting him on a defective charge, which did not indicate the year in which the appellant allegedly committed the offence. In this regard, I find that there was evidence from the police officers that they arrested the appellant on 31<sup>st</sup> July 2015 at about 6.00 a.m in Kutus town. In the circumstances, I find that the year when the offence was committed was 2015. The appellant was not prejudiced by not indicating the year 2015 in the charge. This was a curable defect in terms of section 382 of the Criminal Procedure Code (Cap 75 ) Laws of Kenya. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

7. In ground 2, the appellant has faulted the trial court both in law and fact by amending the charge without a formal application to that effect and by failing to indicate the date of the said amendment. In terms of **section 214 of the Criminal Procedure Code**, it is the duty of the trial court to amend the charge either on its own motion (*suo motu*) or upon application by the prosecutor. The provisions of that section authorize the court to amend the charge at any stage in the course of the trial. However, the amendment is subject to both the right of the accused to plead to the altered charge and the right to recall witnesses who had already testified. The evidence of the police officers show that the offence was committed on 31<sup>st</sup> July 2015. In the circumstances, there was evidentiary basis for amending the charge in view of the evidence given by the police officers. In amending the charge the court was acting within its mandate. It did not thereby take over the role of the prosecution. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

8. In ground 3, the appellant has faulted the trial court both in law and fact for not according him a fair trial because the language of interpretation was Kiswahili, whereas the appellant had indicated he understood Kikuyu. In this regard, it is to be noted that when the plea was taken the name of the court clerk is shown as Murage and the language of choice of the appellant is indicated as Kikuyu. The same interpreter was in attendance throughout the trial of the accused until the prosecution closed their case. There is no evidence to show that Kiswahili was used. This is clear from the record of the proceedings. There is also no evidence that counsel for the accused complained that his client was not being accorded interpretation in Kikuyu language.

9. After the close of the prosecution case, the record shows that the court clerk was the same Murage and the language of interpretation is not indicated. That notwithstanding, the accused gave his evidence and closed his case. Counsel for the appellant proceeded to lead the appellant in his evidence in chief who was then cross-examined and thereafter he closed the case for the defence. Again the record shows that the appellant's counsel did not complain that his client was not being interpreted in the language of his choice namely Kikuyu. What is clear is that the same court clerk (Murage) who understood Kikuyu was in attendance during the prosecution and defence hearing. I find that in the circumstances of this case there was interpretation as required. And that explains why counsel for the appellant did not complain. In the circumstances, I find that the constitutional rights of the appellant to be interpreted in the language that he understood in terms of Article 50 ( 2) (m) of the 2010 Constitution was not violated in any way. This ground is being raised for the first time in this appeal. I therefore find that it lacks merit and is hereby dismissed.

10. In grounds 4 and 5, the appellant has faulted the trial court both in law and fact for failing to consider that cannabis sativa is not a drug within the meaning of the Narcotic Drugs and Psychotropic Substance Control Act No 4 of 1994. Additionally, the appellant has also faulted the trial court for admitting into evidence the Government Analyst report without the maker being called to give evidence. I find from the report of the Government Analyst that the substance which was submitted to him was analyzed and found

to be cannabis. This is clear from the report of the Government Analyzed which was put in evidence as prosecution exhibit 6 A and B) by consent of both parties in accordance with the provisions of **section 77 of the Evidence Act Cap 80) Laws of Kenya**. In the circumstances, I find that there is no merit in these two grounds of appeal which I hereby dismiss.

11. In ground 6, the appellant has faulted the trial court both in law and fact by failing to consider that there was no independent witness called to testify. The three police officers who testified as PW 1, 2 and 3 do not fall in the class of witnesses whose evidence requires corroboration. For instance, they are not children of tender years whose evidence may require corroboration in terms of **section 124 of the Evidence Act**. They are also not accomplices in terms of **section 141 of the Evidence Act (Cap 80) Laws of Kenya**, whose evidence may in certain circumstances require corroboration. If this ground were to be upheld, it will follow that evidence given by police officers is inherently weak and will call for independent corroborating evidence. The appellant has not cited any law whether statute or case law in support of this submission and I am not aware of law in that regard. In the circumstances, I find that this ground of appeal is without merit and is hereby dismissed.

12. In ground 7, the appellant has faulted the trial court both in law and fact by failing to consider that the appellant was ferried in a police vehicle and his car was driven by police who could have planted the cannabis (bhang). I find that the appellant gave sworn evidence just like the three police officers did and at the end of the trial, the trial court found his evidence to be incredible and rejected it. It is important to bear in mind that his defence was that the case against him was fabricated. The trial court which was better placed to assess the demeanour of the witnesses including the appellant as a witness rightly came to the conclusion that the defence was incredible. This ground is without merit and is hereby dismissed.

13. In ground 8, the appellant has faulted the trial court for failing to consider that there was no inventory of the exhibits taken at the scene of the arrest. I find from the evidence of the prosecution that members of the public were very angry and they wanted to burn the vehicle of the appellant. In those circumstances, it was not possible to take an inventory of the items recovered from the appellant. This inventory was prepared at the police CID office in Kerugoya, which the appellant refused to sign because the cannabis was not his property. In the circumstances, I find that this ground of appeal is without merit and is hereby dismissed.

14. In ground 9, the appellant has faulted the trial court both in law and fact for failing to consider that no photographs were taken at the scene and that the whole case was a fabrication. I find that the circumstances at the scene of the arrest did not favour any further investigations including taking photographs, because of the hostile attitude of the members of the public. I find that there is no merit in this ground of appeal and I hereby dismiss it. In passing I find the attitude of members of public very disturbing and should be discouraged and stopped.

15. In ground 10, the appellant has faulted the trial court both in law and fact for failing to consider that no evidence was produced to show that the appellant was trafficking in drugs and that the money in his possession were the proceeds of the sale of cannabis (bhang). The evidence of the police on this aspect is that the appellant was found conveying 10 stones of cannabis (bhang) in a sack that was recovered from the boot of his motor vehicle. This was a huge quantity of cannabis (bhang). The necessary inference to be drawn is that this cannabis was for commercial purposes. I find that there was evidence which was rightly believed that the appellant was found trafficking in drugs within the meaning of the Narcotics and Substances Control Act. This issue is tied up with the issue of the money in the sum of Kshs 33,300/-. In the circumstances of the case, I find that there was evidence upon which the trial court found that the money were the proceeds of sale of the cannabis (bhang).

16. In ground 11, the appellant has faulted the trial court both in law and fact for ordering the forfeiture of both the motor vehicle and the money to the state. I find that the forfeiture order is proper because the motor vehicle was used in trafficking the cannabis and that the money were the proceeds of the sale of the cannabis (bhang).

17. In ground 12, the appellant has faulted the trial court both in law and fact for convicting him without a

comprehensive ruling on no case to answer, which was delivered after the close of the prosecution case. It is the practice in trial courts to simply find that *a prima facie* case has been made out to require the accused to be placed on his defence. This practice is sound in law. It is based on **section 211(1) of the Criminal Procedure Code**. In terms of the provisions of that section the court is not required to deliver a comprehensive ruling. The reason being that it is not a judgement. If on the other hand the court finds that the accused has no case to answer the accused will be acquitted. In that event the court will be required to deliver a comprehensive ruling of acquittal. The reason being that a ruling of that nature is a final judgement, in which the court will be required to give reasons for its ruling in terms of section 169 of the Criminal Procedure Code. If a trial court was to deliver a comprehensive ruling which will involve assessing the demeanour of the prosecution witnesses at that stage, it may easily prejudice the defence case. In the circumstances, this ground of appeal is without merit and I hereby dismiss it.

18. In ground 13, the appellant has faulted the trial court both in law and fact for failing to consider his sworn evidence which was not challenged by the prosecution. This ground involves the demeanour of the witnesses who testified before the trial court, which includes the sworn testimony of the appellant. After seeing and hearing the evidence of the three police officers and that of the appellant, the trial court found that the evidence of the police witnesses was truthful and that of the defence was untruthful. I have considered the evidence in its entirety and I find that the trial court came to the right conclusion that the defence was not truthful.

19. This is a first appeal. As a first appeal court according to ***Peters v. Sunday Post Ltd (1958) EA 424***, I am required to reassess the evidence and come to my own conclusions. I am also required to defer to findings of fact as found by the trial court in particular those that are based on the demeanour of the witnesses. I have done so. I must point out that I have also considered the submissions of both counsel. As a result I find that the conviction of the appellant was based on ample evidence.

20. As regards sentence, the appellant was sentenced to 11 years imprisonment. Additionally, the motor vehicle and cash money in the sum of Kshs 33,300/- was ordered forfeited to the state. In sentencing the appellant, the court took into account that the accused was a first offender and went further to observe that its hands were tied and proceeded to impose a sentence of imprisonment together with an order of forfeiture. I do not find that the trial court has committed any error of fact or law in sentencing the appellant. For these reasons, I confirm both the conviction, the sentence and the order of forfeiture recorded against the appellant. It therefore follows that the bail of the appellant is hereby cancelled and will serve the sentence of imprisonment as ordered by the trial court.

21. In the light of the foregoing, the appellant's appeal is hereby dismissed in its entirety.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **30<sup>th</sup>** day **November 2016**

In the presence of Mr. Magee for the appellant and Ms Mbae for the respondent

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**30.11.16**