REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 112 OF 2014

(From original conviction and sentence in Criminal Case No. 1793 of 2012 of the Senior Principal Magistrate's Court at Nyahururu, D. K. Mikoyan, Ag. SPM)

DANIEL WAHOME GITHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant Daniel Wahome Githu was convicted and sentenced to serve ten years imprisonment by the Hon. D. Mikoyan Principal Magistrate sitting at Nyahururu in Criminal Case No. 1793 of 2012 on a charge of unlawfully cultivating bhang on the 12th October, 2012 at Chamka Village Gachanji Location within Nyandarua West District within Nyandarua County. Being aggrieved by both the conviction and sentence, he lodged an appeal to this court on ten (10) grounds as hereunder -

1. The Trial Magistrate erred in law and fact by faiing to find that the prosecution did not satisfy the ingredients of the charge that was before the court.

2. The Trial Magistrate erred in law and fact by failing to find that the prosecution evidence did not prove that the Appellant cultivated a prohibited plant.

3. The Trial Magistrate erred in law and fact by failing to find that the charge and the particulars did not meet the threshold of Section 134 of the Criminal Procedure Code.

4. The Trial Magistrate erred in law and fact by failing to find that the prosecution did not prove that the Appellant had control and management over the parcel of land where the bhang was allegedly found.

5. The Trial Magistrate erred in law and fact by failing to find that the prosecution failed to prove that the Appellant had prior knowledge of the cultivated bhang.

6. The Trial Magistrate erred in law and fact in disregarding the defence evidence.

7. The Trial Magistrate erred in law and fact by failing to find that the prosecution had not directly linked/connected the Appellant beyond reasonable doubt to the offence of cultivating bhang.

8. The Trial Magistrate erred in law and fact in finding that the prosecution had proved the charge of cultivating bhang beyond reasonable doubt.

9. The Trial Magistrate erred in law and fact in finding a conviction that was against the weight of evidence.

10. The Trial Magistrate erred in law and fact by passing a harsh sentence under the circumstances.

He urged this court to allow the appeal, quash the conviction and set aside the judgment.

2. It was the Appellants submission that the charge sheet was defective and that the particulars of the offence, especially the word Chamka village was so wide that it was not possible for the Appellant to have cultivated the bhang in a whole village, neither would the whole Chamka village be under cultivation of bhang. As such, it was his submission that the charge was amorphous and no conviction could legally be based on such an amorphous charge. This was upheld in the case of **Mohammed Chengo -vs- R Criminal Appeal No. 146 of 2013 KLR** where it was stated that the facts and particulars of the charge sheet did not disclose an offence. The conviction was not safe. It was further held that the facts did not pin point a particular area where the Appellant had planted the bhang within the village.

3. It was further submitted for the Appellant that the word *"cultivate"* was vague and was not specific. The accused was not found growing, tendering, sowing or scattering the plant or harvesting the fruits or flowers, seeds or leaves. It is therefore not clear what the Appellant was accused of doing. It is submitted that the trial magistrate erred in convicting the Appellant on the vague evidence that was not safe to base a conviction on.

4. The Prosecution did not prove that the Appellant was the owner or in occupation of the land where the offensive plants were found, nor did it prove the interest he had if any on the land. No land parcel particulars were stated including the land parcel and ownership of the same. It was not enough for the Area Chief to state without any prove that he knew how the land was sub-divided by the owner and gifted to the sons, among them the Appellant.

During investigations, it was alleged that some photographs were taken. In the photographs taken at the scene, the Appellant does not appear there. That it is submitted, was sure prove that he was not found cultivating the plant, and that the uprooted plants were not from his farm as he did not witness them being uprooted, they could have been so uprooted from any other farm.

It was urged that the conviction was unsafe and ought to be set aside.

5. Mr. Chirchir Learned State Counsel conceded to the appeal and stated that indeed the charge sheet as drawn was defective, and offends the provisions of Sections 137(c)(i)(ii)(f) of the Criminal Procedure Code. He stated that the land upon which the alleged plants were planted were not stated, and that the photographs taken at the scene did not show the Appellant to have been there or even arrested there, and that it proves that the Appellant was not at the scene as stated. The Investigating Officer stated that he did not visit the scene of crime. It is the State's submissions that investigations in the matter were very sketchy and that the conviction was not safe at all. He urged that the appeal be allowed.

6. I have analysed the evidence on record and I agree with the Learned State Counsel that the investigations into the alleged crime were very shoddily done and that evidence tendered by the prosecution witnesses did not connect the Appellant to the crime. There is no nexus to the Appellant and the plants alleged to have been planted and the fact that the Appellant did not own the piece of land nor did he have prior knowledge said plants being cultivated thereon. I find that no evidence was tendered to exclude other persons from being the cultivators of the plant on the land were they found. The prosecution failed in discharging the burden of proof.

7. In his Judgment, the trial court erred in shifting the burden of proof to the Appellant by finding that

the Appellant did not offer any explanation as to how he came into possession of the prohibited plant. In its totality, the trial magistrate was misguided himself in the evaluation of the prosecution evidence and thus arrived at a wrong finding that the prosecution had proved its case beyond any reasonable doubt and proceeded to pass a guilt verdict against the Appellant.

8. In the circumstances I find that the appeal has merit, and the State having conceded to the same, I consequently quash the conviction and set aside the sentence imposed on the Appellant and order him to be set at liberty unless otherwise lawfully held.

It is so ordered.

Delivered, dated and signed at Nakuru this 27th day of March 2015

JANET MULWA

JUDGE

In the presence of:

Kimatta holding brief Nderitu for Appellant

Ms. Rugut for State

Omondi - Court clerk