



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 7 OF 2013

RICHARD NYAKUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the Conviction and Sentence by the Honourable M.I. Shimenga, Resident Magistrate at Kericho in Criminal Case No. 1102 of 2012 on 6.2.2013)

J U D G M E N T

1. **Richard Nyakundi** (*appellant*) was arraigned before the Chief Magistrate's Court Kericho charged with the offence of being in possession of Narcotic Drugs contrary to **Section 3(1)** as read with **Sub-Section 2(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No, 4 of 1994**.

The particulars were that the appellant on the 6th day of July, 2012 at about 1400hours at Kericho Law Courts, in Kericho District within Rift Valley Province, was found in possession of Narcotic drugs namely cannabis, 56 like cigarettes rolls to wit 250 grams with a street value of Ksh. 560/= in contravention to the said Act.

2. He pleaded not guilty and the case proceeded to full hearing with the prosecution calling four(4) witnesses. The appellant was eventually convicted and sentenced to thirteen(13) years imprisonment.

3. Being aggrieved by the judgment he has appealed against both the conviction and sentence raising the following supplementary grounds filed by Mr. Ogaro Orayo;

a) That there was miscarriage of justice given that the appellant was not arraigned in court within the requisite period of time.

b) That the learned trial magistrate erred in law and in fact in not appreciating the appellant's defence that he was not the one in possession, sensu strictu, otherwise she could have arrived at a different decision.

c) That being unrepresented by learned counsel, the appellant was confused by the procedures of arrest, detention, prosecution trial, and the outcome.

4. A brief summary of the prosecution's case is that PW1 and PW2 who are police officers were on **6th July, 2012** stationed at Kericho Law Courts as Court orderlies.

At about 1.30p.m they with other officers were attending to members of the public who had come to see

the remandees who were in the court cells.

5. The procedure is that the visitors are checked as well as the food that is carried for the remandees before the same is received by the remandees.

6. The appellant was one of the members of the public who had come to visit the remandees. In particular he had come to visit his brother Momanyi who was charged with the offence of Robbery with violence.

7. The appellant had two hot pots with him. One had ugali while the other had stew.

The hot pot with stew was checked and cleared. However, the hot pot with ugali had issues. When the ugali was turned over, a nylon paper bag with 56 rolls of bhang was found beneath.

8. The appellant was arrested and later escorted to Kericho police station. Samples of the rolls of bhang were sent to the Government Chemist for analysis by PW3. PW4(*Dennis Onyango*) a government analyst produced the report (EXB5) which confirmed that the tests on the 56 cigarette like rolls revealed that the contents of the rolls were cannabis which falls under the **Narcotic Drugs and Psychotropic Substances (Control) Act**.

9. PW3 also produced the two hot pots, ugali, bhang (*cannabis sativa*) and the exhibit memo form (EXB1-4).

10. For his defence the appellant elected to give a sworn statement without calling any witness. He stated that he was at the Kericho Law Courts on 6th July, 2012 at about 1pm to see his brother Joseph Ogama who was an accused person. As he waited to see his brother another young man stood next to him. He too had come to see a remandee.

11. The young man received a phone call and moved away to talk on the phone and left his luggage under the appellant's care. When the door was opened for them to see the remandees he moved in with the young man's luggage. The young man came and owned up to the luggage.

12. The appellant said he was called back and asked about the food in the hot pot. That on further checking rolls of bhang were found in it. He was arrested together with the young man and placed in cells. Officer Theuri (PW1) later came and called the young man who went and never returned. He was taken to the police station at 5p.m, and later charged.

13. When the appeal came for hearing **Mr. Orayo** for the appellant made no submissions but invited the court to look at the lower court record and allow the appeal in terms of the supplementary grounds raised.

14. **M/S Kivali** for the State opposed the appeal. She submitted that the issue in ground No. 1 was never raised in the trial court. Further that the prosecution evidence established that the appellant was found in possession and this was never rebutted. She also submitted that the sentence was not excessive and asked that the court dismisses the appeal.

15. This is a first appeal and this court is enjoined to reevaluate and reconsider the evidence on record plus the grounds of appeal and arrive at its own conclusion. I am alive to the fact that I did not see or hear any of the witnesses.

In **MUTHOKO & ANOR V R [2008] KLR 297** the Court of Appeal stated thus:

“It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that”

Also see; **Njoroge V R [1982-88] 1 KAR 1134** and **Okeno V R (1972] E.A 32.**

16. I have considered the evidence adduced before the court below, plus the grounds of appeal. I have equally considered the submissions by the counsels for the defence and the state.

I will now deal with each of the grounds of appeal.

Ground No.1

The appellant complains of not having been arraigned in court within the requisite period of time which is twenty four(24) hours.

Article 49(1)(f) of the **Constitution** which provides for this right states as follows.

“An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than-

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day”

17. The charge sheet shows that the appellant was arrested on 6th July, 2012 and arraigned in court on 9th July, 2012. I have checked the calendar which confirms that 6th July, 2012 was a **Friday** while 9th July, 2012 was a **Monday**. The evidence of PW1, PW2 and the appellant shows that this incident occurred around 1-1.30p.m, and the appellant was arrested thereafter.

18. It is obvious that the twenty four (24) hours expired on the next day around the same time. The next day was a Saturday which is not a working day for the courts. After his arrest the police had to investigate the matter and record statements. This could for obvious reasons not have been completed before 4pm when courts close on Fridays.

19. The Constitution provides that if the twenty four (24) hours ends outside the ordinary court hours, or on a day that is not an ordinary court day the arrested person must be arraigned on the next court day. In this case the next court day was Monday the 9th July, 2012, and that's when the police arraigned him in court. Ground No. 1 is therefore unavailable to the appellant.

Ground No. 2

20. Both PW1 and PW2 who were orderlies at the Kericho Law Courts stated that it was the appellant who was in possession of the food that had issues.

21. The appellant does not deny having been at the scene. He admits having carried the suspect food in hot pots as he entered the door for the search by the security officers.

22. He did not have to carry another unknown person's luggage when he knew that the same would be inspected. Nobody forced him to carry it, that is if his story is to be believed.

23. In his defence he stated that officer Theuri had actually released the young man who was the owner of the suspect food.

Officer Theuri testified as PW1. At no point did the appellant in cross examination tell the officer that he had framed him and released the culprit.

24. With the strict security inspection there was no way the appellant could have agreed to carry another person's luggage for inspection. The two officers (PW1 and PW2) confirmed its the appellant who had the suspect hot pots and food. I therefore find no merit in the said ground.

Ground 3

25. There was no evidence on record to support the allegation that the appellant was confused as a result of the procedures of arrest, detention, prosecution trial and the outcome. This ground also fails.

26. I have found that the learned trial magistrate analyzed the evidence well and arrived at the right decision.

27. The offence the appellant was convicted of is a serious offence. The circumstances of the offence being that he was smuggling 56 rolls of narcotic drugs (*cannabis*) to a remandee in prison.

28. I have considered the amount of cannabis involved and the fact that the appellant was a first offender. I do find the sentence of thirteen (13) years imprisonment to be harsh and excessive. **Section 3(2)(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** provides for a sentence of ten(10) years imprisonment where a person satisfies the court that the cannabis was intended for his own consumption. However, in any other case the Act provides for twenty(20) years imprisonment. The appellant's case falls in the second category.

29. My understanding of these sentences is that the court has discretion in terms of the sentence depending on the circumstances.

The quantity herein was 56 Rolls weighing 250gms, which is not a very large quantity. Similarly the appellant was a first offender.

30. The result is that the appeal against conviction fails. The appeal against sentence succeeds to the extent that the sentence of thirteen (13) years imprisonment is set aside and substituted with a sentence of seven (7) years imprisonment from the date of conviction.

Dated, signed and delivered in open court this 26th day of March, 2015

H.I. ONG'UDI

JUDGE

In the presence of:

M/S Mwangi for State

Mr. Orayo for Appellant

Appellant - present

Lagat– Court Assistant

Interpretation - English/Kiswahili