REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 241 OF 2010

WAMBUA MUSYOKA……. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kitui Principal Magistrate's Court Criminal Case No. 406 of 2009** by **Hon. T. M. Mwangi, SRM on 19/8/10)***

JUDGMENT

1. **Wambua Musyoka**, the Appellant was charged with the offence of **being in possession of narcotic drugs** contrary to **Section 3(1)(2)(a)** of the **Narcotic and Psychotropic Substances Control Act, No. 4** of **1994.** Particulars of the offence were that on the **29th March, 2009** at around **2.00 p.m.** at Kalawa Village, Mulundi Sub-Location, in Kitui District of the Eastern Province was found in possession of narcotic drugs namely **Cannabis Sativa** to wit 99 stones which was not in form of medicinal preparation all valued at **Kshs. 49,500/=.**
2. He was tried, found guilty, convicted and sentenced to serve twenty (20) years imprisonment.
3. Being dissatisfied with the conviction and sentence he appealed on grounds that:

- He was convicted on contradictory and insufficient evidence.
- The case was not proved beyond reasonable doubt.
- The charge was defective.
- The sentence imposed was excessive.

4. The facts of the case were that on the **29th March, 2009** police officers from Kitui Police Station tricked the Appellant by posing to be persons interested in purchasing narcotic drugs. He went to **Tourist Hotel** with some 50 stones of what was described as bhang. They arrested him and took him home and conducted a search where some 40 stones and 25 rolls were recovered. His co-accused indicated as his wife was arrested. The substance was subjected to examination and a report made. The Appellant was charged.
5. When put on his defence the Appellant denied having either sold or handled bhang. He stated further that bhang was found at a house of his co-worker but since he was in the homestead with his wife they were arrested. Subsequently they were charged.
6. At the hearing of the appeal the Appellant relied on the grounds of the appeal and added that he never committed the offence in issue.
7. The State through learned State Counsel Mr. Machogu opposed the appeal. He argued that the Prosecution's evidence was credible, consistent and well corroborated therefore the appeal ought

to fail. With regard to the sentence imposed he stated that it was within the law. He called upon the court to uphold the conviction and sentence of the lower court.

8. This being the first appeal my duty is to re-evaluate evidence adduced in the lower court as a whole and re-submit it to a fresh and exhaustive examination, then come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified**. (See Okeno V. R (1972) EA 32).**
9. The Appellant was charged with an offence under **Section 3(1)(2)(a)** of the **Narcotic and Psychotropic Substances Control Act No. 4 of 1994** that provides thus:

> ***"3. (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;"***

The particulars of the offence indicate that he was in possession of **Cannabis Sativa** to wit 99 stones which was not in form of medicinal preparation at Kalawa Village at 2.00 p.m.

10. To prove the case the prosecution called three (3) witnesses. PW1 **P C Joseph Nthuli** the arresting officer, PW2 **P C Jacob Yater**, the Investigating Officer and PW3 **Cosmas Kyalo Syomiti** the Assistant Chief of Kyangwithia Location and Acting Chief of Mutune Location. According to PW1 he was in company of **C I Etyaing, P C Yater, P C Ndirangu, P C Anguenyi** and **P C (W) Kwamboka** when they went to meet the Appellant. It was his evidence that he rung the Appellant on his mobile phone and tricked him to meet them. The Appellant met them at the Tourist Hotel at 2.00 p.m. He possessed 50 stones of Bhang. PW2 however stated that the Appellant and another were taken to him at the police station with the recovered items which he took possession of. PW3 who was neither mentioned by PW1 nor PW2 alleged that he was present. His evidence was that they met the Appellant at the Pastoral Centre. There was a remarkable contradiction as to where exactly the witnesses met the accused. Having denied the allegation that they found him elsewhere other than his home, it was imperative for the Prosecution to adduce evidence of the means of communication if at all it occurred. The Prosecution did not tell the number of mobile phone used to communicate as alleged. Nothing would have been easier than tendering evidence from the service provider to establish that fact.
11. Further, evidence adduced was that after the alleged encounter, they went to the home of the Appellant and from his house they recovered some 49 stones of bhang which were inside the drawer of a coffee table. The court was not told how far the house alleged to have belonged to the Appellant was from where they first encountered him.
12. The alleged recovery at the first instance occurred at 2.00 p.m. and the Appellant was alleged to have had physical possession of the alleged Bhang. With regard to the 2nd recovery it was not personal possession. Possession has been defined by the **Penal Code, Section 4** to mean:

> ***"(a) "be in possession of" or "have in possession" includes not only having in one's own 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;***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"***

The Prosecution had a duty of providing that the Appellant had knowledge of existence of the substance that was recovered from the drawer of the coffee table that was inside the house that was searched and the recovery made.

13. The time of recovery was not stated but definitely it was not at 2.00 p.m. and it was at a different place from either Tourist Hotel or the Pastoral Centre. Looking at the charge as drawn all the stones of bhang as stated were lumped together making a total of 99 stones. The Appellant was accused of having possessed them jointly with his co-accused when evidence adduced was very clear, the other accused person was not with the Appellant when the 50 'stones' were recovered.
14. The purpose of the charge is to notify the accused person of what he is being accused of. This is to enable him to prepare for his/her defence. Clarity in particulars of the offence is therefore called for. In the case of **Nahashon Marenya V. Republic, Criminal Appeal Number 786 of 1982 Todd J** stated that:

> ***"Charges and particulars should be clearly framed so that the accused persons know what they are charged with, and proper references should also be made otherwise confusion may arise, it cannot be said that failure of justice may not have been occasioned."***

15. The fact that the Appellant and his co-accused were being accused of having possessed 99 stones of **Cannabis Sativa** jointly within Kalawa Village without specifications of where each one of them was found and with the exact amount as stated in evidence was confusing. Coming up with a reasonable defence would not have been easy for them.
16. **Section 135** of the **Criminal Procedure Code** which provides for joinder of counts in a charge or information provides thus:

> ***"(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.***
>
> ***(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.***
>
> ***(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."***

17. The Appellant was charged with more than one offence which formed a series of offences of a similar character. Two (2) charges should have been brought against him forming separate paragraphs (counts).
18. The trial court was under a duty to note that the Appellant would be embarrassed in defending himself in the circumstances and act by directing the Prosecution to amend the charge to have separate counts. What happened was prejudicial to both the Appellant and his co-accused.
19. I must also comment on the chain of custody of exhibits that were recovered. PW1 stated that:

> ***"…… he came to Tourist Hotel with the 50 stones ……. We searched the house and recovered another 49 stones of Bhang which were inside a drawer of coffee table. Coffee table was in children's bedroom. Police Constable Woman had a bodily search on 2nd accused and recovered 25 rolls…….. P C Kwamboka informed me that she had recovered 25 rolls from 2nd accused ……. The 50 stones were inside the white polythene sack….."***

20. PW3 on the other hand stated:

> ***"……. I was present and nylon bag contained 50 stones of bhang……"***

On the stated date only 27 stones were in court which necessitated the Prosecution to seek an adjournment. When the court resumed on a subsequent date, all the 50 stones were available. No explanation was rendered as to which exhibits they were and whether indeed they were part of what was recovered. The witness went on to state that the Appellant's house had a small coffee table from which P C Musumba recovered 49 stones of bhang.

21. When the exhibits were eventually handed over to PW2 he stated that he took possession of them and eventually took them to the Government Chemist for analysis. Thereafter he produced them in evidence plus the report.
22. It has been submitted by learned Counsel Mr. Machogu that according to **Section 77** of the **Evidence Act** the document could be produced in evidence and it was not mandatory for the expert to produce it in evidence as it was done in the instant case. **Section 77** of the **Evidence Act** provides:

> ***"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."***

The reason why the court is given the discretion to summon the Analyst if need be is because prior to the production of the document a basis must be laid and the accused person must be given an opportunity to either let the person produce it or not depending on whether the person may have questions to be clarified by the expert. It is for that reason that the provision is not couched in mandatory terms. It states:

> ***"…… may be used in evidence."***

23. In the instant case the officer stated:

> ***"I prepared the exhibit memo forms ….. I sent the entire 25 rolls and one stone out of the 99 stones to the government chemist for analysis and I received ….. a report in respect of the one stone which confirmed to have been cannabis sativa. Both reports were signed by government analyst."***

24. The report in respect of **Wambua Musyoka** was signed by **G. N. Anyona,** a Government Analyst. The exhibit received was indicated as one (1) bundle (132gm) of plant material. On examination it was found to be cannabis. The exhibit was received from **No. 60504 P C Ahmed Sheikh.** It is important to note that although the Appellant was jointly charged with another for possessing the 99 stones the report indicates that it was in respect of only the Appellant.
25. The question that should have been answered is how the witness formed the opinion to submit only one stone for analysis? According to the law, where the narcotic drugs are recovered and are to be used in evidence the officer assumed to be authorized has to take samples of what is to be analyzed in the presence of the suspect and have them submitted for analysis. Thereafter the analyst's report/certificate is forwarded to the officer for production in court. **(Vide Section 74A(1) & (2) of the Narcotic Drugs and Psychotropic Substances Control Act).**
26. In the instant case there were two (2) sets of stones of plant material recovered. The 50 stones and the 49 stones. The question that remains unanswered is **"Where was the stone sampled from?"**
27. It was alleged by the defence that the house in which the plant material was recovered did not

belong to the Appellant but to their worker. To prove the case beyond any reasonable doubt, it was important for the Prosecution to prove ownership of the house. PW1 had not been to the home of the Appellant before. PW3 said they accompanied the Appellant to his home but did not state what made him believe it was his house. Further it was important to prove knowledge on the part of the Appellant of the existence of the material that were hidden in the drawer of the coffee table. This was wanting.

28. Having re-evaluated evidence adduced afresh, I find that it left many loopholes gaping such that it was unsafe to convict the Appellant on evidence adduced.
29. Consequently the appeal is meritorious. I quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.
30. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **24TH** day of **JUNE,** 20**15.**

L. N. MUTENDE

JUDGE