



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.37 OF 2014

JOB SUMBA SHIUNDUAPPELLANT

VERSUS

REPUBLICRESPONDENT

[Appeal from Original Conviction and Sentence from Nyando SPM'S Court: R. M. KIMUTAI - SRM

in Criminal Case No.642 of 2014.]

J U D G M E N T

1. The appellant was charged with the Offence of Possession of Narcotic Drugs Contrary to Section 3(1) as read with Section 3(2)(A) of the Narcotic Drugs and Psychotropic Controls Act No.4/1994. The particulars of the offence was that on the 23rd May 2004 at 1400 hrs at Ahero Township in Nyando district within Kisumu County was found being in possession of narcotic drugs to wit 141 drug rolls of Cannabis of street value of Kshs.15,000/= in contravention of the said act.
2. The appellant was sentenced and convicted to serve 4 years custodial sentence hence this appeal. The prosecution in proving its case called 5 witnesses.
3. **PW1 CPL. KENEDY AJWANG** together with **PW2 MAURICE OCHUKA MOO** the Assistant Chief of Ahero Kakok Sub-Location were on their patrol at Ahero town at around 1300 hrs. They received a tip-off that there was bhang in the appellant's house which was situated behind a shop. They then proceeded to the house where they found an occupant who was the wife to the appellant.
4. The two conducted a search and recovered several assorted rolls of bhang from the main house and the kitchen. The exhibits were produced during trial. They called for reinforcement from the police officers from Ahero.
5. In the course of undertaking the exercise the appellant's wife called the appellant who emerged from the house. He was then arrested and later charged.
6. **PW3 DORINE NYAMWAYA** is the appellant's landlord. She told the court that the front of her building houses a business premise which is run by an Asian. While the accused and his wife live in the rear house and guards the premises on behalf of the Asian lady.
7. **PW5 LABAN MOGERE** who works at the Government Chemist produced the analysis which

showed that indeed the exhibits collected from the scene were bhang.

8. When put on his defence the appellant gave unsworn evidence denying the offence. He said that he was not at the house during the exercise and when he arrived he found PW1 and PW2 already in the house.

9. Mr. Odeny counsel for the appellant took up three issues in his submissions namely that:

- a. **The charge sheet was defective;**
- b. **the exhibits were not in actual possession of the appellant;**
- c. **the house did not belong to the appellant.**

10. On the question of the charge sheet he contented that there was some rubbing on the sub-section and one would not know whether it was genuine or not and that all along the appellant did not know the nature of the charge he was facing. He relied on the case of **KIPKURUI ARAP SIGILAI & ANOTHER VRS REPUBLIC KERICHO CRIMINAL APPEAL NO.7 OF 2004.**

11. On the issue of the house the counsel contented that the appellant was not in the house at the material time and that the Asian business person was the real culprit who ought to have been charged. He further submitted that the appellant was not in the actual possession of the bhang.

12. The state counsel opposed the appellant's appeal by submitting that there was nothing ambiguous on the charge sheet and in any event if there was any alteration in the count the same is cured by Section 382 of the Criminal Procedure Code. On the question of being in possession of the bhang she argued that indeed the same were found inside the appellant's house in the presence of his wife.

13. Having heard the parties herein the first issue to determine is whether the appellant lived in the house that the bhang was traced. The evidence of PW3 the landlady answers this. There were two kinds of premises one business which is occupied by an Asian and one residential occupied by the appellant. I do believe that being her landlord, she was able to give credible evidence. In any event the appellant did not deny being in occupation of the house.

14. Secondly, the recovery of the bhang was according to the two witnesses was done in the presence of the appellant's wife. PW1 and PW2 knew the appellant. PW2 said that he has known him for the last 9 years. I don't think therefore that there was any case of mistaken identity. Moreover the recovery took place in broad daylight. PW2 knew both the appellant and his wife. On the issue of occupation raised by Mr. Odeny I do not find it meritorious as the house was fully occupied by the appellant. In any case the Asian tenant was not called to testify even by the appellant if indeed he occupied even the residential house.

15. Was the appellant present during the search? According to his defence he was arrested when he came to his house. Infact in his defence he admitted being the owner of the house. Both PW1 and PW2 confirmed that the appellant was in the house when they arrived. He came out when the wife called him. Although he denied being at home I find the evidence of PW1 and PW2 that he was present more credible. In any case the appellant in his defence did not deny that bhang was found in his house.

16. Does the alteration of the charge sheet defeat the object of the charges against the appellant? Absolutely not. From the evidence on record there was overwhelming proof that the bhang was found in the premises occupied by the appellant. The search was done in the presence of the appellant and his wife a fact which is evident from the prosecution evidence.

17. Section 382 of the Criminal Procedure Code where the state relied on and which according to it cures any defects in the charge sheet states as follows:

“subject to the provisions herein before contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an

error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless the error, omission or irregularity was occasioned a failure of justice;

Provided that in determining whether an error, omission or irregularly has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding.”

18. Respectfully I do not find the rubbing or alteration in the sub-section to have occasioned any injustice to the appellant. The substance of the charge was being in possession of psychotropic substance namely bhang which the prosecution established.

19. In the premises I do not find the appeal meritorious. The appellant seemed to be a habitual offender and the only recourse is to have him serve the entire 4 years jail sentence. Appeal dismissed.

Dated, signed and delivered this 27th day of July 2015

H. K. CHEMITEI

JUDGE