REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 26 OF 2015

BILLOW ALI GURACHA…….....……APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

(Criminal Appeal against both conviction and sentence by Hon BOAZ M.OMBEWA SRM at MARSABIT PM'S Court in Criminal Case No. 877 of 2014 delivered on 20.8.2015)

J U D G M E N T

The Appellant **BILLOW ALI GURACHA** was charged with an offence of trafficking in narcotic drugs contrary to section 4(a)of Narcotic Drugs and psychotropic Substances Control Act of 1994.He was also charged with an offence of resisting arrest contrary to section 253 (b) of the Penal code. The particulars of the offences are that on the 9th day of November 2014 at Marsabit township he was found trafficking two rolls of bhang valued at kshs.60/= by selling. When police officers were arresting him, he resisted.

The Appellant was found guilty and convicted of the charges and sentenced to serve ten years imprisonment in count one and in count two he was fined kshs.10 000 in default to serve one year imprisonment. He has now appealed to this court challenging the conviction. The Appellant was represented by learned counsel M/s. Thibaru. Counsel relied on the supplementary grounds of appeal dated 5th October, 2015 in which the following four grounds are raised:

1**. The learned trial magistrate erred in law and fact in convicting the Appellant without sufficient evidence that he indeed sold the two rolls of cannabis to PW1.**

2. **The learned Magistrate erred in law and fact by finding the appellant guilty of the offence of trafficking when there was no evidence of the alleged sale or the money used.**

3. **The learned magistrate erred in law and fact by failing to direct his mind to the fact that the accused could not possibly have been trafficking bhang when the quantity in issue was too small and no other bhang was recovered from him or his premises.**

4**. That the learned Magistrate erred in law and fact by failing to find that provisions ofRule16 NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) (SEIZURE, ANALYSIS AND DISPOSAL) REGULATIONS, 2006 were flouted in that the accused was not served with notice of his entitlement to have a sample of the alleged cannabis taken and analyzed at his own cost hence a miscarriage of justice.**

5**. The learned Magistrate erred in law and fact that by failing to find that the prosecution never**

called any independent witness whereas there were so many people at the time of the arrest.

6**. The learned Magistrate erred in law and fact by disregarding the accused defence.**

7**. The learned magistrate erred in law and fact by convicting the accused of the offence of resisting arrest despite the accused's evidence that the officers were in plain uniform and he never knew they were and also despite the fact the accused took himself to the police station.**

The state conceded to the appeal in respect of count one but opposed that in count two. The state was represented by Mr. Motende the learned state counsel.

The facts of the prosecution case are as follows:

While Police Officers were on foot patrol, they received information from a member of the public about a person who was selling bhang near Hotel Badha. They decided to send one of them who was new in the area to go and pose as a buyer. When this officer went to the hotel, he uttered the word "Kolombo" which he had been told meant bhang in the local language. When he gave Ksh.50 to the appellant, the latter told him to add shs.10/= for the price had gone up. He gave out the extra Kshs.10/= and he was handed two rolls of bhang. He walked out and called his colleagues. They went and handcuffed the appellant.

Later the accused called out in Borana language and another man called Boru appeared. After Boru had picked a paper bag and threw it into a toilet, he returned armed with a panga and a hammer. He threatened to kill Police officers for they were destroying his business. When Boru approached the officers, they retreated.

It was at this juncture that the appellant held one of the officers and tore his sweater.

The defence the appellant tendered in court was that while he was serving customers in his hotel, a person went in and said he was the one. He was handcuffed.

He did not know that this person was a Police officer. When his customers intervened and enquired to know what the issue was, these people left.

He went to the Police station and reported that he had been handcuffed by unknown people. He was still in handcuffs.

M/S Thibaru urged that there were contradictions in the evidence of the prosecution witnesses and that P.C Mwirigi Ronald Kalinga (PW1) contradicted himself severally in material aspects of the case. This witness said he was new in the area, and that upon his entry into the hotel, he found the appellant selling. He uttered the word "Kolombo" and gave Kshs.50/= to the appellant. This is when the appellant asked him to add Kshs.10/- for the price had gone up.

During cross examination, he changed his version. He said that when he entered into the hotel, the accused was in the kitchen. Upon his entry he asked who Guracha was.

In his evidence in chief PW1 said upon being given the two rolls of bhang, he walked out and called his colleagues.

However, during cross examination he did not testify of having walked out. This is what he said:

"When accused had sold to me "**kolombo**" I signaled my colleagues who were about 15 meters away"

During cross examination this witness said the appellant was armed with a hammer and a knife.

The evidence of PC Mac Donald Makamu (PW2) is also contradictory. In his evidence in chief he said after PW1 had bought the commodity he went out and signaled to them.

However during cross examination he said: “Immediately PC Mwirigi bought the commodity he waved to us and we came inside.”

This witness testified that one Boru went armed with a hammer and a panga.

In his evidence PC Willy Korir (PW3) testified that Boru had armed himself with a knife and a hammer.

He testified that they did not inspect the pit latrine unlike PW1 & PW2 who said that “they did to see whether they could retrieve what Boru threw inside in a black paper bag.”

PW1 testified that initially Boru asked them to settle the matter out of court before picking the black polythene bag and ran into the toilet with it. The other two witnesses did not testify about this fact. Their evidence was that Boru entered the hotel while being very violent before picking the black polythene paper bag.

Certainly a knife is not a panga and no one can confuse one for the other. There are too many contradictions in the prosecution witnesses. In the case of **Ndungu Kimanyi vs. [1979] KLR 282** the Court of appeal said:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

I am therefore persuaded to disbelieve prosecution witnesses and find that it was unsafe to found a conviction on their evidence.

Regulation 16 Narcotic Drugs and Psychotropic Substance (Control) Act provide as follows:-

1. **Where -**

a. **a person is or is intended to be charged with an offence in relation to a seized substance**
b. -
c. -
d. -

that person shall, when the ultimately arrested and be charged, be entitled to have a sample or samples provide a free representation of the nature of the substance taken and analysed, at his own cost by an analyst chosen by him if there is a sufficient quantity of the seized substance remaining in the custody of the seizures Registrar to enable the sample or samples to be analysed.

(2) A Police officer shall make all reasonable attempts to serve on each person referred to in paragraph (1) notice of his entitlement under paragraph (1) to have a sample or samples of the seized substance taken and analysed at that person’s own cost.

In the instant case, it is clear that the Police did not comply with this mandatory requirement.

Police officers have always operated under cover. This makes it easier to work undetected. However, when it comes to effect an arrest, it is important they identify themselves by producing identification documents. This is to ensure that the citizenry are not in any way duped by imposters.

In the instant case the purported arrest of the appellant was not professionally done. To merely state that one is a police officer is not sufficient identification.

The evidence on record leaves doubts as to whether the appellant resisted arrest. PW1 said that the appellant held him and his (PW1’s) sweater was torn. It is doubtful how he was able to do this while still

in handcuffs. This was not interrogated at the trial. My doubts are bolstered by the account of PC Mac Donald Makamu (PW2). He testified that the appellant was handcuffed when he started being violent with Korir (PW3). He further said that when they wanted to move out with the appellant, he refused to move though they tried to pull him. The account of PC Willy Korir (PW3) is that the accused resisted arrest but did not testify how. It is instructive to note that unlike PW2, he never said the appellant was violent to him (PW3). The much he said was that he called his people and many young people tried to pelt them with stones.

From the foregoing analysis of the evidence on record, I make a finding that the conviction of the appellant on both counts was unsafe.

In count two, the Learned Trial Magistrate imposed an illegal sentence. **Section 28(2) of the Penal Code** has provided a scale which cannot be exceeded in default of payment of a fine. The appellant was fined Kshs.10, 000 in default to serve one year imprisonment.

However, the maximum period as provided under Section 28 (2) of the Penal Code is 3 (three) months.

I do agree that if the prosecution had proved their case in count one (1) the penalty was too harsh in the circumstances. I concur with the decision of the Court of Appeal *in* ***Rehema Kahindi Kalume Vs. Republic Cr App.138 and 139 of 2011 (at Mombasa).***

In a nutshell the conviction on both counts cannot stand. The same is quashed and the sentence set aside. If fine was paid in count 2, the same to be refunded to him. The Kshs.4, 830/= recovered on the appellant to be released to him.

The appellant to be set at liberty unless if he is otherwise lawfully held.

DATED at Marsabit this 11th Day of November 2015

KIARIE WAWERU KIARE

JUDGE