



transfer order but before the proceeding were finalized, the appellant was arrested and charged with the present offence.

Learned Counsel contended that there was bad blood between the appellant and PW5 such that PW5 was unfair in his investigations and was biased against the appellant. Further, PW1, was not a fair witness since he made an admission that he was a potential witness in the disciplinary proceedings.

Learned Counsel submitted that the appellant's house was not locked but merely latched when he went for lunch according to what PW3 stated. Therefore, there was possibility of the cannabis having been "planted" in the appellant's house since no cannabis was seen in the appellant's house by PW3 when he left for lunch together with the appellant.

Learned Counsel contended that no other house but that of the appellant was searched by PW5 and wondered why PW5 zeroed in on the appellant yet he was informed that his officers were involved in drug trafficking.

Learned Counsel submitted that police officers mentioned by PW1 were not called to testify and did not also record statements. That, if the information by the informer was hearsay then what remained against the appellant was mere suspicion.

Learned Counsel prayed that the appeal be allowed as the case against the appellant was not proved beyond reasonable doubt. He relied in support of the appeal in the decisions in **Maina & three others vs. Republic Criminal Appeals No. 8 and 19 of 1986** and **Burunyi & Another Vs. Uganda High Court Uganda Criminal Appeal No. 223-236 of 1968.**

The Learned Prosecution Counsel, **Mr. Chelashaw**, opposed the appeal on behalf of the state respondent and submitted that the learned trial magistrate carefully considered the evidence by the prosecution and made correct findings. That, the contradictions regarding the number of bags found in the appellant's house were insignificant as they did not water down the prosecution evidence. That, the alleged grudge between the appellant and PW5 was a "professional" grudge and as such, there was no need for PW5 to frame up the appellant without good cause. That, grounds 4 and 5 of the appeal are insignificant in terms of Article 159 of the Constitution in so far as they are matters of technicality. That, the exhibit memo showed that the suspected cannabis was to be examined and certified accordingly.

The Learned Prosecution Counsel further submitted that PW3 alluded to a curtain petitioning the appellant's house. He could not therefore have seen everything inside the house.

With regard to the informant, the learned prosecution counsel submitted that the authorities cited by the appellant's counsel and in particular **Maina Vs. Republic (supra)** are irrelevant and that there was no need to call the informant who needed protection against a police officer. The learned Prosecution Counsel, urged this court to dismiss the appeal.

The submissions by both sides having been considered, the duty of this court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Accordingly, the case for the prosecution was briefly that on the material date at about 3.00 p.m., the officer Commanding Kakuma police station (OCS), **CIP Benjamin Lwande (PW5)**, acting on information received from an informant visited Kakuma IV Police post within the Kakuma Refugee Camp in search of the appellant, a police driver, as the information was that some police officers were involved in drug trafficking and that one of the officers who was the appellant was in possession of cannabis sativa (bhang) in his house and was looking for its market. The OCS did not find the appellant at the police post. He traced him at a nearby market and summoned him together with other police officers to the police post. Thereafter, he (OCS) inquired from the officers about the bhang and if there was any arrest in relation thereto. It was then that the appellant indicated that there was bhang in his house. The OCS noted that the bhang was not reflected in the occurrence book (**O/B**) and accompanied

by the appellant and others officers including **Sgt. Raphael Marowa (PW1)**, **Cpl. Isaac Ngugi (PW2)** and **PC Samson Kibewa (PW3)**, they proceeded to the house of the appellant where four sacks of cannabis sativa were found and recovered. The appellant was immediately arrested.

The OCS investigated the case and gathered that the bhang was intercepted on the 5th Mrch, 2013, while being ferried on a motor cycle which was impounded and released to its owner **Alfred Nyarangi (PW4)**, who had taken it for repairs. Both the bhang and the motor cycle were produced as exhibits and so was a report of a Government Chemist who confirmed that the substance recovered was actually cannabis-sativa.

The appellant was eventually charged with the present offence but he denied the offence. His defence was that he had worked for the police force for ten (10) years and was based at Kakuma Police Station as a driver. He reported on duty as usual on the 18th March, 2013 and worked throughout the day and night. He reported off duty on the morning of the material 19th March, 2013 and proceeded to his house at Kakuma IV Police post. At 10.30 a.m., he left for the market at Kakuma III in the company of a colleague, PC Samson Kibegwa (PW3). While there, the OCS (PW5) accompanied by some officers arrived and told him (appellant) and told him (appellant) and Kibegwa that they were all needed at Kakuma IV police post. They accordingly went to the police post and the OCS informed them of the purpose of his visit and said that he wanted to conduct a search on some officers. He then began the search at his (appellant's) house where four bags of bhang were removed from therein by Sgt. Marwa, P.C. Kassim and P.C. Gene. On being asked about the bhang, he said that he knew nothing about it and that it was not inside the house when he left for the market with P.C. Kibegwa. Nonetheless, he was arrested and taken to the officer commanding police division (OCPD) who directed that he be locked in the cells. He was later arraigned in court.

The appellant contended that his relationship with the OCS was rocky after an attempt was made to transfer him from Kakuma IV police post to Kakuma police station.

From all the foregoing evidence, it is apparent to this court that the fact of possession of the bhang as against the appellant was not substantially disputed. The defence raised by the appellant was a denial of possession and an indication that the bhang appeared from nowhere and found itself inside the house. There was a further indication that due to the frosty working relationship between the appellant and the O.C.S. (PW5), the bhang could have been taken into the house by the O.C.S or under his instructions.

However, the said indications were clearly rebutted and discredited by not only the evidence of the O.C.S. But also that of other police officers who were present when the OCS summoned them to the material police post and communicated to them the reason for doing so and were also present at the house of the appellant when the bhang was recovered.

The O.C.S. Said that after summoning his officers who included the appellant and after indicting to them the seriousness of the emerging issue relating to the information given to him concerning the bhang, the appellant freely disclosed that he had the bhang in his house. This was confirmed and enhanced in credibility by the testimonies of Sgt. Marowa (PW1) and Cpl. Isaac Ngugi (PW2).

However, according to these officers (PW1 and PW2), the appellant gave a qualification to his disclosure or acceptance that the bhang was in his house to the effect that the bhang was found being ferried in a motor cycle by police officers who were on duty and included one PC Ernest Mwakisha and one P.C. Jenniffer Kamau and that it were those officers who handed over the bang to the appellant together with the motor bike whose rider had escaped.

The owner of the motor cycle (PW4) confirmed that the rider was his employee called Ekai Nerotin who absconded duty and disappeared. He (PW4) found the motor cycle having been impounded by the police at Kakuma IV police post and it was only when he presented ownership documents that it was released to him on condition that he looks for and bring to the police the rider. He (PW4) took the motor cycle to a repair outlet from where it was retaken by the Cpl. Ngugi (PW2), was the officer in charge of the Kakuma IV police post but surprising enough, he knew nothing about the motor cycle and the bhang

until such time that the OCS summoned them. He said that when the appellant accepted that he knew about the motor cycle and that the bhang was in his house, he made it clear that he was investigating the matter regarding the two items.

Indeed, the owner of the motor cycle (PW4) indicated that the appellant and another officer returned the motor cycle to him when he produced its log book on condition that he brings its rider.

**P.C. Kibewa (PW3)**, was in the company of the appellant when the OCS found them in a market and summoned them to the police post. He confirmed that the bhang was recovered in the house of the appellant in his presence but appeared to suggest that he did not know how the bhang went there. He however, confirmed that at Kakuma IV police post, there was no exhibit store nor an exhibit register, a fact acknowledged even by Sgt. Marowa (PW1).

Although in his defence, the appellant denied knowing anything about the bhang and his possession thereof, the evidence against him showing the contrary was cogent and credible. He simply could not be heard to deny possession of the bhang when it was him who freely, willingly and voluntarily accepted and disclosed that the substance was in his house and implied that it was there for purposes of investigations after having been recovered while being ferried on a motor bike and handed to him by his colleagues.

Instead of stating the truth with regard to the circumstances which led to the bhang being in his house, the appellant decided to lie and say that he knew nothing about the bhang hoping that he would be believed by the trial court. He failed to realize that honesty vindicates a person most times and must now know that his dishonesty contributed most to his conviction by the trial court.

Be that as it may, the explanation given to the OCS (PW5) by the appellant of the circumstances which led to him being in possession of the bhang was not disproved such that it may safely be stated that he (appellant) did not have the substance in his house for a criminal purpose but for purposes of preservation and safe custody pending conclusion of the investigations pertaining to it.

What the prosecution established in the opinion of this court was the act of possession on the part of the appellant but without the criminal intent which is a vital element in establishing an offence.

Also not disproved was the fact that the bhang was handed to the appellant by his colleagues P.C. Mwakisha and P.C. (W) Kamau both of whom were not called to testify and deny the fact.

Ideally, the bhang ought to have been kept at the police post in an exhibit store. However, there having been no exhibit store at the material police post the appellant ought to have applied any other alternative storage facility or method permissible under the set police rules instead of keeping the bhang in his house thereby raising suspicion that he was upto no good.

Either he was not subjected to strict supervision by his immediate supervisor or he had not been properly trained on how to handle exhibits.

If anything, the appellant together with his immediate supervisor (PW2) and police constables Ernest Mwakisha and Jennifer Kamau ought to have been disciplined by way of internal mechanism for their negligence if not reckless performance of police duty.

Since it was evident that the appellant was not operating with a criminal mind when he kept the recovered bhang in his house within the police lines, the action of charging him in court with a criminal offence was misadvised. The circumstances of the case dictated that he ought to have been given the benefit of doubt by the trial court and since this was not done, this court now gives him that benefit by a finding that his conviction by the trial court was neither proper nor lawful.

Consequently, the appeal is allowed to the extent that the conviction is quashed and the sentence set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Ordered accordingly.

**[Delivered and signed this 21st day of January, 2014.]**

**J.R. KARANJA.**

**JUDGE.**