REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 121 OF 2011

CHARLES KYALO KATIKU….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising from the Original Conviction and Sentence in Criminal Case No. 465/2010 at the Senior Resident Magistrate's Court at Kilungu on 16/5/2011)

JUDGEMENT

The appellant herein **Charles Kyalo Katiku** was charged and convicted of the Offence of being in possession of Narcotic Drugs contrary to **Section 3(1) as read with Section 3(2) (a) of the Narcotic Drugs and Psychotropic Substance Control Act No.4 of 1994.** Particulars were that on the 29th day of August 2010 at Nzukini, Kyamuoso location in Kilungu District within Eastern Province was found being in possession of Cannabis Sativa (Bhang) to wit 3 kg which was not in any form of medical preparation.

The appellant had denied the charge. Prosecution called a total of four witnesses. Appellant gave unsworn defence and called no witness. At the end of the trial, the learned trial magistrate convicted the appellant and sentenced him to 5 years imprisonment. The appellant was aggrieved by the findings of the trial magistrate and thus filed this appeal. He relied on the following grounds:-

1. **THAT, the charges of possession of Cannabis Sativa contrary to Section 3(1) as read with section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 were never proved beyond reasonable doubt.**

2. **THAT, the learned trial magistrate erred both in law and fact when he drew and applied the doctrine of recent possession of the prohibited article without observing that the same was not affirmatively proved.**

3. **THAT, the learned trial magistrate erred in law by accepting and relied on contradictory evidence that lacked credibility to base and sustain conviction and sentence.**

4. **THAT, the learned trial magistrate erred in law when he based and sustained conviction and sentenced on unproved allegations contrary to Section 19-21 of the Evidence Act.**

5. **THAT, the learned trial magistrate erred in law when it shifted the onus of proof to defence, the burden bestowed to the shouldered of the prosecution.**

6. **THAT, the learned trial magistrate erred in law when he rejected his plausive defence contrary to Section 169(1) CPC as the reason relied upon were very weak and could not water down the formidable & plausible defence adduced.**

7. **THAT, the learned trial magistrate erred in law by breaching the requirements of Section 77 (2)(a)(c)(d)(e)(f) of the former Constitution as read with Section 107 and 198 of the Criminal Procedure Code 9Cap 75) law of Kenya to detriment of the appellant.**

8. **THAT, the prosecution never proved their case to the required standards as critical witnesses were never called.**

On the date of hearing this appeal, the appellant filed amended grounds of appeal and written submissions which herelied on entirely.

M/s Kwamboka , the **learned State Counsel** submitted for the state. She opposed the appeal and supported both the conviction and the sentence. She urged the court to uphold them and further submitted that there was sufficient evidence to prove that appellant was in possession of Narcotic Drugs. That he was a repeat offender and sentence meted against him was lawful. She further urged the court to uphold both the conviction and sentence as the evidence was strong against the appellant herein.

In rejoinder, the appellant submitted that the trial court relied on previous conviction to sentence him.He further submitted that was against the spirit of **Article 50 (2) (1) of the Constitution 2010.**

I have now considered the grounds of appeal and the submissions herein.

This being a first appellate court, I am duty bound to reconsider and re-evaluate the evidence on record and come up with my own conclusions and inferences.I have taken into account the fact that I did not have an opportunity to see the witnesses as they testified and so I cannot comment on their demeanour. I am guided by the following cases:-

i. ***Okeno Vs Republic (1972) EA 32***
ii. ***Kiilu & Another Vs Republic (2005 KLR***

iii. **Odhiambo Vs Republic Cr. Appeal No. 280 of 2004 (2005) KRL** where the Court held that:-

"On a first appeal the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluation and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court and therefore cannot tell their demeanor".

In considering ground No. 1 of the appeal, where the appellant stated that the offence of possession of cannabis sativa was not proved beyond a reasonable doubt, I make the following findings;

It is trite law that he who alleges must prove. In criminal cases, the burden of prove is always on the prosecution.

I refer to the case of **Woolmington Vs D.P.P (1935) DC 462** where it was held;

"It is the duty of the prosecution to prove the prisoners guilt. If at the end of the whole case there appears any reasonable doubt created by the evidence brought forward by the prosecution, the prosecution has not proved its case and the prisoner is entitled to an acquittal".

In this case, it was alleged that the appellant herein was in possession of Narcotic Drugs. The appellant denied the charge. It was therefore the duty of the prosecution to call enough evidence to prove its case beyond a reasonable doubt that appellant was in possession of such Narcotic Drugs. Prosecution therefore needed to prove that appellant herein was in possession. Possession is described in the Penal

Code as:-

" Being in possession of or to have 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 or occupied by oneself or not) for the use or benefit of oneself or of any other person".

Further, the **Black Law Dictionary** describes **"possession"** as:-

"The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object"

PW1 and PW2 had told the Court that on 29/8/2010 at 5.30 am they went to the house of the appellant in company of one **Benjamin Musua**, the Chief of ***Ndolo*** location. That the said chief had information that the appellant was dealing in bhang (**Canabis Sativa).** The said Chief who had received such information was not a witness to clarify on the information that he had received. It was also the evidence of PW1 that they recovered the exhibits in a freshly dug hole in the shamba which he alleged belonged to the appellant. PW1 told the court that appellant was the occupier of this land. However, in cross-examination, PW1 admitted that he had no evidence to show that appellant was the proprietor of this parcel of land. He also could not tell how many people till the land. PW1 further admitted that the land was not fenced and there was a foot path near the scene of recovery.

From the above evidence, is evident that there was no tangible evidence to prove that appellant was in exclusive control of this parcel of land. No one saw him burying the exhibits in the said farm. He was not found in actual possession of the said exhibits.

PW2 on his part told the court it was PW1 who discovered the exhibits buried in the shamba which was 40 – 50 meters from the house of the appellant. PW2 also admitted that the land where the exhibits were recovered was not fenced and anybody could enter it. Though it was alleged that the appellant used to till the land, there was no evidence from any family member or even a neighbour to confirm that. In his findings, the trial magistrate stated as follows:-

"According to the officers who recovered the exhibits, the scene of crime was within the accused's person father's land in a portion allocated to him for tilling. He was actually seen tilling on the portion the day before recovery".

The appellant father was not called as a witness to confirm that indeed that portion of land belonged to the appellant. Again, the person who saw the appellant tilling the said land before the date of recovery was also not called as a witness. Since the land was not fenced and there was a footpath near where the exhibits were recovered, the court cannot find that appellant had exclusive control of the parcel of land and thus the exhibits recovered thereon was his.

The prosecution failed to call vital witnesses and the court will find and draw adverse inferences .

I refer to the case of **Nganga Vs Republic (1981) KLR 483** that:-

"It ***is the trite law that when prosecution fails to call a material witness, they do so at their own risk. An adverse inference will be drawn that the evidence of that material witness if called would be adverse to the prosecution".***

From the above reasons, I concur with the appellant that prosecution did not prove its case beyond reasonable doubt that appellant was in possession of the Narcotic Drugs in question.

I will deal with the other grounds together. It was evident that the exhibits were not recovered directly

from the appellant or from an area where he had exclusive control. I will rely on the case quoted by the appellant **Mwangi Vs Republic (1974) EA 105** where the Court held that:-

"when an exhibit is not found in possession of the accused person, then he is not liable for it .

From the above analysis of the evidence on record, it is evident that the exhibit was not recovered from the appellant. He cannot be held liable for it. The trial magistrate also stated this in his findings.

" In his cross- examination of these witnesses, the accused person wanted to create the impression that the scene of recovery was a portion which he had a dispute with his neighbor and he had lodged a caution with the land Registrar. This was emphatically disputed by PW2, the A.P Corporal who appeared well aware of this dispute".

I have re-evaluated the evidence of PW2 in cross- examination and I noted he had stated as follows;-

" I do not know whether the land, the scene of recovery has a pending dispute".

PW2 therefore did not dispute the assertion by the appellant that he did not know about it.

In the case of **Burunyi & Others Vs Uganda 1968 EALR 123** (Quoted by the appellant) it was held that:-

"It is not the duty of the Court to stage manage the prosecution case nor it is the duty of the court to endeavor to make a case against the co accused where there is none".

Having considered the evidence on record, I find with due respect, that the learned trial magistrate did arrive at a conclusion that was not supported by the available evidence. He therefore stage managed the prosecution case. The conviction herein was not based on sound evidence.

For the above stated reasons, the Court finds that the appellant's appeal has merit. In the result, I allow the appeal, quash the conviction and set aside the sentence. The appellant to be released forthwith and be set at liberty unless lawfully held.

Appeal succeeds.

It is so ordered.

L. N. GACHERU

NVI.

Dated, Signed and delivered at **MACHAKOS** this 18th day of February 2014

B. T. JADEN

NVI.