



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 333 OF 2010

MICHAEL NDUNG’U NG’ANG’A APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Sd. W.N Kaberia Senior Resident Magistrate delivered on 6/8/2010 in Kajiado Senior Resident Magistrate Criminal Case No. 1199 of 2008)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Michael Ndung’u Ng’ang’a**, was charged with the offence of **trafficking in narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994**.

The particulars of the offence were that on the 10th day of October 2008 at **Namanga Township** in **Kajiado District** within the **Rift Valley Province** trafficked in Narcotic drugs namely Cannabis Sativa (bhang) to wit 32 kilogrammes valued at Kenya Shillings 32,000/= using a handcart.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
3. The prosecution case was that on 10/10/2008, four police officers among them PW1 **PC Morris Mwirigi** were on patrol duties along the **Namanga** boarder point. They came across the Appellant and three other young men loading a pick up motor vehicle with sacks of maize. Next to the motor vehicle was a wheelbarrow with a gunny bag on it.
4. The police officers opened the gunny bag that was on the wheelbarrow. They found bhang inside. Upon interrogations the Appellant who was the conductor of the pickup, admitted that the bag containing the bhang was his. The Appellant and the bag containing bhang were escorted to **Namanga Police Station**. After investigations the Appellant was charged with the offence herein.
5. In his defence, the Appellant denied the offence. The Appellant stated that he was loading maize into the motor vehicle when somebody placed some luggage a few metres away. The police officers who came there then accused him of being the owner of the luggage and did not give him a chance to explain anything.
6. At the conclusion of the case, the trial court found the Appellant guilty. The Appellant was convicted and sentenced to three years imprisonment. The Appellant was aggrieved by both the

conviction and sentence and appealed to this court on the following grounds:-

- v. **That the Appellant was not accorded a fair trial.**
 - v. **That the prosecution evidence lacked corroboration.**
 - v. **That the prosecution evidence was insufficient and contradictory.**
 - v. **That the burden of proof was shifted to the defence.**
 - vi. **That the Appellant's defence was not given sufficient consideration.**
7. The appeal was canvassed by way of written submissions which I have duly considered.
 8. Only one eye witness, PW1 **PC Morris Mwirigi** testified. The other police officers he was with at the material time did not testify. These were crucial witnesses who could have corroborated PW1's evidence.
 9. The trial magistrate in his judgment erred when he relied on the evidence by PW1 which showed that it was the interrogations carried out by the police officers that revealed that the Appellant was the owner of the bhang. This amounts to a confession. The confession was not made in accordance with the provisions of **section 25** of the **Evidence Act, Cap 80** Laws of Kenya.
 10. The defence raised by the Appellant was that it was somebody else who placed the bhang next to the motor vehicle. PW1's evidence pointed out the presence of other young men at the scene. It is therefore difficult to say with certainty whether the bhang belonged to the Appellant. I am persuaded to give the Appellant the benefit of doubt.
 11. The appeal has merits and must succeed. Consequently, I quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28th day of March 2014.

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B. THURANIRA JADEN

JUDGE