



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 4 OF 2012

ANTHONY MWANGANGI MUGO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by S.M. MOKUA Senior Principal Magistrate Siakago in Criminal Case No. 368 of 2011 on 6th January, 2012)

J U D G M E N T

ANTHONY MWANGANGI MUGO the appellant was charged and convicted of the offence of **being in possession of cannabis contrary to Section 3(1) as read with Section 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. He was sentenced to five (5) years imprisonment on 6/01/2012.

1. The quantity of the cannabis was:-
 - i. **Three (3) stones of cannabis.**
 - ii. **250 grams of cannabis packed in black polythene papers.**
2. He appealed against both conviction and sentence and raised the following grounds:-
 - i. **The learned trial Magistrate erred in law and fact by convicting him harshly without material facts.**
 - ii. **The learned trial Magistrate erred in both law and fact by convicting and sentencing him without considering the charge sheet was defective i.e. the date to court and the date of arrest.**
 - iii. **The learned trial magistrate did not realize that his rights were violated as he stayed in police custody for two months without being taken to Court.**
 - iv. **The trial magistrate erred in law and fact when sentencing him on the dubious evidence which were not corroborating between PW1 and PW2.**
 - v. **The learned trial magistrate erred in law and fact by rejecting his defence which was not challenged by the prosecution. Its rejection was not disclosed as clearly stipulated by the provision of Section 169(i) of the Criminal Procedure Code.**
3. The prosecution's case is premised on the evidence of 5 witnesses. PW1 who is the appellant's father and a sub area reported the appellant to the assistant chief for having cannabis. With the assistance of other villagers the appellant was arrested and found with 3 stones of cannabis. (EXB1). The stones were packed in a red handbag (EXB3) in his house. Also found in his handbag were:

- cannabis in black polythene (EXB2)
- 3 packets of paper (EXB4)
- a packet of perfumed sticks.

4. The evidence of PW1 was supported by that of PW2 a member of the community policing group and PW5 (the assistant chief).

5. The recovered cannabis was taken by PW3 to the Government Chemist for examination. PW4 from the Government Chemist confirmed that he examined some 4 bundles of plant material weighing 714 grams. He found it to be cannabis. He produced his report (EXB8).

6. In his sworn defence the appellant denied having been found in possession of any cannabis. He stated that he used to sell miraa. He said he was arrested after asking about his mother's whereabouts.

7. His mother (DW1) testified that she was chased away from her matrimonial home by PW1. When she left on 4/7/2011 the appellant was not present.

8. When the appeal came for hearing the appellant presented the Court with written submissions. He cites contradictions in the evidence of PW1 and PW2 and asks this Court to dismiss their evidence. He also submitted that this matter was framed on him because of family wrangles. He denied having been found in possession of any cannabis.

9. Ms. Mbae the learned State Counsel opposed the appeal saying the evidence by the prosecution witnesses was overwhelming. The plants found in the bag of the appellant were confirmed to be cannabis. She submitted that this evidence had not been controverted and further his constitutional rights were not violated.

10. This is a first appeal and this Court is enjoined to re-evaluate and reconsider the evidence adduced in the Court below and come to its own conclusion. I am alive to the fact that I did not hear nor see the witnesses. I am guided by the case of *AJODE VS REPUBLIC [2004] 2 KLR 81* where the Court of Appeal stated as follows:-

“In law, it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that”.

11. I have considered the submissions by both the appellant and the State plus the grounds of appeal. I have equally considered the evidence that was adduced in the Court below.

12. I will first deal with grounds 2 & 3 jointly. The appellant claims that the charge sheet was defective because of the date to Court and the date of arrest. He further claims that his rights were violated when he was kept at the police station for 2 months. I have looked at the charge sheet and do not see any defect in it. It shows that the appellant was arrested on 13/7/2011 and arraigned in Court on 15/7/2011. There is no defect in that.

13. It only shows he was arrested on a Wednesday and arraigned in Court on a Friday. It is clearly over 24 hours. That does not make the charge sheet defective and it does not go to the root of the case that was before the Court. If the appellant is keen on pursuing the delay for less than a day in terms of violation of his rights he is at liberty to do so at the relevant forum.

14. I have checked the Court record and it is nowhere indicated that the appellant informed the Court that he had been in police cells for two months. The charge sheet has confirmed his date of arrest as 14/7/2011. All the witnesses have also referred to that as the date of his arrest which the appellant never challenged in cross-examination. I therefore find grounds 2 & 3 to have no basis. They therefore fail.

15. I will now deal with the rest of the grounds jointly. The issue for determination is whether the appellant was found in possession of three (3) stones of cannabis and another 250 grams packed in a polythene paper.

16. I would wish to point out that the original record clearly shows that PW1 went to the assistant chief's place on 13/7/2011 and not on 1/7/2011 as submitted by the appellant. The appearance of 1/7/2011 in the typed proceedings is therefore an error.

17. There is no dispute that PW1 is the father of the appellant. He said the appellant used to smoke and sell cannabis from home. He reported this matter to other administrators on 13/7/2011. PW2 a community policing member assisted PW1, and the appellant was arrested. PW1 and PW2 made the recoveries. The appellant was handed over together with the exhibits (1-5) to PW3.

18. There is no contradiction in the evidence of the witnesses PW1, PW2 and PW5 about the arrest of the appellant. It is clear he was arrested from his home and some substances in a red bag recovered from him.

19. These substances were later examined and confirmed to be cannabis. The confirmation was by a Government analyst. Infact when the Government Analyst (PW4) testified the appellant had no questions for him in cross- examination.

20. The issue of family grudges was well addressed by the learned trial Magistrate in his judgment when he stated at page 15 lines 21 – 24

“The accused does not deny having been at his home on the fateful day. Though he made allegation of wrangles at home it does not occur in the evidence herein that such wrangles resulted in the accused being framed up”.

21. PW1 had also explained how the appellant would cause problems at home because of the cannabis he was taking and dealing with. PW2 confirmed that when he arrived at PW1's home he found the appellant abusing his father (PW1).

22. I am therefore satisfied that the appellant was properly convicted and the judgment complied with Section 169 of the Criminal Procedure Code.

23. In his submissions in Court the appellant stated that the sentence was too harsh. After the conviction the appellant was given an opportunity to mitigate and the learned trial Magistrate found him not to be remorseful. He also considered the effect cannabis was having on youths in the area and arrived at the sentence of five (5) years imprisonment.

24. The sentence in itself is not unlawful as the maximum sentence provided for is ten (10) years. Would the circumstances mitigate for a lesser sentence?

25. Given that the person who reported this matter and even participated in the arrest of the appellant is his father(PW1) and that the appellant was a first offender, a sentence of 5 years was harsh and could end up restraining the already sour relationship between them this notwithstanding the fact that cannabis is a dangerous narcotic drug.

26. I am also considering the quantity of the cannabis found with him. The Government Analyst (PW4) said it weighed about 714 grams.

27. I find this to be a suitable case for this Court to interfere with the sentence. I set aside the sentence of 5 years and substitute it with a sentence of 3 ½ years from the date of conviction. The result is that the appeal on conviction is dismissed. The appeal only succeeds on sentence to the extent stated above.

Orders accordingly.

DATED AND SIGNED AT EMBU THIS 29TH DAY OF APRIL, 2014.

H.I. ONG'UDI

J U D G E

**DELIVERED IN OPEN COURT AT EMBU ON 30TH APRIL, 2014 ON BEHALF OF JUSTICE
H.I. ONG'UDI BY;**

D.S. MAJANJA

JUDGE