REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.82OF 2012

LESIIT, J

FRANCIS MBOGUA M'RINGERA…….....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal from original Criminal Case No. 1272 of 2011 of the Principal Magistrate at Nkubu HonA.K.Ithuku)

JUDGEMENT

1. The Appellant **FRANCIS MBOGUA M'RINGERA** was charged with two counts of offences. In count 1 the Appellant was charged of cultivating a Narcotic Drug contrary to section 2(1) (b) as read with section 6(b) of the Narcotic Drugs and Psychotropic Substances Control Act herein after NDPSCE Act). The particulars of the offence were that on the 6th day of August 2011 at Kirikuru Village, Gathine Sub Location Kibirichia Location in Meru Central District within Meru County was found cultivating cannabis Sativa (bhang) to wit 3,000 stems with a street value of Ksh. 16,950/ in contravention to the above said Act.

2. The second offence charged of Being in Possession of Cannabis Sativa (bhang) to wit 42 kilograms with a street value of 6,300/- contrary to section 3(2)(a) of the same Act. The Particulars of the offence are being in possession of Cannabis Sativa (bhang) contrary to section 3(2) (a) of Narcotic Drugs and psychotropic substances Control Act No. 4 of 1994.

3. Appellant was found guilty in both counts and was sentenced to 5 years in prison in count 1 and 3 years in prison in count 2 on 25th October 2012. The sentences were ordered to run concurrently.
4. The Appellant was aggrieved by the conviction and sentence and so filed this appeal. The grounds of appeal are in the Petition of Appeal and are five as follows:

i. **That I pleaded not guilty at trial.**
ii. **That the trial magistrate failed by rejecting my defence of alibi which is true.**

iii. **That the trial magistrate failed by not considering that I am a first offender.**

iv. **That the trial magistrate failed to consider my mitigation that I am the sole bread winner of my family and, my incarceration is a threat to my family especially now that I am 70 years**

old.

5. When the appeal came up for hearing, Mr. Kaimenyi for the Appellant stated that he was pursuing the appeal against the conviction only. In his submissions, Mr. Kaimenyi urged that the prosecution failed to prove that the house in which five bags of bhang were recovered belonged to the Appellant. Secondly counsel for the Appellant urged that the prosecution failed to relate the parcel of land where bhang was uprooted to the Appellant. Thirdly counsel urged that PW1 and 3 who recovered the bhang were both Police Officers. Counsel urged that there was no other evidence to connect the Appellant to the house or the land.

6. Mr. Moses Mungai learned Prosecution Counsel opposed the appeal. Learned counsel urged that the prosecution adduced sufficient evidence to sustain the conviction. Counsel urged that the Appellant was found in possession of a bag in which bhang was found, and that the Appellant was in same house bhang was found. Mr. Mungai urged the court to uphold the conviction.

7. The facts of the prosecution case were as follows. PW1 and 3 both Police officers attached to Kariene Police Station acting on information received from members of public proceeded to a home within Kibirichia area where they found dried plant material. They took possession of it. In a ¼ acre piece of land the two officers uprooted 14 bags of plant material. The plant material was taken to Government Chemist who confirmed that the plant material was cannabis sativa or bhang.

8. The accused defence was by way of an unsworn statement. He said that his land borders the Mt. Kenya Forest. He stated that he knew nothing about the bhang.

9. I have considered this appeal, submissions by counsel and have subjected entire evidence to a fresh analysis and evaluation. I have cautioned myself of the fact that I was not the one who heard the case so I had no chance of seeing the demeanor of witnesses and as such I have given due allowance.

10. I am guided by the court of Appeal case of **OKENO vs REPUBLIC1972 EA 32**where the court laid down the duties of a first appellant court as follows:

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."**

11. I must start by commenting on the sentence ordered by the learned trial magistrate. The learned trial magistrate ordered the Appellant to serve in count 1 five years in prison and in count 2 three years in prison. With due respect to the learned trial magistrate this is an unknown sentence to the law or statute books. The section under which the Appellant was charged provides that a person convicted under Section 2(1) (b) and 6(b) is liable to a fine of 250, 000/-… or to imprisonment for a term not exceeding twenty years. A person convicted under section 3 (2) (a) of the Act is

> "**A person guilty of an offence under subsection (1) shall be liable-**
>
> **(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;**

12. The term used is imprisonment. The learned trial magistrate ordered accused to serve 5 and 3

years in prison respectively. That term "in prison" is a foreign term in the law and does not mean the same thing. The term in "prison" introduces controversy and requires interpretation. The prisons authorities properly exercising their minds will be at a loss to know what it means.

13. The sentence ordered by the court should not be ambiguous but clear, plain and simple as stated in the law being enforced. The learned trial magistrate imported to the sentence terms that were not used in the law. It was a foreign/strange sentence.

14. Turning now to this appeal the learned counsel for the Appellant has simply urged that the prosecution did not prove as required any connection between the Appellant and either the house and or the land where the bhang was recovered. Learned prosecution counsel on his part urged that the prosecution discharged its burden of proof.

15. None of these two counsels has cited any cases or any law, or demonstrated in which way "connection" between Appellant and land or houses was or was not proved. I decry the lack of any use of law or citation of cases as this is a sure way of ensuring no jurisprudence is developed by the court.

16. The evidence of PW1 and 3 was clear that they went to a house in which the Appellant was, and recovered 5 sacks of bhang from the two rooms. In the ¼ acre of land few meters from the house, the two officers recovered nine sacks of bhang which they uprooted personally.

17. The charges against the Appellant were "cultivation" and "being in Possession" of bhang contrary to the Narcotic Drug Psychotropic Substances Control Act No. 4 of 1994

18. The Penal Code, in its preamble is described as "An Act of Parliament to establish a Code of Criminal Law." In absence of any definition for term possession in the NDPSC Act, the Penal Code, being an Act of part to establish a Code of Criminal Law, is an important piece of legislation to fall by in order to assist in interpretation of this term.

19. Section 4 defines "possession in the following terms:

> **"(a) be in possession of or "have in 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 to or occupied by oneself or not for the use or benefit of oneself or of any other person."**

20. In this case the prosecution's case was that the appellant was found inside a house where 5 sacks of plant material later confirmed by a Government Analyst to be bhang, were found. In the piece of land few meters from the same house, more plant material was found. It was uprooted and found to be nine sacks. It too was confirmed to be bhang.

21. Having proved that the Appellant was in a house from which bhang was found, the prosecution had established "possession" as against the Appellant. This is because the evidence adduced by the prosecution established that the Appellant was in the house and on a piece of land in which bhang was recovered.

22. Possession in terms of having bhang in any place was proved. The prosecution needed not prove that the house or land belonged to the Appellant. Neither did the Prosecution need to prove that the Appellant occupied the house or land in which the bhang was found. By finding the Appellant in a house and on a land where bhang was recovered the prosecution had discharged their burden of proof in the case.

23. The Appellant had the burden to account for his possession or explain how he came to be in the house and on the land where the bhang was instead of explaining his possession he made a passing statement that he knew nothing about the bhang.

24. I am satisfied that the prosecution had proved their case against the Appellant beyond any reasonable doubt.

25. I have come to the conclusion that the Appellant's appeal against conviction has no merit and is accordingly dismissed.

DATED SIGNED AND DELIVERED AT MERU THIS 9th DAY OF APRIL 2014.

LESIIT, J.

JUDGE