



No. 224/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 164 OF 2012

**NZEMBI JOHN .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 153/2012 by Hon. S.A. Ogot, R.M on 12/10/2012)*

**JUDGMENT**

1. The Appellant, **Nzembi John** was charged with the offence of being in possession of narcotic drugs contrary to **Section 3(1)(2(a))** of the **Narcotic Drugs and Psychotropic Substances Act 4 of 1994**. Particulars of the offence being that on the **22<sup>th</sup>** day of **July 2012** at **7.20am** at **Mwangeni Trading Centre, Athi Location** in **Ikutha District within Kitui County** was found being in possession of narcotic drugs namely cannabis to wit **29 sachets** and **410 grammes** of street value **Kshs. 2580** which was not in any form of medical preparation.
2. She was tried, convicted and sentenced to serve **7 years** imprisonment. Being dissatisfied with the conviction and sentence. She appeals on the following grounds;-
  - i. That the learned magistrate erred in law had fact when he convicted on a defective charge and sentence the appellant to serve seven (7) years imprisonment
  - ii) The learned trial magistrate erred in law and fact when he failed to appreciate that the prosecution did not prove its case beyond a reasonable doubt.
  - iii) That the learned magistrate erred in law and fact when he handed down an excessive sentence against the appellant.
3. Facts of the case were that **PW1 No. 2008-060509 APC Jennifer Kasoa** and **PW3 No. 2007121051 APC Mbarok Omar** acting on information received went to the appellant kiosk. They carried out a search and they recovered some 29 sachets of some dry plant material. They then moved to her house and recovered some 10 bundles of the material. They took her to Mutomo Police Station. **PW2, No. 91677 P.C. Haron Yator** took over investigations. He prepared an exhibit memo form and escorted the exhibit to the Government Chemist for analysis. A report was made. The appellant was charged.
4. In her defence the appellant denied selling bhang or having knowledge of where it came from. She stated that **Omar** wanted to marry her child in order to take her to Mombasa.
5. This being the first appeal it is my duty as a court to re-evaluate the evidence adduced during trial,

- in order to arrive at my own independent conclusion, bearing in mind that I neither heard nor saw witnesses who testified. ( *see Okeno versus Republic [1972] E.A. 32*).
6. This is a case where there was an omission in respect of the Section of the law that the appellant was said to have contravened. The Section quoted is non-existence in law.
  7. The next issue to be determined is whether the prosecution proved the case beyond reasonable doubt. The charge as drawn stipulate that the appellant was found with cannabis sativa to wit 29 sachets and 410 grammes of street value of Kshs. 2580-which was not in any form or medial preparation.
  8. PW1 and PW3 said they found the appellant seated. When she stood a paper bag branded "**Uchumi**" fell down. It contained some 29 sachets of the plant material that they referred to as "*bhang*". They then made her go to her house where they recovered some 10 bundles of some plant material. These exhibits were taken to the Government Chemist by PW2. He produced a report in court. It is not indicated why the police officer produced a report of a Government Analyst in court. It is not stated why the Government Chemist/Analyst was not called as a witness. Procedurally application to produce the document should have been made pursuant to **Section 77 of the Evidence Act**. The appellant should have been asked whether or not she objected to the production. She could have intended to cross-examine the Government Analyst. The process adapted by the court was against the law and prejudicial to the appellant.
  9. The charge sheet as drawn indicates quantity of the plant material recovered. The street value is given as Kshs. 2580/= . In his testimony PW3 the investigation officer stated thus:-

***"I prepared an exhibit memo form and escorted to Government Chemist in Nairobi. The report found that the 29 sachets and 10 bundles of bhang was found to be cannabis that falls under the 1<sup>st</sup> schedule of Narcotic drugs and Psychotropic Substances Control Act 1994. The report is dated 15/8/2012 and signed by the Government Analyst, J.M. Welimo."***

10. Other than usurping the powers of the Government Analyst by giving evidence on his behalf un-procedurally, the officer failed to tell the court how he came up with the quantity of the plant material as stated in the charge sheet and also the street value.
11. It is alleged that where the appellant was found in possession of the plant material there were some two "wazees" present. It would have been imperative for the police to treat the two (2) people as witnesses. Further it is stated that PW1 and PW3 asked the appellant to lead them to her house. She declined but they compelled her to do it. She complied and the 10 bundles of the plant material indicated as 400 grammes by a report purported to be from the Government Chemist were found under a bed. It was important for the prosecution to prove ownership of the said house by the appellant. There was no such evidence.
12. In his findings the trial magistrate stated thus:-

***"I find the defence wanting and does not challenge the prosecution case which I find credible. The accused also failed to satisfy this court this cannabis was intended solely for her own consumption..."***

13. It is obvious that the court misdirected itself when it shifted the burden of proof to the appellant. The onus was upon the prosecution to adduce evidence to prove that particular fact which it failed to do.
14. After evaluating the evidence, adduced, it is apparent that the prosecution did not prove the case beyond doubt. The appeal is merited. It is allowed. The conviction is quashed and the sentence set aside.

**DATED, SIGNED and DELIVERED this 3<sup>RD</sup> day of APRIL, 2014.**

**L.N. MUTENDE**

**JUDGE**