



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 87 OF 2013

ROBERT TWILE NILE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court
Criminal Case No.817 of 2011 by*

Hon. M.A.O. Opanga Ag. SRM on 29/1/2013)

J U D G M E N T

1. **Robert Twile Nile**, the appellant was charged with the offence of being in possession of **Cannabis Sativa (Bhang)** contrary to **Section 2(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**.
2. Particulars of the offence being that on **21st day of December, 2011** at **Matuu location in Yatta District** within **Machakos County**, was found in possession of **Cannabis Sativa (Bhang)** to wit **250g** valued at **Kshs. 250/=** which was not in medicinal preparation.
3. He was tried, convicted and sentenced to serve **ten (10) years** imprisonment.
4. Being aggrieved by the conviction and sentence thereof he appealed on grounds that; the learned trial magistrate erred in law and fact by convicting on evidence that was uncorroborated and contradictory; by failing to observe that the recovery of the alleged exhibits was wanting; by shifting the burden of proof to the appellant and by failing to observe the gravity of the offence when meting out the sentence.
5. The facts of the case were that **PW1 No.81062433** Senior Sergeant **Gabby Wanjala** and **PW2 No. 96059063** Sergeant **John Maithya** acting on information received went to a house where they found the appellant outside smoking some substance. They took possession of it and searched the house whereby they recovered two (2) rolls of dry plant material, two packets of rizzler papers and a rolling apparatus. They arrested the appellant and charged him.
6. In his defence the appellant stated that on the fateful day he fought his wife who reported the incident to the police. They went to his house and alleged that they found cannabis in the house.
7. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify. (*See Okeno versus Republic [1972] E.A. 32*).
8. I have re-evaluated evidence adduced. Evidence adduced by PW1 as to how they found the appellant at his house smoking some plant material is corroborated by that of PW2. The plant material was handed over to **PW3 No.69476 P.C. John Bwami** who stated that he prepared an exhibit memo form and submitted the material to the government chemist for examination.

Thereafter he received a report which he produced in evidence. On cross-examination he stated that what was submitted was what he received from the Administration police officer who arrested the appellant. In other words there was a dispute as to what exactly was submitted to the government chemist for analysis.

9. I have previously held that an expert's report purporting to be made under a hand of a government analyst should only be used in evidence after leave is sought from the court pursuant to the provisions of **Section 77 of the Evidence Act (See Mutua Muli alias Katoo versus Republic Criminal Appeal No. 131 of 2013)**
10. The appellant herein should have been informed the reason why the government analyst was not available. A basis had to be laid for not calling the analyst to enable the court draw a conclusion that the analyst made the report having held the office and qualifications professed at the time of signing it. It was irregular for a police officer to simply state that:

“...I wrote exhibit memo which I took to government chemist Nairobi to ascertain whether exhibit was Cannabis Sativa. I received a report confirming that it was Cannabis Sativa.”

11. It is also important to note that according to PW3 he received per his evidence:

“2¼ rolls of bhang 250 grams not packed.”

What is indicated as having been received at the government chemist was **thirty five (35) grams** of plant material. The contradiction is not explained by the officer. The question not answered is whether what was submitted is what was received at the government chemist?

12. A question remaining unanswered is proof of doubt. The appellant had no duty of establishing the defence he came up with. The prosecution had a duty of disproving the defence put up, which it failed to do.
13. From the foregoing the case was not proved to the required standard. The appeal therefore succeeds. The conviction is quashed and sentence set aside. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of NOVEMBER, 2014

L.N. MUTENDE

JUDGE