REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 192 OF 2010

GEORGE NJERU IRERI alias "SAITOTI".. ….....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Cr. Case No. 1700 OF 2010 at the Chief Magistrate's Court at Embu by Hon. A.A. INGUTIA – RM on 1/12/2010

J U D G M E N T

GEORGE NJERU IRERI alias SAITOTI the Appellant herein was charged with the offence of being in possession of Narcotic drugs contrary to section 3(1)(a) as read with section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994.

The particulars as stated in the charge sheet were as follows;

> **GEORGE NJERU IRERI alias SAITOTI: On the 20th day of August 2010 at Kyeni North location of Embu East District within the Eastern Province was found in possession of 16 kilogrames of cannabis in contravention of the said Act.**

The matter proceeded to full hearing and he was convicted and sentenced to ten (10) years imprisonment.He was aggrieved by the Judgment and filed this appeal in person citing six (6) grounds viz;

1. ***That the learned trial Magistrate erred both points of law and facts by not considering the Prosecution did not produce any documentary evidence to prove their case.***
2. ***That the trial Magistrate erred in both points of law and facts by not considering that no search warrant had been issued to conduct a search in the Appellant's premises.***
3. ***That the learned trial Magistrate erred in both points of law and fact by denying the Appellant time to recuperate since he was sick at the time of trial.***
4. ***That the learned trial Magistrate erred in both points of law and fact by ignoring the fact that although the Appellant had made an application to be furnished with witness statements he was not provided with the same.***
5. ***That the learned trial Magistrate erred in both points of law and facts by overlooking the***

discrepancies in the evidence.

6. ***That the learned trial Magistrate erred in both point of law and fact by not being summoned as required by the law.***

The case by the Prosecution was that PW1 and PW2 and others on tip off went to the house of the Appellant on 20/8/2010. Both of them stated in their evidence that when they went to the Appellant's house he opened for them.Upon search they found 3 sacks in the sitting room and charged him.

In his defence the Appellant while unsworn denied the charge. He denied having been found with the bags.

When the appeal came for hearing Mr. Momanyi was appearing for the Appellant. He raised three (3) main issues.These were;

1. ***The particulars in the charge sheet not having been proved.***
2. ***There being contradictions in the evidence.***
3. ***The analysts report being produced by a police officer without the participation of the Appellant.***

Mr. Wanyonyi learned State Counsel for the State did not oppose the appeal on the following grounds;

a) ***The evidence of PW1 and PW2 was inconsistent.***

b) The time of recovery and even quantity of recovery was not indicated

c) The Report was produced by a police officer without Appellant's participation.

I have considered the submissions by learned Counsels. I have equally considered the evidence on record and evaluated it, as is expected of a 1st appeal Court. In the case of ***MWANGI -V- REPUBLIC [2005]2 KLR 28.*** This is what the Court of Appeal stated;

1. ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.***
2. ***The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.***
3. ***It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's evidence 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 the fact that the trial Court had the advantage of hearing and seeing the witness.***

PW1 at page 8 lines 11-13 states;

"We found 3 sacks in the sitting room and charged him. The accused is in Court. The bag is in Court. Here it is (points at it). The bag is estimated at 16kgs)".

And this is what PW2 states at page 9 lies 9-11.

"He opened for us the door. We recovered from his sitting room three bags before the Court. We arrested him and later charged him".

The charge sheet states that the Appellant had been found in possession of 16kg of cannabis. Both PW1 and PW2 stated that the Appellant was found with three sacks or bags. What offence is there in one being found in his house with three sacks or bags? Is there any offence in possessing three bags?

It is therefore clear that there was absolutely no evidence showing that the Appellant was found in possession of 16kg of cannabis.

PW2 at page 9 lines 11-13 states;

"I sent a sample to Nairobi and I got back a report. This is the bag (EXB1), exhibit Memorandum (EXB2) and report (EXB3)"

The sample that was sent to Nairobi was a sample of the bag or what?

In his Judgment the learned trial Magistrate states at page 11 lines 16-17;

"They were able to recover approximately 16kg of cannabis sativa which was kept in the sitting room".

A perusal of the record as I have pointed out reveals that what was recovered was three sacks and not 16kgs of cannabis. The learned trial Magistrate therefore made a wrong finding. It was also wrong for him to have allowed PW2 to produce an analyst's report when no basis had been laid for it. Secondly the Appellant was never given a chance to raise an objection if any to its production. See ***KAZUNGU KAHINDI -V- REPUBLIC – CRIMINAL APPEAL NO. 97/99 (COURT OF APPEAL MOMBASA)*** where the Court of Appeal stated;

> ***"We, however wish to add that where, as here, the accused is unrepresented, it is the duty of the Court to inform him of his right not only to object to the production of an expert's report by a person other than the maker, but also, where the report has been admitted in evidence, to request that the maker of the report be called as a witness for purposes of being cross-examined on the report by him. There is no indication on record that the Appellant here was so informed. It is an omission which, in an appropriate case might be fatal to the conviction.***

Finally what the learned trial Magistrate delivered as a Judgment fell short of a Judgment in terms of the Provisions of section 169(1) Criminal Procedure Code.He did not analyse the evidence nor raise the issues for determination. Ref: ***TITUS BREWER OTIENO & ANOTHER CRIMINAL PROCEDURE ACT NO.92/06 (COURT OF APPEAL KISUMU).***

The learned State Counsel well conceded to the appeal.

I find merit in the appeal which I allow. I quash the conviction and set aside the sentence.

The Appellant to be set free unless otherwise held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF JUNE 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Wanyonyi for State

Mr. Mungai for Momanyi for Appellant

Appelllant

Njue – C/c