



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 191 OF 2010

PETER MWANIKI SAMMY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of A.A. INGUTIA Senior Resident Magistrate Embu in Criminal Case No. 1701 of 2010 on 1st December 2010)

J U D G M E N T

PETER MWANIKI SAMMY the appellant herein was charged with the offence of **being is 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:-

On the 20th day of August 2010 at Kyeni North Location of Embu East District within the Eastern Province was found in possession of 12 kilogrammes 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 dissatisfied with the judgment and appealed against both conviction and sentence. He did this in person raising the following grounds.

- 1. The learned trial magistrate erred in law and fact by arriving at convicting relying on evidence full of contradictions.***
- 2. The learned trial magistrate erred in point of law and facts by not considering that material witnesses were not summoned in court.***
- 3. The learned trial magistrate erred in both points of law and fact by rejecting his prayer for adequate time to prepare his defence.***
- 4. The learned trial magistrate erred in both points of law and fact when he rejected his defence without due explanation.***

The case of the Prosecution was that on 20/8/2010 at about midnight PW1 and PW2 (police officers) acting on a tip off went to the appellant's house. He opened for them and they entered and went to his bedroom and recovered 12 kg of cannabis. They arrested the appellant and had him charged. The

cannabis was sent to the Government Chemist for examination. PW2 produced the report from the Government Chemist EXB3 which confirmed the sample received to be cannabis.

The appellant gave an unsworn statement in his defence and denied the charge. He stated that on this day he was asleep when he heard the dogs barking. On checking he found people in his compound. They arrested him and placed him in a motor vehicle. They demanded for Shs.20,000/= from him which he did not have.

When the appeal came for hearing Mr. Momanyi appeared for the appellant. He abandoned the 2nd and 3rd grounds of appeal. He argued the 1st and 4th grounds. His submissions were on the contradictions in the charge sheet and the evidence adduced. He further submitted that the Government Analyst's report was not produced by the maker. He cited the case of **REPUBLIC VS JULIUS KARISA CHARO High Court Criminal Appeal No. 7/2002 Malindi.**

Finally he argued that the learned trial Magistrate had not complied with provisions of Section 169(1) of the Criminal Procedure Code. He referred the court to the case of **TITUS BREWER OTIENO & ANOTHER Criminal Appeal No.92/06 (Court of Appeal Kisumu).**

Mr. Wanyonyi the learned state counsel conceded to the appeal on 3 grounds viz:-

1. **The evidence did not support the charge.**
2. **It was not clear what was recovered.**
3. **The Government Analyst's report was not produced by the maker. And the court had not called upon the appellant to object or accept its production.**

As a first appeal court it is my duty to reconsider and reevaluate the evidence bearing in mind that I did not see nor hear the witnesses. In the case of **OKENO VS REPUBLIC [1972] EA 32** it was held at page 36 as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala Vs Republic, [1957] EA 570)”.

And in **AJODE VS REPUBLIC [2004] 2KLR 81** the Court of Appeal held thus:-

“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 witness and make allowance for that.”

I have heard and considered the submissions by both counsels. I have equally subjected the evidence on thorough evaluation. PW1 in his evidence stated that him, PW2 and others went to the appellants house on 25/8/2010 at 12.30 a.m. PW2 contradicts himself by saying in fact they went there on 20/8/2010. The charge sheet states that the recovery was on 20/8/2010.

From the evidence of PW1 and PW2 it is not clear what was recovered. PW1 states that it was 12 kgs of cannabis in 2 gunny bags plus 6 bundles of stones of cannabis. But PW2 states that they found 6 bundles i.e. stones rolled in 3 gunny bags. The learned trial Magistrate however in his judgment at page 12 lines 14 – 16 states:-

“They recovered from near his bed stored in gunny bags 6 stones of cannabis as well as some more in dried dust form together weighing approximately 12 kilograms.”

The charge sheet again talks of 12 kg of cannabis. It does not mention any stones or any in dust form. It is therefore not clear where the learned trial magistrate got this evidence from.

Section 77 of the Evidence Act which deals with production of reports by experts and provides for production by the maker of the document. And Section 33 of the same Act provides for exemptions in the said Rule in Section 77. Where the prosecution wishes to have a document produced by a witness who is not the maker, they must lay a basis for such production. Further more the court must then inform the accused person of the application and find out from him if he objects or does not object to the production. It is clear from the record herein that the appellant was denied this right of electing to object or not when a non-maker of a document was producing the same. This was grievous to him. I am guided on this by the case of **KAZUNGU KAHINDI VS REPUBLIC Criminal Appeal No. 97/99** where the 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.”

My finding is that the learned trial Magistrate failed to appreciate the facts well and did not also fully comply with the Provisions of Section 169(1) of the Criminal Procedure Code. He failed to identify the issue/issues for determination. He only stated how he believed the two witnesses and did not believe the appellant. (**Ref. TITUS BREWER OTIENO & ANOTHER VS REPUBLIC Criminal Appeal No. 92/2006 Court of Appeal Kisumu**).

The State did not support the conviction. And after fully evaluating the evidence, I do find that the learned trial Magistrate erred in convicting the appellant. I allow the appeal, quash the conviction and set aside the sentence of ten (10) years.

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

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

H.I. ONG'UDI

JUDGE

In presence of:-

Mr. Wanyonyi for State

Mr. Mungai for Momanyi for Appellant

Appellant

Njue CC