



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 175 OF 2010

JOHN NJERU NJOKA APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No.1699 of 2010 at the Chief Magistrate's Court at Embu by Hon. A.A. INGUTIA – SRM on 15/11/2010

J U D G M E N T

JOHN NJERU NJOKA the Appellant herein was charged and convicted of 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;

JOHN NJERU NJOKA: On the 20th day of August 2010 at Kyeni North Location of Embu East District within the Eastern Province was found in possession of 6 kilogrammes of cannabis in contravention of the said Act.

He was sentenced to ten (10) years imprisonment. He then filed this appeal raising the following grounds;

1. ***That the learned trial Magistrate erred in law and facts by failing to solve the vivid contradictions present in Prosecution case in the Appellant's favour yet they touched the core of the case.***
2. ***THAT the learned trial Magistrate erred in law and facts by failing to consider or adequately consider the Appellant's defence.***
3. ***That the Appellant's Constitutional rights were violated contrary to section 49(f)1.***
4. ***That the sentence imposed is manifestly harsh and excessive considering all circumstances of this case.***
5. ***That the trial Court findings in the Judgment was not supported by evidence adduced thereof.***

The Prosecution presented two witnesses in Court. Their evidence was that while on patrol on 20/8/2010 at 2am they got a tip off from members of the public of some people in Kagumori village who were selling cannabis sativa also known as bhanga. PW1, PW2 and another officer went to the Appellant's house, identified themselves and the door was opened for them. They searched the house and recovered 6kg of cannabis sativa (EXB1) and rolling materials (EXB2). A sample was sent to the Government chemist (EXB3) and the report confirmed the substance as cannabis sativa bhanga.

In his unsworn defence the Appellant denied that the exhibits were found in his house.

When the appeal came for hearing the Appellant presented the Court with written submissions. The learned State Counsel M/s Ing'ahizu opposed the appeal saying the evidence was overwhelming and the sentence was safe.

I have considered submissions by the Appellant and the learned State Counsel together with the grounds of appeal. This being a first appeal this Court it is enjoined to re-consider and re-evaluate the evidence on record and come to its own conclusion. I am guided on this by the cases of;

- i. ***OKENO –V- REPUBLIC [1972]EA 32***
- ii. ***KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174***
- iii. ***SIMIYU –V- REPUBLIC [2005]1 KLR 192***

I am also alive to the fact that I did not hear or see the witnesses.

In ground 4 the Appellant states that he was arrested on 20/8/2010 and arraigned in Court on 23/8/2010. The evidence of PW1 and PW2 is that he was arrested on 20/8/2010 at 2am. I have confirmed that 20/8/2010 was a Friday. The earliest he could be taken to court was 23/8/2010 which was a Monday. I therefore find no merit in ground number 4. I will consolidate all the other grounds as they touch on the evidence and deal with them together.

The evidence of the two (2) witnesses is that they went to the Appellant's house at 2am and they found the cannabis and rolling materials in the said house. All he said in his defence was that the exhibits were not found in his house. There was no reason why the witnesses who were just officers on duty would fabricate this evidence against the Appellant. Contrary to his submissions the learned trial Magistrate captured the evidence well and was satisfied by the report that the substance recovered from the Appellant's house was cannabis. Secondly he also had the rolling materials. All these exhibits were produced in Court. In his Judgment the learned trial Magistrate considered the defence and said it did not raise anything contrary. I do find that there was proof that EXB1 was recovered from the Appellant's house and that the said EXB1 was cannabis (EXB4a). He was properly convicted. Cannabis sativa weighing 6kg is not something small.

The effect it has on human beings is enormous. The learned trial Magistrate captured all this before sentencing him. I am sure his stay in prison has taught him some lesson. The sentence may have been too harsh for a first offender. I set aside the sentence of ten years. I substitute it with a sentence of seven (7) years imprisonment from the date of conviction. To that extent only does the appeal succeed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

Appellant – present

Njue – C/c