



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 88 OF 2010

SAMUEL NJIRU NJUKIAPPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 441 of 2010 at the Principal Magistrate's Court at Siakago by Hon. D.O. ONYANGO - SRM on 10/6/2010

J U D G M E N T

SAMUEL NJIRU NJUKI the Appellant was charged with the offence of being in possession of cannabis sativa contrary to section 3(2) (a) of the Narcotic and Psychotropic Substances Control Act No.4 of 1994.

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

SAMUEL NJIRU NJUKI: On the 9th day of June 2010 at Runyenjes village Runyenjes location in Embu East District within Eastern Province was found being in possession of half smoked cigarette of bhang of street value kshs.10/= which was not in medical preparation.

The Appellant was convicted on admission of the facts read to him and he was sentenced to eight (8) months imprisonment. He was aggrieved by the Judgment and filed this appeal citing the following grounds;

1. ***That the learned trial Magistrate erred in law and fact by failing to note that the charge against the accused was defective.***
2. ***That the learned trial Magistrate erred in law and fact in failing to appreciate the fact that facts did not specifically disclose where the alleged bhang was found.***
3. ***That the learned trial Magistrate erred in law and fact in that he never gave the accused option to mitigate and that the same was given to the Prosecutor.***
4. ***That the learned trial Magistrate erred in law and fact in convicting the accused before any records were produced.***
5. ***That the whole proceedings are bad in law as the Act under which the accused is charged only defines cannabis in section 2(1) and in the first schedule which does not include bhang.***

When the appeal came for hearing the Appellant simply asked the Court for leniency.

Mr. Wanyonyi the learned State Counsel conceded the appeal on two main grounds;

- i. The charge was defective.
- ii. The substance found on the Appellant was not taken for analysis.

The offence the Appellant was charged with talks of "*cannabis sativa*". The particulars talk of Appellant having been found with a "*half smoked cigarette of bhang*". This has no relationship with "*Cannabis sativa*". It is also not among the psychotropic substances mentioned in the Narcotic & Psychotropic Substances Control Act No. 4 of 1994. I agree with what my sister Justice Karanja as she then was when stated in a Ruling in this matter as follows;

"The drafter of the charge must nonetheless connect bhang with the name assigned to it in the Act. Ordinarily the police will charge somebody with being found in possession of cannabis sativa but either include the work bhang immediately thereafter in brackets, or say "to wit bhang" or even state "otherwise known as bhang" after the words cannabis sativa. The word bhang cannot stand on its own as it is not recognized in the Act"

Finally the so called cigarette of bhang was not taken for analysis to establish its contents. It's therefore not known what the contents of the cigarette were.

The State conceded the appeal and correctly so. For the above reasons I do find that the charge was incurably defective.

I allow the appeal and quash the conviction. The sentence is set aside and the cash bail deposited herein be refunded to the Appellant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18th DAY OF OCTOBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr Wanyonyi for State

Appellant

Mutero/Kirong – C/c