REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Criminal Appeal 150 of 2011

LEWELA MWAKUNDWA …..…...…….. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No.215 of 2010 of the Resident Magistrate's Court at Wundanyi – M. Chesanga – DM II)

JUDGMENT

LEWELA MWAKUNDWA herenafter referred to as the "**Appellant"** was charged with two offences as follows

1st Count

"handling stolen goods contrary to Section 322 (2) of the Penal Code"

2nd Count

"Being in possession of cannabis sativa contrary to Section 3 (1) as read with section 3 (2) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994."

The particulars of each count are as per the charge sheet.

The appellant was tried, convicted and sentenced to serve 4 years imprisonment one each count to run consecutively.

He has appealed against the conviction and sentence on the 2nd count. He has relied on three grounds

1. That the Learned trial Magistrate erred in law when going ahead to convict and sentencing the appellant without questioning himself to whether the police officer who arrested, searched and seized the alleged drugs complied with the narcotic drugs Act No. 4 of 1994 given that:

a. They didn't comply with Section 72(a) of the Narcotic Act.

b. Did not comply with Section 74(a) (1)a,b,c,d, (20) of the Narcotic Act for proof of the seized substance.

2. That the Learned Trial Magistrate failed in rule of law and fact when basing the conviction and sentencing the applicant in insufficient evidence that should not warrant conviction given that;

a. For the offence of possession to stand there should be a link and

b. The said MWANGEKA which was to link me was not exhibited before Court.

3. That the Learned trial Magistrate erred in law by going ahead to convict and sentence the appellant when not indicating Section 211 of the Criminal Procedure Code when placing him in defence that turned to be an unfair trial.

He has also relied on the written submissions. The appeal has been opposed on the conviction. The State submitted that all the Sections of the law the appellant alleges were violated namely Section 72, 74 and 211 were complied with.

I have considered the appeal. I have re-evaluated the evidence afresh. I find that Section 72 of the Act relates to **Procedure upon seizure of narcotics.** Section 74 relates to **The seizure of Narcotic drugs**. Section 211 of Criminal Procedure Code relates to **The accused's right of defence**.

PW3 – APC Edward Musili PW3 testified upon the arrest of the appellant,

"He was found with a bag known locally as Mwangeka. The bag had bhang in it. The bhang was 15 gm (Exh.1) The man is the one the dock"

This evidence was corroborated by the evidence of APC Inspector Erick Kipkemei PW4. Finally Sgt David Macharia PW5 the Investigating Officer produced the recovered cows relating to the 1st count. However **he did not produce the Government analyst report.** Apparently, the same was produced before the case was started ***de novo***. After the case started afresh the report was not produced. This in the subsequent hearing, the accused did not have the evidence of the analysis of the recovered substance alleged to be bhang. Under Section 77 of the Evidence Act, it is required that the Government analyst report may be used in evidence. That documents can only be used if produced. The production can only have been by the Government analyst or the Investigating Officer. None produced the said report. The purpose of that report was to prove beyond reasonable doubt that, the alleged bhang was indeed a narcotic drug. Thus, failure to retrieve the report after the case started ***de novo,*** dealt a **fatal blow** on the prosecution case. Consequently, the conviction was unsafe and I quash it.

As the State has conceded on sentence, I concur with their submissions that a District Magistrate II could not pass a sentence of more **than 2 years imprisonment**. In that case, the sentence imposed herein was also unlawful. Having quashed the conviction, the sentence issue does not arise. I set it aside accordingly.

In the same light, Section 364 of the Criminal Procedure Act gives the High Court powers on revisions, having noted that the appellant was also given an unlawful sentence on the 1st count. I herby revise the same. I set aside the 4 years sentence and substitute it with two years imprisonment from the date of sentence.

Orders accordingly.

Dated, delivered and signed in open court on this 21st September 2012 at Mombasa

G. NZIOKA
JUDGE
21st SEPTEMBER 2012

In the presence of:

Mr. Jami for State

Appellant in person

Benta Court clerk