



REPUBLIC OF KENYA

High Court at Malindi

Criminal Appeal 93 of 2011

HUSEIN KAZUNGU MBARUK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1.The Appellant in this case was charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The Particulars of the charge against the Appellant were that “**Husein Kazungu Mbaruk** on the 4th day of May, 2010 at Manda area in Lamu District within Coast Province was found trafficking in narcotic drugs by conveying 57 big rolls of Cannabis Sativa valued at Kshs. 17,100/= in contravention of the said act .”

2.The Appellant was found guilty of the offence and convicted and sentenced to serve 14 years imprisonment. He has appealed against both the conviction and the sentence and raised the following grounds of appeal:

**1.That the honourable trial magistrate erred in law and in fact when he convicted and and sentenced me on reliance of fatally defective charge sheet.**

**2.That the honourable trial magistrate erred in law and in fact when he convicted me without considering that the two witness who testified contradicted each other.(sic)**

**3.That there was a miscarriage of justice as the arresting officer who is indicated in the charge sheet did not come forward to testify to the effect of my arrest.**

**4.That the evidence of Pw1 contradicted and in real sense exposed a false representation by the different officer as the arresting officer while Pw1 had testified of calling and participating in the arrest with another officer.(sic)**

**5.That the case lacked independent witness although they were easily available(sic)**

**6.The hon. Trial magistrate erred in law and fact when he did not consider the grudge that existed between me and Pw1.**

3.The Appellant relied upon his written submissions through which the Appellant conceded to the conviction stating that he had the drugs in order to earn a living as he was handicapped and he was remorseful therefore sought leniency. The State did not address this court on the said concession and opted to leave the matter of sentence to the court.

4.The above notwithstanding, the court of first appeal has a duty to re-evaluate the evidence and reach its own conclusion as spelled out by the landmark case of ***Okeno V R [1972] EA 322.*** .This is while bearing in mind the trial court had the benefit and opportunity of seeing the witnesses and observing their respective demeanour in order to assess the credibility.

5.What then was the evidence at trial? Pw1, the Assistant Chief of Manda testified that on the material date 4th day of May, 2010, he was on duty and was at Manda Jetty. That he saw a boat destined to Lamu from which the Appellant disembarked having a suitcase and that he appeared restless. He therefore sought the assistance of Administrative police to assist him. They searched the appellant and found 57 rolls of *bhang*. The Court takes Judicial Notice of this street name for *Cannabis Sativa*.

6.Pw2, a police constable attached to Lamu Place Station, stated that he was on duty on the material date. He confirmed that two Administrative Police accompanied by the Pw1, brought the Appellant to the police station with 57 rolls of *bhang* in a suitcase. He testified that he then recorded the statements and forwarded to the Mombasa Government Chemist the 57 rolls for analysis.

7.The Government Analyst's (PW3) evidence was to the effect that he received 10 dry plant material rolls and he then prepared a report. The Report was produced as Exhibit 6 which indicates that the police reference number was 371/62/2010 which coincides with the police case number in the charge sheet. He testified that upon analysing the material found the same to be *cannabis sativa*.

8.Pw4, one of the arresting officer testified that he found at the scene a crowd who informed him that there was a man carrying suspicious goods. That the man resisted their attempts to take the said goods. That he was together with the chief of Manda. They found 57 rolls of *Bhang*.

9.The Appellant admitted traveling from Manda to Lamu and on his way saw Pw1 at the jetty. That a boat arrived with an Administrative Officer. He also stated that he was taken to the home of the police officer and then the office took him to the police station.

10.The Appellant had been charged with trafficking under Cap 245 (Act No. 4 of 1994). Trafficking is defined as “*the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof.*”

11.A fact need not be proved by calling a particular number of witnesses unless the law so requires, See **Section 143 Evidence Act, Cap 80** which provides that “*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*”This principle has been rehashed by the court of appeal in ***Benjamin Mbugua Gitau vs Republic [2011]eKLR***. The testimony of one of the arresting officer and the Pw1 was consistent and there was no need to call an 'independent' witness as raised in the grounds of appeal.

12.The Appellant has contested that the trial court failed to consider the grudge that existed between Pw1 and himself. The Appellant at trial did not demonstrate the link between the alleged grudge and the case at hand. There is no bearing. The germane issue was whether or not the items found in the Appellant's possession were substances proscribed under the law and in particular the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The prosecution presented a case that proved beyond reasonable doubt that some of the substances were *cannabis sativa*.

13.On considering the evidence afresh it does not disclose the offence charged. The Appellant in the appeal raised the issue that the evidence before court did not support the charge making the charge-sheet defective. See ***Yongo Vs Republic 1983 KLR 319***. However the court has power to convict on a lesser charge where the evidence reveals the lesser charge. In this case, it revealed the charge of Possession contrary to section 3 (1) as read together with Section 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act. Hence the charge of trafficking is substituted with that of possession contrary to section 3 (1) as read together with Section 3 (2) of the Narcotic Drugs and Psychotropic Substances

Control Act.

14.The Appellant has also appealed against the sentence. I must state that the Appellant got lucky as he got away with a 10 year jail term instead of a life sentence as prescribed under the the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and confirmed by the Court of Appeal decision in **Kingsley Chukwu V R [2010] eKLR.**

15.The trial court ordered that a probation report be presented in light of the mitigation offered. The Probation Officer's recommendation is in tandem with my position that the Appellant is not a suitable candidate for a non-custodial sentence. This is as guided by the **Chukwu case** and the prevalence of the offence in the North Coast area.

16.Based on my finding on the evidence, I will therefore set aside the conviction for Trafficking and substitute it with that of Possession contrary to Section 3 (1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and uphold the sentence of 10 years from day of sentence.

Delivered and signed this **12th** day of **November, 2012** in the presence of the Appellant, Mr. Kemo for the State.

Court Clerk – Evans.

**C. W. Meoli**  
**JUDGE**