REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 308 OF 2007

JOSEPH THUKU MBAYA.....……...……..APPELLANT

VERSUS

REPUBLIC……...…….……...……RESPONDENT

(Appeal arising from the original conviction and sentence by V. W. Ndururu, Ag. Senior Resident Magistrate in the Mukurweini Senior Resident Magistrate's Criminal Case No.1022 of 2006 delivered on 16th October 2007 at Mukurweini)

JUDGMENT

JOSEPH THUKU MBAYA, the appellant herein, was tried and convicted for the offence of being in possession of bhang contrary to *Section 3(2)* of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. He was sentenced to serve ten (10) years imprisonment. Being dissatisfied, he filed this appeal. He listed the following grounds in his Petition:

1. ***That the learned trial magistrate erred in law and facts in convicting without considering that the allegedly recovered plant materials were never identified to be cannabis sativa by a government analyst.***
2. ***That he erred in law and facts in disregarding the fact that the evidence of recovery was inconsistent and prejudicial in nature.***
3. ***That he erred in law and facts in overlooking the non-availability of an essential witness for a just determination of this case.***
4. ***That he erred in law and facts in awarding a harsh and unjust sentence on a case which was not proved beyond reasonable doubts.***

The case that was before the trial court was short and straightforward. Four witnesses testified in support of the prosecution's case. **Francis Maingi** (P.W.1) was informed by A.P.C. Kagonye (P.W.2) that the Appellant had boarded motor vehicle registration No. KAU 137S, a mini-bus headed for Mukurweini from Nairobi. It was said that the Appellant was carrying bhang. P.W.1 and P.W.2 laid an ambush at Mukurweini bus stage whereupon the driver was ordered to drive the aforesaid motor vehicle to Mukurweini Police Station where a search was conducted. **Cpl. Njeru** (P.W.4) recovered a blue bag and a black polythene bag kept under the seat of the Appellant. The bags were opened after identifying the Appellant to be the owner. Upon opening the aforesaid bags 19 stones of bhang and 170 grammes of the same stuff were found. The Appellant was then apprehended. P.W.4 prepared an exhibit memo which was sent together with the samples of the bhang and forwarded to the government analyst for examination. **Daniel Mungai** (P.W.3) the conductor of motor vehicle registration no. KAU 137S, told

the trial court that the Appellant boarded the aforesaid motor vehicle at Kariokor before they left for Mukurweini while carrying the blue bag whereupon he occupied the second seat from the back. P.W.3 said the Appellant had picked an argument with him over whether or not the blue bag should be kept at the carrier. P.W.1, P.W.2 and P.W.3 all confirmed having seen P.W.4 recover the blue bag under the seat occupied by the Appellant. The record shows that P.W.1 and P.W.4 had previously dealt with the Appellant in other criminal matters not related to the one before court. When placed on his defence, the Appellant gave unsworn testimony. He admitted that he boarded motor vehicle registration No. KAU 137S on the date of the offence. He claimed he had only carried two loaves of bread. He said the motor vehicle was commandeered by P.W.1 to Mukurweini Police Station where he was shown a bag containing bhang while being led to the cells. He said he was not found with the stuff. The trial Magistrate analysed the evidence and came to the conclusion that P.W.3 had seen the Appellant being the last passenger to board the mini-bus carrying the bag where the cannabis sativa was recovered.

When the appeal came up for hearing the Appellant was permitted to file and rely on written submissions. On the first ground, the Appellant complained that since the Government analyst report was not produced by the person who analysed the plant then the report was improperly received. He claimed the bhang was not identified. I have perused that and it is clear that the government analyst examined the plant material and found it to be cannabis sativa which is a Psychotropic substance. The report was forwarded to P.W.4 who had sent for analysis of the plant material. Under *Section 77(2)* of the Evidence Act, the court had the discretion to receive the report without the necessity of calling for the maker to present the report. Consequently I see no merit in the Appellant's complaint.

The Appellant also contended that the bhang was not in his possession. It is his argument that P.W.1 and P.W.4 conspired to frame him up. In order to settle this issue it is important to examine the evidence of the mini-bus conductor, (P.W.3). P.W.3 said that the Appellant was the last passenger to board the mini-bus. In fact he said that the Appellant refused to have his bag placed on the bus carrier but preferred to carry it to where he sat. P.W.3 was able to show the seat he gave the Appellant. The bag containing the plant material was recovered under the seat the Appellant had occupied. It is important to note at this stage that P.W.3 did not know the Appellant hence it cannot be said he was framed up. I am convinced the offending plant material i.e. cannabis sativa was found in possession of the Appellant. With respect, I agree with the submissions of Mr. Makura that there was sufficient evidence to sustain a conviction.

The last ground argued by the Appellant is to the effect that the sentence pronounced against him was harsh and excessive. Mr. Makura pointed out that the trial Magistrate gave the minimum sentence prescribed by law hence the same is not harsh nor excessive. I have perused the provisions of *Section 3(2)* of the Narcotic and Psychotropic Substances (Control) Act No. 4 of 1994 and it is clear that there are two categories of sentences. First, if it is shown that the cannabis was intended solely for the culprit's own consumption, the maximum sentence would be 10 years imprisonment. Secondly, if it is shown that the cannabis was intended to other purposes, the maximum sentence would be 20 years in prison. The trial Magistrate appears not to have differentiated between the two sentences. It is difficult to infer whether the cannabis was meant for the Appellant's own consumption or for other purposes. I have perused the evidence and it is clear that the amount of cannabis was stated to be 19 stones and 170 grammes. The quantity recovered appears to suggest that the same was meant for the appellant's own use. I think the maximum sentence in the circumstances is 10 years imprisonment. The Appellant was sentenced to 10 years imprisonment. He was not a first offender since he had previously been convicted on his own plea of guilty. Looking at the overall picture of this case, it is my view that the Appellant should not have been given the maximum sentence. The record shows that in the previous case he had readily pleaded guilty and was sentenced to serve 12 months. I will interfere with the order on sentence by reducing it to six (6) years.

In the end, the appeal against conviction is dismissed. The appeal as against sentence is allowed. Consequently the sentence of 10 years is set aside and is substituted with a sentence of six (6) years. The sentence to run from the date of sentence.

Dated and delivered at Nyeri this 1st day of April 2011.

J. K. SERGON

JUDGE

In open court in the Mr. Makura. N/A for the Appellant.

J.K. SERGON

JUDGE