REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 12 of 2009

YAHIJA SALIM ALI ……..…..…..……..…….APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT

Yahiya Salim Ali (the appellant) was convicted on a charge of trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The appellant denied the charge and after trial where three witnesses testified he was sentenced to pay a fine of Kshs. 200,000/- and serve 6 years imprisonment.

The prosecution case was based on facts which stated that on 11th day of September 2007 at Maweni village in Malindi location, within Malindi District was found trafficking in Narcotic drugs to wit 100 rolls of cannabis sativa (bhang) valued at Kshs. 90,000/- in contravention to the said Act.

PW1 Sgt Tsuma Mwadzembi told the trial court that on 11th September 2007 at around 7.40pm, while on patrol in Maweni area, with his colleague APC Hamisi Abdallah, they received information that there was a room in Maweni which was being used to sell and smoke drugs. The informer explained exactly where the house was and led the officers there. The police officers then asked the informer to leave- they went to the room which was locked from inside, knocked and when it was opened the police officers introduced themselves and appellant introduced himself as Yahuya Salim Ali. Inside the room was one chair, a metal box and on top of it was a tin and silver coins all over, plus a candle. The officers removed the items which were on the box and requested appellant to unlock the box – which he did, and inside the box they found 100 rolls of bhang. PW1 counted the money which amounted to Kshs. 11,677/- which he believed was the day's sales. The notes were in a tin. So appellant was arrested together with the items found in the house and which were produced before the trial court as exhibits.

The appellant did not tell the police officers who owned the bhang.

On cross-examination PW1 stated that the informer never told them who was the seller of the drugs, or who owned the house. They had found the main door open and entered going straight to the last room.

PW1 denied suggestions by appellant that they arrested two people. Pc Hamisi Abdalla (PW2) who was with PW1 corroborated PW1 evidence step by step up to the point of recovery of the bhang – clarifying that there was nothing else in the box and that appellant never explained his presence inside the room or who was the owner of the bhang. He too confirmed that the only person they found inside the house was the appellant.

Pc Johannes Nyambati (PW3) of Malindi police station received the appellant from the AP's, together with the recovered items. He sent the recovered substance to the Government Analyst in Mombasa for examination and the report confirmed the same to be cannabis sativa under the Act. The Analyst's report was produced after the defence counsel, Mr. Abubakar stated:

> ***"We have no objection to the witness producing the report because the issue is not whether the exhibit is bhang or not. The issue is one of possession"***

In his sworn defence, the appellant told the trial magistrate, that, he was arrested from the house belonging to Joseph Karisa Chome (a tailor) where he had gone to collect his trouser. The tailor was in Maweni at Kwa Famau. When he got there, he found five men and a woman inside the tailor's house and they asked him to identify himself – before he could do so, a body search was carried out on his person, and they addressed the tailor who was present. When they found the metal box they opened it and found money. Both appellant and the tailor were arrested, and that is when appellant learnt that there were rolls of bhang in the box.

The police officers beat up the tailor who was rushed to hospital, and he eventually died. Appellant maintained that he had a house in Sabasaba Maweni which was rented but he was unable to get the tenancy agreement because he was in custody.

On cross-examination appellant confirmed that bhang was in the room from where he was arrested.

The trial magistrate noted as follows in her judgment.

> ***"The fact that the accused was alone in the room, he is the one who opened the door was enough for the officers to presume that he occupied the said room."***

The trial magistrate considered appellant's defence that the house belonged to one Mzee Joseph Chome, a tailor and found that the court did not have the benefit of confirming that part of evidence as the said tailor was said to have died. – and there was no proof whatsoever that such a person ever existed.
The finding was that nothing dented or shook the credibility of evidence offered by prosecution witness. Appellant was granted leave to file amended grounds of appeal but did not do so, and grounds remain as they were. Appellant challenged both conviction and sentence saying that:

1) He was deliberately detained at the police station for many days, which was a violation of his rights.
2) His arrest was circumstantial as he had gone to the late tailor to collect his clothes.
3) No independent prosecution witness was summoned
4) No investigation was conducted
5) His defence was not considered

At the hearing, Mr. Aboubaqr who appeared on behalf of the appellant submitted that prosecution needed to prove that appellant was selling or storing the drug and that this was not proved, and no single witness testified to confirm finding any drugs on the appellant or that the room where the drugs were found was under the control of the appellant. It was Mr. Abuobaqr's contention that appellant wasn't a tenant and that no evidence from a landlord or fellow tenant was adduced as to enable the prosecution discharge the burden of proof.

He also argued that there was no evidence from an independent witness corroborating that of the two administration police officers given that quite a number of people, including the *sungusungus*, participated in the appellant's arrest.

It was further argued on behalf of the appellant, that his defence was not an ambush, as he had all along raised the issue of a second person arrested alongside him and whom he claimed died in custody due to beatings by police. Also that during the trial, the appellant had shown a willingness to call witnesses, but being in custody made this difficult and he only closed his case because he wished to finalise this matter.

Mr. Aboubaqr also submitted that the trial magistrate shifted the burden of proof onto the appellant by finding that appellant should have called the landlord, saying it was not up to the appellant to call further evidence and so that finding by the trial magistrate was a misdirection – it was enough simply for the appellant to raise doubts to the prosecution case.
He argued that it was up to the trial magistrate to invoke the provisions of section 150 Criminal Procedure Code and call material witnesses mentioned in the matter whether the appellant called them or not, and that such failure resulted in a miscarriage of justice.

Mr. Aboubaqr further argued that the trial magistrate was bound to accept the defence and acquit the appellant and if new issues were raised by the defence then prosecution had a remedy under section 212 Criminal Procedure Code to call evidence to reply to or rebut the appellant's evidence.
It is also argued that the participation of the APs in arresting the appellant raises doubt as to the genuineness of the AP's evidence saying the Act provides for regular police to conduct arrest.

Mr. Aboubaqr criticized the conduct of the investigating officer, saying he simply relied on what the APs told him and conducted no investigations whatsoever nor did he even bother to interrogate the landlord, members of the public or tenants and that material evidence in the form of the OB was not produced to rebut appellant's assertion that there were two of them arrested from the said house and such failure should be resolved to the benefit of the appellant. Mr. Aboubaqr's contention is that police were hiding material evidence which would have assisted the appellant and that the Government Analyst did not testify.

As regards infringement of the appellant's rights, Mr. Aboubaqr points out that appellant was arrested on 11th September 2007 and taken to court on 13th September 2007 and this violated his Constitutional rights – he cited the case Cr. Appeal No. 14 of 1972 reported at pg 475 in EALR (1973) to support the contention that the trial magistrate should have considered whether the evidence by appellant raised any doubt as to his guilt.

The appeal was opposed and Mr. Ogoti submitted on behalf of the State that appellant's presence in the room and the recovery of the bhang therefrom in his presence was not a contested issue. He argued that prosecution called all the relevant witnesses and no prejudice was occasioned to the defence in failing to call the witnesses mentioned by the appellant since prosecution did not even stand in the way of the defence in calling those persons as defence witnesses. Mr. Ogoti points out that if the defence did not use the opportunity to call them; then that cannot be visited on the prosecution.

As for shifting the burden of proof, it is Mr. Ogoti's contention that the trial magistrate tried to give directions to appellant after he hurriedly closed his case notwithstanding the absence of his advocate, saying appellant was at liberty to call the witnesses mentioned, to corroborate his defence but appellant did not make use of that opportunity and it is not demonstrated what kind of prejudice appellant suffered.

As regards his arrest by APs, Mr. Ogoti contests the assertion made by appellant's counsel saying the officers acted within their mandate as they are members of the police force and have powers of arrest, and their evidence corroborated one another very well. It is pointed out that the question of the Government Analyst not having testified was a non starter as the very counsel now appearing for the appellant, is the one who informed the trial magistrate that the defence had an objection in the report being produced without calling the maker – I agree!!
As regards the definition of trafficking, Mr. Ogoti submitted that there are several requirements in that definition and in the present situation what was required was storing, and all the witness' evidence proved the storage as the search led to the recovery of the substance which was inside a box.

Regarding violation of appellant's rights it is the State's position that the cited cases referred to do apply and if such violation is proved, then the remedy has in compensation under provisions of section 72(6) of the Constitution of Kenya.

Appellant's presence in the room, recovery of the substance are not in issue. The recovered substance was examined and confirmed to be bhang – Mr. Aboubaqr must stop playing musical chains blowing hot and cold at the same time. He is the one who told the trial magistrate that the Government Analyst's report could be produced without calling the maker, and he cannot now turn around and claim such production was irregular.

Appellant claimed the house belonged to one Mzee Chome – whose existence was not established – he could well be a creation of the appellant.
The question of calling a landlord/other tenants to confirm whether appellant was the owner of the premises did not in my view weaken the prosecution case – the police found appellant de facto within the premises and they denied having arrested someone else, in any case there was no evidence that appellant was a tenant – he could well be the owner – in which case calling of a landlord would not arise – the prosecution proved hat appellant had been found within the premises alone and the burden of showing that he was there as a visitor shifted from prosecution to appellant at that point. The same goes for the submission that other tenants should have testified – there is no evidence that there were other tenants in that building and one wouldn't expect prosecution to create characters who never existed in the first place just so as to have so called independent witnesses.

I fail to appreciate Mr. Aboubaqr's contention that APs do not have powers to arrest – that argument is misguided.
Was the charge of trafficking as defined under the Act proved?
The definition of trafficking under the Act includes:

> ***"Importation,exportation …supplying, storing,….conveyance…of a narcotic drug or psychotropic substance."***

That definition was catered for in the evidence adduced considering the quality of the drug and where it was found.

Appellant was arrested on 11-9-07 and taken to court on 13-9-07 – a lapse of two days. Under section 72(3)(b) of the Constitution he should have been presented to court within 24 hours of his arrest – so he ought to have appeared in court on 12-9-07 – which means there was actually one day's delay. To my mind that delay was not unreasonable, and in any event does not justify an acquittal – he finds remedy under section 72(3) (b) of the Constitution of Kenya and may sue for damages.

The upshot is that there is no merit in the appeal and the same is dismissed.

Delivered and dated this **15th** day of **February 2010** at Malindi.

H. A. OMONDI
JUDGE