REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 73 of 2009

JOSEPH IRUNGU MUTURI……..…..……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal from the original conviction and sentence of F. M. Kombo Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No.260 of 2008 dated 31st March 2009 at Mukurweini)

JUDGMENT

JOSEPH IRUNGU MUTURI the appellant herein, was tried on a charge of being in possession of *cannabis sativa*, contrary to *Section 3 (2)* of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994. The particulars of the offence are that on 18th May 2008 at Kaharo Village in Nyeri District within Central Province, was found being in possession of one stone and six rolls of *cannabis* which was not in form of medicinal preparation. After undergoing a trial, the Appellant was convicted and sentenced to five (5) years imprisonment. Being aggrieved, he is now before this Court on appeal.

On appeal, the Appellant, put forward the following grounds in his Petition:

1. ***That the trial magistrate erred in law and facts in failing to consider that the Police officers and security youths broke onto my house without my presence they found nothing apart from my radio cassette which they forfeited.***

2. ***That the trial magistrate erred in law and facts in failing to consider that the Police officers had no recovery forms to show the items found in my house nor that they did not have a search warrant neither they did not request for any one from outside to come and witness the search.***
3. ***That the trial magistrate erred in law and facts in failing to find that the same Police officers had asked me for five (5,000) thousand shillings as bribe so that they set me free failure to that they will charge me with three (3) sticks of bhang.***
4. ***That the trial magistrate erred in law and facts in failing to consider that during cross-examination, the Police officers admitted that they do keep bhang in the Police Station's store. My Lordship, this could be one of them planted on me as a clear evidence to frame me with this offence.***
5. ***That the trial magistrate erred in law and facts in failing to consider that the sub-chief, who was present during the breaking of my house was not summoned before the court to give his evidence of how the items in question were***

found in my house.

6. ***That the trial magistrate erred in law and facts in failing to dig out in deep and come into a conclusion that whether there was a standing grudge between the sub-chief, security youths and I or not.***
7. ***That the trial magistrate erred in law and facts in failing to consider that I was detained in Police custody for forty eight (48) hours without taken to court for no apparent reason.***
8. ***That the trial magistrate erred in law and facts by relying on prosecution witnesses evidence without asking himself why the person who was arrested and released with the connection of the said bhang, my lordship, the whole of this case had so many doubts in it.***

When the appeal came up for hearing, the Appellant relied on his grounds of appeal and the written submissions. Miss Ngalyuka, learned Senior State Counsel, opposed the appeal. The main issue which was ably argued regards the Appellant's Constitutional rights having been breached. It is the submission of the Appellant that he was held in Police custody for two (2) days without any justification before being taken before a Court of law. Miss Ngalyuka indicated that she was unable to secure a replying affidavit from the investigating officer to explain the delay. Miss Ngalyuka urged this Court to rule that the Appellant should have raised the issue early enough before the trial court to enable the State explain. The record shows that on 10th February 2010 Miss Ngalyuka applied for leave to file a replying affidavit to explain the reasons which made the Police delay for two days to take the Appellant to Court. She was given ten (10) days to do so. When the appeal came up for hearing on 4th May 2010, Miss Ngalyuka expressed her frustrations in getting a replying affidavit from the investigating officer. The only inference I can make is that the Police had no good reasons to give to justify the delay in taking the Appellant to court. The record shows that the Appellant was arrested on 18th May 2008. He was taken to court for plea on 20th May 2008. To be fair to the Police, I think they delayed for one day to take the Appellant to court. What I know is that the court has the discretion to excuse a delay of say one or two days where there was a good explanation. It is unfortunate in this case because the Police have flatly refused to tender an explanation for the delay. I find that the Appellant's constitutional rights under *Section 72 (3) (b)* of the Constitution as having been breached. The failure by the prosecution to explain the delay, has given the Appellant a leeway to exit from prison. It is trite law that where the Constitutional breach has been found, the Applicant is entitled to an acquittal irrespective of the strength and nature of evidence presented in support of the case against the Appellant. Having come to the above conclusion, I will not bother to reconsider the case that was before the trial court. In the end, the appeal is allowed. The conviction and sentence are hereby quashed an

d set aside respectively. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 9th day of July 2010.

J. K. SERGON

JUDGE

In open court in the presence of the Appellant and Mr. Makura Litigant State Counsel.