



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 29 of 2009

(From original conviction and in Criminal Case No. 889 of 2008 sentence of the Senior Resident Magistrate's Court at Kilifi before Hon. J. M. Nduna – SRM)

SALIM SAID MAKIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Salim Said Maka (the appellant) was convicted on a charge of being in possession of narcotic drugs contrary to section 3(1) as read with section 2(d) of the Narcotic and Psychotropic Substances Control Act No. 4 of 1994.

The appellant denied the charge and after due hearing in which prosecution called two witnesses and appellant was the only defence witness, he was convicted and sentenced to serve 5 years imprisonment.

The prosecution case was that on 25th October 2008 at Kibaoni area, Kilifi District, the appellant was found in possession of narcotic drugs to wit 234 rolls of bhang, in contravention of the Act.

Pc Nicholas Mango (PW1) and Pc Francis Kiru (Pw 2) were at Kibaoni matatu stage when they saw some people loading suspicious luggage onto a vehicle, through the window. The police officers intervened and searched the luggage which was placed at the back seat; and they found that it contained bhang. They arrested the owner of the luggage (who was a passenger and was just boarding the motor vehicle) – it was the appellant.

On cross-examination PW1 stated:

“You are the one who was loading the bag to the vehicle”

(Pw 2) Pc Kiru corroborated PW1's evidence and is the one who prepared the exhibit memo form and forwarded samples of the recovered material to the Government Chemist. He produced the report by the Government Chemist as exhibit – the report confirmed that the recovered material was cannabis sativa and could be included in the definition of narcotic drugs.

PW2 on cross-examination stated:

“I saw you moving the bag from one vehicle to another. I saw you myself carrying the bag and loading it to the matatu.”

The appellant gave unsworn evidence in which he said he was travelling from Mombasa to Malindi and when he got to Kilifi, he transferred from the vehicle to another one as the conductor informed him that he had arranged with the other matatu to take him to Malindi at no extra cost. He was surprised when he was arrested. His parting shot was:

“this is not my bhang”

The trial magistrate considered the evidence and held that appellant’s defence in fact confirmed what PW2 had said, that appellant transferred from one vehicle to another and it followed that he transferred together with his luggage.

The trial magistrate was satisfied that appellant was positively and clearly identified as the owner of the disputed luggage which on analysis was found to be bhang.

Appellant contests these findings saying that

- (1) Prosecution witnesses were not called to court.
- (2) No independent witnesses were called yet he was arrested in a public place.
- (3) PW1 and PW2’s evidence did not corroborate
- (4) The report by the Government Chemist was not produced by the author.
- (5) It was not clear the exact position where the bag was recovered from.

The appellant filed written submission saying a prosecution witness listed in the charge sheet, did not testify. Further that there must have been people who saw him loading the luggage, yet none was called as a witness.

Appellant also argues that the motor vehicle registration was not given.

He also questioned why the court admitted the Government Analysts’ report without the maker being called.

He wonders how the luggage turned out to be connected to him, yet that was a public vehicle with passengers and insists that the evidence is not clear as to where the luggage was found. Appellant also submitted that PW1 and PW2’s evidence was not corroborated and did not prove the charge.

The appeal is opposed – Miss Waigera on behalf of the State submitted that the evidence supported by the charge, and although the Government Analyst’s report was produced by someone other than the maker, it confirmed that the recovered material were narcotic drug.

Further that appellant’s defence was a mere denial.

The outstanding feature in the proceedings before the trial court, was the production of the Government Analyst’s report, by the police officer. No reasons were given to the trial court, no preliminary grounds were raised on production by one who was not the maker, no inquiry as made to find out from appellant whether he had any objection to the report being produced by a police officer, who obviously was not the one who carried out the analysis nor compile the report which the trial magistrate relied on in holding that the recovered substance was a narcotic drug.

Generally documents are admitted as evidence, upon production by the maker, the person to whom it is addressed or copied to – but section 33 of the Evidence Act gives exception – yet it does not show on the record that any reasons were given as to why the Government Analyst could not be called to attend court and produce the report, and the police officer apparently just produced the report as a matter of course. I think this was prejudicial to the appellant. So is he entitled to an acquittal? Taking into account the totality of the evidence, and the period appellant has spent in prison, I am persuaded that justice will be done by quashing the conviction and setting aside the judgment, and directing that the matter be retried before a magistrate

in Kilifi other than the one who handled the matter initially. I direct he appears before Kilifi Magistrate on 22/07/10 for retrial directions.

Delivered and dated this **8th** day of **July 2010** at Malindi.

H. A. Omondi
LADY JUSTICE