



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 75 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 315 of 2005 of the Resident Magistrate's Court at Wundanyi: F.K. Munyi – R.M.)

MWAKUGHU MWAKIO APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **MWAKUGHU MWAKIO** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Kwale Law Courts. The Appellant who was the 1st accused in the lower court case faced four charges as follows

COUNT NO. 1

Burglary contrary to S. 304(2) and Stealing contrary to Section 279(b) of the Penal Code

COUNT NO. 2

Breaking into a Building and committing a Felony contrary to Section 306(a) of the Penal Code

ALTERNATIVE CHARGE

Handling stolen goods contrary to Section 322(2) of the Penal Code

COUNT NO. 3

Breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.

COUNT NO. 4

Cultivating Cannabis Sativa contrary to Section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances Control Act 1994

The Appellant denied all the charges. The prosecution called a total of eleven (11) witnesses in support of their case. **PW2 EMMANUEL MAGHENYI** (the complainant in Count No. 1) told the court that on the night of 20th June 2007 at about 9.30 p.m. unknown people broke into her house by cutting the padlock and stole three chickens and 20 iron sheets and 5 caps. **PW9 JOSEPHINE AUMA** gave evidence that on 4th June 2007 at 8.00 p.m. her husband Reuben Kisaghi called to inform her that their Shomoto bar had been broken into. Various items including a mattress were stolen. Both thefts were reported to the local authorities and a search was mounted for the missing items. The search led to the house of the Appellant wherein a mattress was recovered. The searchers also recovered iron sheets in the Appellant's shamba. The matter was reported to police who arrested and arrested accused and later charged him in court.

At the close of the prosecution case the Appellant was found to have a case to answer and was put on his defence. He gave an unsworn defence in which he denied all the charges he faced. On 30th July 2008 the learned trial magistrate delivered her judgement. She acquitted the Appellant on counts 1, 2, and 3. She however convicted him on the alternative charge of Handling and on the 4th Count of Cultivating Cannabis Sativa. Being dissatisfied with the court's decision the Appellant filed this appeal.

The Appellant who was not represented at the hearing of his appeal relied on his written submissions which had duly been filed in court. **MR. MUTETI**, learned State Counsel conceded the appeal with respect to the alternative charge but he urged the court to confirm the Appellant's conviction and sentence for the fourth charge.

I have carefully perused the record of the trial and I am quite in agreement with the learned State Counsel's concession of the appeal on the alternative charge. It is alleged that a mattress was recovered in the Appellant's house. A mattress is an ordinary household item which I wager will be found in virtually every home in this country. **PW9** did not positively identify it as her mattress – indeed she said the mattress she lost was pink yet the one police recovered was grey. I thus quash the conviction of the Appellant on this charge of Handling. The subsequent four (4) year sentence is also set aside.

With respect to Count No. 4 there is clear evidence from the police officers and the villagers who went to search the Appellant's house **PW1, PW4, PW6, PW7** and **PW11** all testify that they found a bhang plant at the Appellant's door which they uprooted. The plant was taken to the Government Chemist for analysis. **PW12 SENIOR SERGEANT DUNCAN WAWERU MURAGE** of Wundanyi Police Station did with the consent of the Appellant produce the report which indicated that the plant was Cannabis Sativa. All the witnesses identify the recovered plant in court. I do find the evidence on this count to be both consistent and overwhelming. I do therefore uphold the Appellant's conviction on this charge. The two (2) year sentence imposed for this charge is also upheld. To that extent this appeal fails and the Appellant will continue to serve this two (2) year sentence to run from the date of his first conviction by the lower court.

Dated and Delivered in Mombasa this 6th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Appellant in court
Mr. Onserio for State

M. ODERO
JUDGE
6/10/2010