REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 109 OF 2009

ALEXANDER NJERU NJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant herein was a remand prisoner at the Embu G.K. Prison in the months of January - February 2007 in a matter that has not been disclosed. According to PW1 a prisons warder attached to the prison, he had received a tip off that the Appellant herein used to sell bhangi to the remandees. A search was arranged and all the remandees were subjected to a major search on 15.01.07. According to PW1 – Warder James Muchiri Nthenge, he went straight to where the appellant was, PW2 Warder Wako Boru joined him. They searched the Appellant and they recovered 3 stones of bhang and 3 rolls tied with a string around his body and covered with a shirt he was wearing. They arrested him and took possession of the bhang. He was later escorted to Itabua police station where he was charged with the offence of Trafficking in Narcotic Drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. He was brought to court for plea on 22/02/2007. He denied the charge and the matter went to full trial. PW1 and PW2 the prison warders narrated to the court how they carried out the search and how they recovered the bhang from the Appellant.

The bhang was escorted to the Government Chemist for analysis and it was confirmed to be drug and psychotropic substance as defined in the relevant Act.

In his defence, the Appellant denied being found in possession of the bhang. He said that the case was fabricated against him by PW1 who had threatened to teach him a lesson. His 2 witnesses who were fellow remandees testified that nothing was recovered from the Appellant during the search. The learned trial magistrate who unlike me had the opportunity to see and hear the witnesses found the prosecution evidence overwhelming. She found the charge proved beyond any reasonable doubt and proceeded to convict the Appellant. He was sentenced to 5 years imprisonment but he was given an option to pay a fine of KShs.80,000.

Being aggrieved by the said conviction and sentence, he filed this appeal. He relies on 6 home made grounds of Appeal which I do not find necessary to repeat for purposes of this Appeal.

I have nonetheless considered the same along with the appellant’s written submissions and the submission in response thereto by the learned counsel for the state. One of the grounds raised by the Appellant was

that he was taken to court over 24 hours after his arrest. The insinuation is that his constitutional rights were violated and he is therefore entitled to an acquittal. That ground however flops for 2 reasons. Firstly, as stated earlier, the Appellant was a remandee and was therefore in lawful custody. The 24 hours limitation period did not therefore apply to him as the same was applicable only to somebody whose right of liberty was violated.
Secondly, the Court of Appeal has now settled the law in this area and put an end to the circus surrounding the interpretation of Section 72(3) of the now repealed constitution. I call it a circus because there were several interpretations given to it by the Court of Appeal.

The current position as laid down in the most recent case of **JULIUS KAMAU MBUGUA VS REPUBLIC (2010) eKLR** is that a person whose rights under that provision are violated is not entitled to an acquittal but can sue the state for compensation by way of damages. The other grounds were generally that the learned trial magistrate convicted on contradictory evidence and also she disregarded the evidence of the defence witnesses.

I have gone through the evidence adduced before the trial court. I did not find the evidence of PW1 & PW2 contradictory at all. I am also satisfied that the learned trial magistrate did consider the defence evidence as clearly shown in her judgment. She chose to give more credence to the prosecution witnesses.

As stated earlier on, I did not have the advantage of seeing the witnesses testify and could not therefore assess their demeanor. I have therefore no basis for faulting the finding of the learned trial magistrate. She heard the direct evidence, assessed the demeanor of the witnesses as they testified and formed the opinion that the prosecution witnesses were more credible than those called by the Appellant. This was a finding of fact which I have no reason to interfere with.

For the foregoing reasons, my finding is that the conviction of the Appellant was safe and based on the law and evidence that was presented before the learned trial magistrate. On the sentence, if I were to interfere with it I would only enhance it and that would be to the disadvantage of the Appellant herein. I desist from doing so. I nonetheless find the Appeal devoid of merit and dismiss the same.

W. KARANJA

JUDGE

Delivered, signed & dated at Embu this 18th of November 2010

In presence of:- Appellant & Ms. Matiru for the state.