



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1009 of 2002

FRANCIS KIARIE MUHIAAPPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the judgment of Resident Magistrate Mr. C. V. Odembo dated 10th September, 2002 in Criminal Case No. 3546 of 2001 at Githunguri Law Courts)

JUDGMENT

The appellant, *Francis Kiarie Muhia*, faced a charge in two counts, namely: (a) being in possession of narcotic drugs contrary to s. 3 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994) as read with s. 2 (a) of the same Act; and (b) assaulting a Police officer contrary to s. 253 (b) of the Penal code (Cap. 63, Laws of Kenya).

The particulars for each of the charges, respectively, were as follows:

- (i) the appellant, on 2nd December, 2001 at Kigumo Trading Centre in Kiambu District of Central Province, was found being in possession of one roll of *bhanga*, in contravention of the said Act;
- (ii) the appellant, on the said date and at the said place, unlawfully assaulted No. 50927 *Police Constable Mutunga*, a Police officer, in the due execution of his duty, thereby occasioning him actual bodily harm.

Police Constable Linus Mutunga (PW1) was in the company of *Police Constable Kiminza* (PW2) at about midnight, on 2nd December, 2002 and carrying out patrols; and while so engaged, they were tipped-off that there were, in the neighbourhood of Starehe Bar, two persons who were smoking *bhanga*. PW1 and his colleague arrested one of the two suspects; the other escaped. But there was a scuffle in which the arrested suspect (appellant herein) knocked down PW1, as he resisted arrest. With the help of his colleague, PW1 arrested the appellant, and delivered him at the Police station. On the appellant, PW1 found a roll of *bhanga* which was partially smoked.

PW1's testimony was corroborated by PW2 who also said the appellant had attempted to resist arrest, and had attacked PW1 with his fist. It was PW2's testimony that the *bhanga* recovered was analysed by Government Chemist and found to be *cannabis sativa*: the chemist's report was produced as an exhibit.

In his defence, the appellant testified that he was at Kigumo Trading Centre and "very drunk" at the

material time. He said in his sworn defence that he had a lot of money in his pocket on the material night, and he got into a corridor at the bar, to find his way home, for safety, but then met PW1 who attempted to arrest him. He denied having assaulted PW1; and he denied having had *bhang* in his possession. He said he resisted arrest, but PW1 overpowered him and arrested him. The appellant said he had no *bhang* on him, and that he did not assault PW1.

The learned Magistrate's assessment of the evidence went as follows:

"I did not find as true, the evidence of the accused as to why the Police would single him out of a [large] crowd, and more so, at night. I did not see why the Police would come to Court to lie about the accused. *Mutungu* was known to the accused, but there is nothing on record to show that a grudge existed. The accused did admit that he struggled with PW1 but denied having assaulted him. We have it on record that [the] accused was smoking *bhang* which dropped when he was confronted by the Police. A Government Analyst's report [shows] that the substance the accused had dropped was *bhang* I believe the prosecution version and reject the defence. The [accused] said he had been very drunk on the material day. His version may not [represent] the truth of the events of that day."

The learned Magistrate found the appellant herein guilty as charged in both counts; convicted him in respect of both counts; committed him to jail for three years on the first count, and one year on the second count.

In the petition of appeal filed by M/s Nyangoro & Co. Advocates, it is contended that: the trial Court should have rejected the prosecution evidence; that the appellant had not been found with *cannabis sativa* at the time of arrest; that the two prosecution witnesses were both Police officers and were not independent; that those who had led the Police officers to effect the appellant's arrest had not been called as witnesses; that the Police officers had planted the incriminating evidence on the appellant; that the prison terms awarded were manifestly excessive; that the appellant had been given no opportunity to make a mitigation address; that there had been a miscarriage of justice.

At the hearing of this appeal, learned counsel *Mr. Makura* who appeared for the respondent, indicated he would concede to this appeal, on a technicality: the prosecution had been led by *Corporal Ongeru*, who was not a qualified prosecutor, by virtue of ss. 85 and 88 of the Criminal Procedure Code (Cap. 75, Laws of Kenya) as these sections stood. The testimony of both prosecution witnesses, and of the appellant herein, had been taken when it was *Cpl. Ongeru* conducting prosecution; and the effect, counsel urged, was that the trial was a nullity.

Learned counsel asked the Court to order a *retrial*, as there was overwhelming evidence against the appellant, and prosecution witnesses were available, and a *retrial* would cause no prejudice to the appellants. The appellant had been subjected to two sentences, one for three years, and the other for twelve months; and he has all along been on *bond pending appeal*.

For the appellant, learned counsel *Mr. Getanda* submitted that *retrial* would be an "abuse of the process of the justice". He urged that the charge-sheet was defective, and that on this account, *retrial* cannot be ordered. He said the charge-sheet had not given certain details, such as time of arrest.

Learned counsel *Mr. Makura* has rightly urged that the trial proceedings had a procedural defect, such as must render them a nullity. The only remaining question is whether *retrial* should be ordered. *Mr. Makura* urges that there is overwhelming evidence, which will probably lead to a conviction; but learned counsel *Mr. Getanda* contests this. *Mr. Getanda* raises the somewhat curious proposition that a *retrial* would be "an abuse of the process of the Court". I think he is wrong on that point; for *retrials* are ordered only as directed by the Court, after considering well recognized principles of law: *Ahmed Dharamsi Sumar v. Republic* [1964] E. A. 481; *Pascal Clement Braganza v. R.* [1957] E. A. 152; *Musila Muli v. Republic*, Machakos High Ct. Crim. Appeal No. 65 of 2003.

The principle to guide this Court in this matter has been thus summarized, in *Lenkai Sane Ole Kampei & Another v. Republic*, Nairobi High Ct. Crim. Appeal Nos. 227 & 230 of 2005 (Consolidated):

“From the authorities, therefore, it is for certain that the responsibility lies with this Court to sense the gravity of [a] factor which nullifies a concluded trial; to have a feel of the weight and character of the evidence available; to take due account of any vital issues of administration of justice; to bring into the equation a sense of justice for the accused persons; and to take into account any weighty and relevant matters, as a basis for determining whether or not a retrial should be ordered in a particular case”.

The evidence on record shows an offence to have been committed; and there is a constitutional obligation resting on the office of the Attorney-General (s. 26 of the Constitution), to keep watch on the commission of offences, and to institute prosecution, for the control of crime, in the public interest.

I have been unable to see any consideration of justice towards the appellant, in this case, which would dictate that he be not prosecuted for the offences in question.

I hereby declare the proceedings before the trial Court and the judgment of that Court null, and quash them accordingly. I order that the matter shall be the subject of retrial, at Githunguri Law Courts. I will direct as follows:

- 1. This matter shall be listed for mention before the presiding Magistrate at Githunguri Law Courts on 19th February, 2009 ? for directions for retrial before a Magistrate other than the one who first heard the case.*
- 2. The bond pending appeal which had been granted to the appellant shall henceforth be cancelled; and any question of bond/bail shall be determined at the first level by the trial Court.*
- 3. Retrial shall be conducted on the basis of priority- scheduling of hearings.*

Orders accordingly.

DATED and DELIVERED at Nairobi this 12th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Appellant: Mr. Getanda

For the Respondent: Mr. Makura