



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Criminal Appeal 54 of 2007**

**DENNIS OTIENO ..... 1<sup>ST</sup> APPELLANT**

**KEVIN ANUNDA ..... 2<sup>ND</sup> APPELLANT**

**PHILIP NYACHENGA ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The appellants Dennis Otieno, Sammy Kaitano and Kelvin Anunda were the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons respectively in the Chief Magistrate's Criminal Case Number 6310 of 2006 charged with being in possession of cannabis sativa contrary to section 3(2) of the Psychotropic Substance Control Act Legal Notice Number 4 of 1994. The particulars were that on the 17<sup>th</sup> day of September, 2006 at Langas Estate in Uasin Gishu District within Rift Valley Province were jointly found in possession of eleven (11) stones weighing 5 kilograms of bhang which was not in its medicinal preparation form. The first accused was Philip Nyachenga who pleaded guilty to the charge and was convicted and sentenced to serve seven years imprisonment. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants pleaded not guilty but at the close of the prosecution and defence case they were found guilty as charged and accordingly convicted and sentenced to serve seven years imprisonment. They each filed separate appeals being appeal numbers 54, 53 and 55 all of 2006 all of which were consolidated and heard together under pilot case number 54/2006.

The grounds of Appeal for Dennis Otieno are that he never pleaded guilty at trial, that the rightful owner and bearer of the bhang was the 1<sup>st</sup> accused and who pleaded guilty; that he had no links with the said 1<sup>st</sup> accused and he never led the police to arrest the 1<sup>st</sup> accused and that the two ladies arrested on 17/9/06 in connection with the case were not called as prosecution witnesses nor were they charged. The grounds of appeal for Sammy Kaitano are that he never pleaded guilty to the charge; that the sole owner or the bearer of the opium was the 1<sup>st</sup> accused who clearly admitted possession of the drugs; he had no links or connection with either the 1<sup>st</sup> accused or the opium and that he was not arrested with the exhibit or near the exhibit to connect him to the drug.

The grounds of appeal for Kevin Anunda were that he never pleaded guilty to the charge; the sole owner and bearer of the opium was 1<sup>st</sup> accused who pleaded guilty; the honourable magistrate never considered his defence of denying possession of the drug and having no links with the people he was arrested with and that he was never arrested with the opium and no evidence was adduced to directly implicate him in the case. The appeals were opposed by the state.

The prosecution called three witnesses all of whom were police officers. PW1 told of how he and 2 other colleagues received information from an informer on some four persons who were taking bhang (cannabis sativa) in a house in Kisumu Ndogo Eldoret. The trio proceeded to the house and on peeping through a hole on the door they saw four men preparing the bhang by removing the leaves and packing them in polythene papers. The witness and his colleagues knocked on the door and one of the four opened the door. On entering the house the witness and his colleagues found bhang on the table and some more of it in a blue metal box. The witness said they called duty officer who sent to them a Police Landrover in which they carried the four and the bhang and blue metal box. In the metal box there was a knife, a diary and a pair of slippers all of which were produced in evidence. A sample of the bhang was taken to the Government Chemist for testing. He produced the report from the Government Chemist. He said the diary contained telephone

numbers of persons suspected to be customers of the four and all the transactions. Cross examined by the 2<sup>nd</sup> accused the witness said that the information he got was that the house in which they were arrested from was rented by all four of the accused persons. The 2<sup>nd</sup> accused asked that OB of the date of arrest that is to say 17/09/2006 be produced in court. The same was produced in court later in the day and the 2<sup>nd</sup> accused proceeded with his cross examination. The two girls in the Police Landrover at the time of the arrest of the four accused persons were not arrested by the witness. Cross examined by the 3<sup>rd</sup> accused the witness said he was the arresting officer who had arrested the four from the same house and he did not know the accused before the arrest. He said that the two girls were arrested by the duty officer for a different offence. In answer to the 4<sup>th</sup> accused the witness stated that he arrested all four of them in the same house and not from a road. PW2 gave evidence that he was with PW1 when they received information from the informer and proceeded together to the house they were directed to from which they arrested the four accused persons. On cross-examination by the three accused the witness said they arrested all the four from the same house. He said that the girls in the landrover are not the ones who showed the police officers the house from which they arrested the accused persons. PW3 was the investigating officer. He was the duty officer on the date of arrest. While on separate duty on the material night of 17/09/2006 he was called by PW1 and PW2 who told him that they had arrested four suspects with bhang. He proceeded to where PW1 and PW2 were and on the way arrested two ladies for the offence of loitering. On arrival he found the witnesses with four suspects and the witness recognized Accused Number 2 and 3 as persons he had arrested on previous occasions for having committed many crimes. He said he took the accused persons to the police station in the landrover and booked them and prepared the charge sheet with the offences accused's were facing. On cross examination by the accused he said that the two women were arrested for loitering and had nothing to do with the accused persons or the charges they were facing. He denied that the 3<sup>rd</sup> accused was arrested from his home and admitted that it was his first encounter with the 4<sup>th</sup> accused. He said he took a sample of the bhang and took it to the Government Chemist for testing.

In his defence the 2<sup>nd</sup> accused said he was arrested outside a butchery by police officers. He was with a girl called Lily and another girl. He said the policemen beat him up asking him to show them his friend the first accused herein. He said that he took them to the 1<sup>st</sup> accused person's house and that is where the officers after a search they found the exhibits produced in court. He said that was when the first accused was arrested and who later admitted to the charge.

Accused number 3 who like the 2<sup>nd</sup> accused gave unsworn statement said he was on his way from running his parents' errand when he found five policemen beating accused No. 2 and they asked accused No.3 where accused one was. He said he did not know and he was beaten, handcuffed and taken to the police station and charged with the offence.

Accused No. 4 also gave unsworn statement. He said he had been sent to his aunt's place to collect a pressure lamp when at Lancaster Bar and Restaurant he found police officers beating the 2<sup>nd</sup> accused. He said a lady accompanying the 2<sup>nd</sup> accused showed them the house of the 1<sup>st</sup> accused whom they were looking for. They collected bhang from that house and then charged the accused persons with the offence.

That is pretty much what the appellants reiterated in their appeals. I have now carefully evaluated the evidence. I find that the evidence of the prosecution witnesses was consistent and reliable and the trial magistrate was properly directed when she accepted it. All the three appellants while denying that they were with 1<sup>st</sup> accused in the house admit to knowing first accused and further that the exhibits produced in court were all found in that house and they were present when the exhibits were found. Their belated disassociation with the 1<sup>st</sup> accused was rightly rejected by the trial court. 2<sup>nd</sup> accused did not call his friend Lily; if ever there was a Lily, to prove that he was not in the house preparing bhang and where the police say they arrested him from. 3<sup>rd</sup> and 4<sup>th</sup> accused persons did not call evidence to prove that they were not arrested from the house with accused number 1. The magistrate was right in rejecting the appellant's testimonies as made up-stories as indeed that is what they appear to be, made up stories. It is true as the trial magistrate pointed out that the prosecution evidence was indeed corroborated by the accused own testimonies in very material fact. The sample sent to the Government Chemist was tested and found to be cannabis Sativa. I find that the three appellants were correctly convicted. Their appeals do not raise any issue of merit and the same are for dismissal and they are accordingly dismissed.

Orders accordingly.

**DATED AT ELDORET THIS 27<sup>TH</sup> DAY OF MAY, 2009.**

**P.M. MWILU**

**JUDGE**

**DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF MAY, 2009.**

**M.K. IBRAHIM**

**JUDGE**

**In the presence of;**

**Court Clerk**

**Appellants 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup>**

**Counsel for the state**