



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 156 of 2008

KIMARU GITIMUAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original Conviction and Sentence of the Senior Resident Magistrate's Court at

Mukurwe-ini in Criminal Case No.165 of 2007 by F. KOMBO – SRM)

J U D G M E N T

The appellant **Kamaru Gitimu** was arraigned before the Senior Resident Magistrate's court at Mukurweini on four counts. The first count was being in possession of cannabis sativa contrary to *section 3 (2)* of the Narcotic Drugs and Psychotropic Substances Control Act. It was alleged that on 23rd February, 2007, at Gachiro village, Nyeri District, he was found with 52 stones of the drug valued at Ksh.10,400/=, 170 rolls of the drug valued at Ksh.1700 and 5 kilograms of bhang plant material. The drug was not in medicinal preparation.

In count 2, the appellant was charged with the offence of resisting arrest contrary to *section 253 (a)* of the Penal code whose particulars were that on 22nd February, 2007 at the same village and District, he resisted arrest by No.65897 **P.C. Joseph Kamau**, and No.8435 **P.C. Lees Muriuki**, having been informed of his said arrest for that offence of being in possession of bhang.

In count 3, the appellant was charged with the offence of assaulting a police officer contrary to *section 253 (b)* of the Penal Code. According to the particulars, that offence was committed on the same date, place and District. The police officer allegedly assaulted was one **P.C Lees Muriuki** No.84357 in due execution of duty. In the final count, also at the same date and place, the appellant maliciously damaged a Ceska Pistol – Serial No.94434 valued Ksh.50,000/=, the property of Kenya Police Department.

The appellant pleaded not guilty to all the counts and he was duly tried. It is significant to note that the entire prosecution case was presided over by **Hon. Ndururu (SRM)**. However at the close of the prosecution case, a new magistrate, **F. Kombo SRM** took over the case, heard the defence, wrote and delivered the judgment. However in taking over the case, as a foresaid he failed to comply with the mandatory provisions of *section 200* of the Criminal Procedure Code. I will revert to this issue later in this judgment.

According to PW1 **Simon Kibira** Assistant Chief, Gaturia Sub-location, he had received information from a youth that the appellant had bhang in his house. He then proceeded to the appellant's house in the

company of **Robert Kiongo** PW2 also an Assistant Chief, **Wanjohi Kangara** who did not testify, **P.C. Lee Muriuki** PW3, **P.C. Joseph Kamau** PW4 and **P.C. Musachu**. Upon reaching his house, the appellant was called out by PW1 to open the door but he flatly refused. According to the witnesses, the appellant could be seen peeping at them through the spaces in the wall of his house that was made of off-cuts. When they persisted on him opening the door the appellant suddenly opened a window and began to hurl jembe sticks and pangas at them. In the process, the panga injured PW3 **P.C. Lees Muriuki** and his injury was classified as harm by PW4 **Joseph Njoroge Kinyanjui** a clinical Officer who examined him at Mukurweini sub-district hospital. PW5 **P.C. Joseph Kamau** then forced the door of the appellant's house open and on sensing this, the appellant retreated into a bedroom. According to this witness, the appellant then suddenly came out with a sword and charged at him. This was after he heard the police vehicle approaching following a call for reinforcement by PW3. PW5 testified further that when the appellant charged at him as aforesaid, he aimed a blow at him which he blocked using his pistol, which left a mark on it.

According to PW5, he had before that charge, fired a warning shot in the air which did not at all deter the appellant. This forced him to shoot the appellant in the thigh, which immobilized him, enabling the appellant to be arrested.

According to all these witnesses they entered the appellant's house. Inside the bedroom on the bed they found a carton with 52 stones of bhang. Next to the carton were 170 rolls of bhang and 5 kilograms of plant material suspected to be bhang. They seized and packed all these items which were later exhibited before court.

Put on his defence, the appellant stated in unsworn statement of defence that PW1 and his colleagues went to his house to enquire about matters to do with Thunguri coffee factory of which he was compiling names of alleged defrauded members. PW2 alleged that he was bent on inciting members against him and vowed to silence him. He then ordered **P.C. Kamau** to shoot him so that he could be silent. He then took the pistol following the shooting and cut it himself with a panga. He further stated that both the Assistant Chief and **P.C. Muriuki** had informed him that they would frame him with these charges. He stated that when the charges were eventually read to him, he denied them.

The learned magistrate having carefully analysed and evaluated the evidence tendered by the prosecution as well as the defence came to the conclusion that the prosecution had proved its case to the required standard and convicted the appellant on all the four counts preferred. Upon conviction as aforesaid, he sentenced the appellant to 10 years imprisonment each in respect of counts one and one year imprisonment in respect of count two, three and four. The learned magistrate correctly ordered that the sentences aforesaid do run concurrently. The appellant was aggrieved by the conviction and sentence aforesaid. Hence he preferred the instant appeal. However since the appeal was conceded to on a technical ground unrelated to any of the grounds of appeal advanced in the appellant's petition of appeal, it is not necessary to set them out or even consider them.

Mr. Orinda, learned Senior Principal State Counsel conceded to the appeal on the grounds that the incoming magistrate failed to comply with the mandatory provisions of *section 200* of the Criminal Procedure Code when he took over the case from the preceding magistrate. As the evidence on record was overwhelming, the Senior Principal State Counsel sought for an order of retrial. The appellant had nothing to say in response.

The record reveals that the prosecution called a total of 5 witnesses all of whom testified before **V.W. Ndururu, SRM**. For some reason **Ndururu** did not complete the trial. At the defence hearing another Magistrate, **F. Kombo, SRM** took over the case. The new Magistrate, like **Ndururu**, was a Senior Resident Magistrate. This is how the proceedings went on the day he took over the case.

“5/6/08

I will not be reverting back to Mukurweini law courts for part heard. Previous proceeding to be typed. Mr. Kombo SRM to decide on the way forward.

Sigd. V.W. NDURURU SRM

5/6/08

18/6/08

Before F. KOMBO SRM

PROS – IP SIMIYU

C/C – F. NURU

ACCUSED – PRESENT

INTER – ENG/KIK

PROS – This is a defence hearing, it was not concluded by Mr. Ndururu.

Sigd. F. KOMBO SRM

18/6/08

25/6/08

Before F. KOMBO SRM

PROS – I.P. SIMIYU

C/C – NURU

ACCUSED – PRESENT

INTER – ENG/KIK

PROS – Matter is for defence hearing”

That record according to **Mr. Orinda** clearly shows that the magistrate who took over the case did not comply with the mandatory provisions of *section 200* of the Criminal Procedure code, and in his view, therefore, the proceedings of the trial court thereafter were a nullity. I agree. I have earlier reproduced the proceedings of the trial court when the 2nd magistrate took over the hearing of the case. It is clear that no explanation was given to the appellant concerning his rights under that section of the law. It is not shown that after the explanation was given as required the appellant decided that it would be to his benefit if the trial proceeded from where the first magistrate had left. Equally there is no note whether the succeeding magistrate informed the appellant of his right to resubmit witnesses. As it is the decision to proceed from where the previous magistrate had left was the incoming one's for there is no appellant's categorical response implying that he wanted the succeeding magistrate to pick up from where his predecessor had left. In my view therefore, the appellant was not made aware of his rights under *section 200* of the Criminal Procedure code. His trial was thus defective and a nullity and I so hold. I

accordingly allow the appeal against conviction and set aside the conviction and sentence. Relying on the principles set out in the case of **Wilson Washington Otieno & Anor. V Republic (1988 – 1992) 2 KAR 251**, it would not be appropriate or right for me to quash the conviction.

Should I order a retrial? **Mr. Orinda** has urged me to do so. The appellant on his part was however nonchalant. Where an appeal is allowed on the ground that the trial was either defective or a nullity, the usual order to make is one of retrial of the appellant on the self-same charge(s). I think that in all the circumstances of the case, I ought to order a retrial. The offences of which the appellant was convicted were committed on 23rd February, 2007 slightly over 2 years ago. The trial of the appellant in the subordinate court lasted from 5th March, 2007 to 9th July, 2008 when the learned Magistrate convicted and sentenced him as aforesaid. His appeal to this court was filed on 18th July, 2008. It was heard and determined by 30th June, 2009. Thus the appellant cannot claim prejudice due to the length of time that the proceedings have taken. The evidence on record is obviously overwhelming. Should the self-same evidence be tendered at the retrial a conviction is likely to result. The witnesses all were civil servants and I do not think that it will be difficult to trace them for purposes of testifying again. Accordingly I order that the appellant should undergo a retrial before any other magistrate of competent jurisdiction apart from **V.W. Ndururu** and **F. Kombo** who presided over the initial trial. For this purposes the appellant shall be presented before the Senior Resident Magistrate's court in Mukurweini on 10th July, 2009 for his retrial to commence. However in the event that it is only **F. Kombo** who is the magistrate thereat, then the appellant shall be presented before the Principal Magistrate's court, Karatina for the same purpose. Until then however the appellant shall remain in prison custody.

Dated and delivered at Nyeri this 30th day of June, 2009.

M.S.A. MAKHANDIA

JUDGE