REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 132 OF 2006

(From original sentence and conviction in Criminal Case No. 1850 of 2005 of the Senior Principal Magistrate's Court at

Malindi)

MWALIMU KALAMA FONDO ……..……..……APPELLANT

VERSUS

REPUBLIC …….……..……PROSECUTOR

JUDGMENT

Mwalimu Kalama Fondo (the appellant) was convicted on a charge of cultivating cannabis sativa plants contrary to section 6(a) of the Narcotics Drugs and Psychotropic Substances Control Act No. 4o of 1994 and sentenced to seven (7) years imprisonment.

The proseuction's case was that on 16th August 2005 at Shika Mwana village, in Magarini sublocation, he was found cultivating cannabis sativa plants to wit 2000 plants in contravention of the said Act. Appellant denied the charge. Prosecution called a total of four witnesses in support of its case.

The evidence of PW1 IP THOMAS KIMUYU of Malindi police station was that on 16-8-05, the OCPD told him there was information about bhangi being planted in Pokea Mwana Village, Magharini location. PW1 mobilised other police officers and proceeded to the area where they found Mr. Shillingi, the location chief with the appellant. They accompanied them and appellant showed the officers his farm where bhangi plants were found growing alongside maize plants.

PW1 uprooted the bhang and loaded the same in a lorry which brought the plants to Malindi Police station. The plant material was later presented to the government Analyst and the report which was produced in court, confirm the same to be bhangi. Katana Shillingi (PW2), the chief of Magharini location told the trial court that on 16-8-05, he received a phone call from Ap Cpl. Hamisi who said he had gone to a farm and found bhangi planted there – this was as a result of information received from members of the public and he requested PW2 to help look for the owner of the farm. So he arrested the appellant and when police came, they went to his farm. PW2 confirms that the bhangi was growing on the farm, being inter-cropped with maize plants. He helped in uprooting the bhangi. On cross-examination he confirmed that it was the appellant who directed them to the farm saying:

*"**you showed us two farms and indicated that (sic) were yours. You personally took us there"***

Pc Moses Wekesa who accompanied officers to the scene gave evidence which corroborated that of PW1.

PW4 John Kitini Njenga (who is at attached to Government chemist department, Mombasa) informed the trial court, that he received a khaki envelope which contained dry plant material and upon carrying out analysis, he found the same to be cannabis sativa and was included in the Narcotic Drugs and Psychotropic Substances Act. He prepared the report and produced it as exhibit.

In his unsworn defence, appellant told the trial court that he is a fisherman and stays at Msufuni. He narrated about an incident involving one of his children who was bitten by a dog and the chief had ordered the dog owner to pay appellant compensation of Ksh 2000/-. – the dog owner paid Ksh. 2000/- but the chief retained Ksh. 1700/- and since then there has been a grudge between the appellant and the chief. He confirms being asked by the chief and police officers to show them his farm (which he did) and insists the farm only had 170 mango trees, 36 coconut trees and 80 banana trees. The officers went around the farm, appellant did not know what they were looking for, and then they all left in a motor vehicle, stopped midway, left appellant inside the motor vehicle, walked for about 30 minutes and returned with a person and a few green plants, then he was charged with being in possession of bhangi. It was his contention that this charge was framed up by the chief so as to see his children miss education.

In his judgment, the learned trial magistrate found that there was no evidence adduced to prove existence of the grudge alleged to exist between appellant and the chief.

He noted that land at Pokea Mwana area was currently under adjudication and so there was no way prosecution could have produced title documents and was persuaded that the plants found thereon were on land belonging to the appellant. The learned trial magistrate held that there was evidence presented to him, proving that the plants were cannabis sativa.

1. The learned trial magistrate erred in law and fact by failing to consider that the chief and police officers were just led to the shamba and the one who led them was acquitted and police did not make him a witness.

2. The learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses could prove that the said shamba where the bhang was found belonged to him.

3. The learned trial magistrate failed to note that even the area chief could not say whether that shamba belonged to him or not.

4. The learned trial magistrate erred in not keenly observing and examining the report to establish that the remaining plants were bhang.

5. The learned trial magistrate did not consider his defence.

Appellant filed written submissions in which he argued that the verdict of the trial magistrate was based entirely on the evidence of PW2 (the chief) and PW4 (the government analyst) yet there was nothing to prove that he was the owner of the farm. He also pointed out that since the chief had said he received information about the bhang from Ap Cpl. Hamisi, then it was paramount to call the said Hamisi as a witness and that failure to do so was fatal to the prosecution case – he cited the case of **Bukenya and 5 others v Uganda Cr. Appeal No. 68 of 1972** reported in **(1972) EALR at page 549** saying the prosecution must make available all witnesses to establish the truth even if their evidence may be inconsistent and if that is not done, then the court may infer that if such a witness were called his evidence would tend to be adverse to prosecution. He further submitted that the trial magistrate misdirected herself in holding that PW2 knew the accused and his farm, whereas PW2 had testified that "I don't know your residence…I don't know how you got the farm. There are two elders who you stay with and they are the ones who directed AP Hamisi"

He also submits that the officer who had submitted the plant material to the government analyst should have been called to confirm that they were the same ones produced in court and ordered to be destroyed and the failure to call him was fatal to prosecution case.

It was also his contention that there was contradiction in the evidence of prosecution witness as regards the size of the farm and complained that the trial magistrate shifted the burden of proof onto the defence by requiring that he adduce evidence regarding the child who was the cause of the purported grudge between him and the chief.

The appeal is opposed, and Mr. Naulikha for the State submitted that appellant is the one who led police and the chief to the portion of land in question and that what was taken to the government analyst was the same plant which had been received.

As for the size of the land, Mr. Naulikha pointed out that each witness gave an estimate and that contradiction as to the size was not fatal.

I have re-evaluated the evidence, it is true that prosecution did not lead any evidence to show that the land in question belonged to the appellant, yet this must be viewed in the light of the evidence given by the area chief (Shillingi) that the area is currently under adjudication and so there re no title documents. He explained that residents however have portions which they farm and that is known to everyone else apart from this, each prosecution witness who went to the scene consistently stated that appellant is the one who directed them to the farm, saying it was his. The error made by the trial magistrate is in stating that PW2 knew the farm belonged to appellant – there is nothing of the sort of record, but I must also state that appellant's residence need not necessarily be the farm as one may reside in one location and farm in a separate location – that holding the misdirected does not rain a fatal blow to the prosecution case as the issue of ownership and identification was adequately and consistently explained by the prosecution witnesses. Indeed even in his defence, the appellant never denied ownership of that land, choosing instead to describe the vegetation on it.

Is the failure to call AP Hamisi so fatal as to warrant an acquittal? I think the decision in **Bukenya and 5 others v Uganda** has been misapprehended. The principle advanced in that case is that failure to call as witnesses, persons who have been mentioned in a hearing does not automatically mean its because their evidence would have been fatal to prosecution case and therefore call for an automatic acquittal. It is when the evidence called is inadequate as to leave loopholes which could have been filled by the testimony of the person mentioned but not called, that the same becomes fatal and gives room for the court to infer that had such a person been called, he would have given evidence adverse to the prosecution. This is not the case here, indeed all that AP Hamisi did was to alert PW2 that some bhang was growing on a certain farm within his jurisdiction – there is no evidence that Ap Hamisi linked appellant to the farm – the information he gave PW2 was that when he visited the farm, the owner was not present. I find that **Bukenya** is not applicable in the present case.

The contradiction as to the size of the farm does not affect the material particulars of the charge – which is that cannabis sativa was found intercropped with maize.

The appellant is splitting hairs, the officer whom he now whines about not testifying was simply a handy man who was given the exhibit in an envelope to deliver to the government chemist and failure to call him is in my view insignificant.

Consequently, my finding is that the conviction was safe and I uphold it.

Appellant was sentenced to seven years imprisonment for an offence which carries a maximum sentence of twenty years imprisonment.

Bearing in mind the number of plants recovered and the damaging effects bhang has on our population, I consider that sentence most adequate and I find no reason whatsoever to interfere with it and I confirm the sentence.

The appeal is dismissed.

Delivered and dated this **20th** day of **July 2009** at Malindi.

H. A. OMONDI

JUDGE