



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J.)**

**CRIMINAL APPEAL NO. 401 OF 2006**

**BETWEEN**

**MARGARET WAMBUI KAMAU.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the judgement of Principal Magistrate K.W. Kiarie dated 26<sup>th</sup> April, 2006 in Criminal Case No. 3519 of 2005 at the Kiambu Law Courts)***

**JUDGEMENT**

The appellant was charged with the offence of being in possession of bhang, contrary to s.3(2) (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No.4 of 1994). The particulars were that the appellant, on 30<sup>th</sup> November, 2005 at Gachie Village in Kiambu District, within Central Province, was found in possession of 107 rolls of bhang which was not in the form of a medicinal preparation. The appellant faced a second charge, that of being in possession of Heroin contrary to s.3(2) (b) of the Narcotic Drugs and Psychotropic Substances (Control) Act; and the particulars of this charge were that the appellant, on 30<sup>th</sup> November, 2005 at Gachie Village in Kiambu District, was found in possession of 20 sachets of Heroin.

PW1, **Geoffrey Kamau Munga** who is the Assistant Chief of Kihara sub-location, testified that on 30<sup>th</sup> November, 2005 at about 8.00 p.m., he was on patrol with a Community Policing Group within the area of Kihara Market. While in the company of others, such as *one Mburu Waweru Kimani* and *Ngugi wa Mworira*, (both not called as witnesses), PW1 met the appellant herein, in the company of her husband. Already, PW1 and his colleagues had information that the appellant was selling narcotics within Gachie Shopping Centre. The appellant was, at the time, carrying a black paper bag, which PW1 and his colleagues searched, and in it, found 107 rolls of bhang, and 20 sachets of Heroin. PW1 thereupon telephoned **Corporal Gichuki** of the Police, who came along with other Police officers and re-arrested the appellant and her husband.

PW2, **Wilson Kimani Mungai**, a trader at Kihara and who is the person in charge of Community Policing in the locality, testified that, on 30<sup>th</sup> November, 2005 at 8.00 p.m. he was in the company of the Assistant Chief. Members of the Community Policing Group already had information from members of the public, that the appellant herein, was selling drugs. When PW2, PW1 and others met the appellant herein, in the

company of a man, they conducted a search on her, finding 107 rolls of bhang and 20 sachets of a drug.

PW3, Force No. 28101, **Corporal Christopher Gichuki**, testified that he is attached to Kihara Police Post. On 30<sup>th</sup> November, 2005, at about 8.00 pm, he received a telephone call from the Assistant Chief of Kihara, to the effect that an arrest had been made of two persons found with illicit drugs. PW3 and his colleagues went and re-arrested the two suspects, and took possession of a black polythene bag said to have been found with the suspects. PW3 had the suspected drugs delivered, with a memo form, to the Government Chemist; and the analytical report returned to him confirmed that the 107 rolls recovered, were bhang. The sachets, were also confirmed to be a drug, namely Heroin.

The appellant, in her defence, made a sworn statement in which she averred that the criminal case against her had been a frame-up.

The learned Principal Magistrate thus stated the question for determination:

***“The issue for determination is whether the accused committed [either] or both the offences, or whether she was a victim of false implication.”***

The Court’s findings were set up as follows:

***“The accused has made very serious allegations against her arrestors. However, upon careful analysis of the evidence on record... I do not find any ..... evidence supporting her version. Her claim that she was beaten until she bled from the ears ... is not supported by any evidence .....***

***“I find that the evidence [given] by the prosecution is consistent and holds together. The prosecution has therefore proved its case against the accused person on both counts, beyond any reasonable doubts. I find her guilty and, accordingly, convict her on both counts.”***

In the petition of appeal filed on 1<sup>st</sup> August, 2006 the appellant alleged that she had gone to the Police on an entirely different question, but “*was shocked when [Police officers] produced some drugs claiming that they had caught me with them.*” She pleads that she is “*an orphan single parent, and the only bread winner [for] my family.*” The appellant pleads: “*I beg the Honourable Court to review my case and pardon me.*”

Although the defence evidence is bare in point of detail, and mainly takes the form of assertions, learned State Counsel **Mrs. Kagiri** submitted that the conviction was not well-based. It was her view that there was “*no independent witness to support the prosecution case.*” She urged that the second suspect who was arrested together with the appellant, had not been called as a witness, and it was not known what happened to him. Counsel urged: “*Where a material witness was not called, it [should be] presumed that [such a] person would have given evidence prejudicial to the prosecution.*”

The appellant in her submission, only said: “*I have seven children, who are no longer going to school; and I asked to be released.*”

The question is whether or not the appellant committed the offence charged. Unlike the submission of learned State Counsel, I have found nothing to lessen the weight of the evidence adduced by PW1, PW2 and PW3. I found no lack of “*independence*” in those three witnesses, such as would compromise their truthfulness. Their evidence, moreover, is substantially the *direct evidence* of persons who perceived the drug-possession incident in which the appellant herein was involved. PW1 and PW2 arrested the appellant as she carried the drugs; and the drugs were tested and found to be just that.

While it is true that the man (her husband by the testimony of PW1) who was in the company of the appellant as she exercised possession of the drugs in question, was not called as a witness, I cannot see what contribution his testimony would have made to the existing evidence showing that the appellant was searched, and found to have the offending drugs. It is not in these circumstances, apparent to me that the

evidence of the man not called as a witness, was at all necessary to prove a fact already well proved by the testimonies of the other witnesses.

I would also not draw the conclusion that, had evidence come forth from the man not called, this would have been prejudicial to the prosecution case; for the pertinent principle of the law of evidence only applies where all the prosecution evidence is, without the missing testimony, *threadbare*.

This principle is stated in *Blackstone's Criminal Practice* 2002, 12<sup>th</sup> ed., by *Peter Murphy* (Oxford U.P., 2002), p.2341 (para. F 19.14):

**“It seems from ..... Murray v. DPP (1994) 1WLR ..... that inferences of guilt should not be drawn from failure to give evidence to contradict a prosecution case of ‘little evidential value.’ This accords with the position at common law, where it was considered improper for a judge to bolster up a weak prosecution case by making comments on an accused’s failure to give evidence ..... [emphasis supplied].”**

The statement of the law in *Murray v. DPP* (1994) 1 W.L.R. 1 reads as follows (per *Lord Slynn of Hadley*, at p.11):

**“..... if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt.”**

The principle entails, in my opinion, that, even as an insufficient evidentiary base to the prosecution case calls for *no answer* from the accused, it does not become necessary for the prosecution to call a witness who, by all appearances, may be quite relevant to the circumstances of the case, *if already, direct or circumstantial evidence has been adduced which establishes the prosecution case.*

In the instant matter, it is clear to me, the evidence given by PW1, PW2 and PW3 establishes a water-tight case against the appellant. Consequently, no adverse inference is to be drawn from the fact that some particular witness was not called by the prosecution.

The trial Court, after taking into account the fact that the appellant was a first offender, dispensed sentence in the following words:

**“The offences are serious and attract a jail term of up to 20 years and a fine of up to Kshs.1 million or both.**

**“I therefore sentence the accused to serve seven years’ imprisonment on each count. Sentences to run concurrently.”**

With regard to sentence, the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, s.3 (2) thus provides:

“A person guilty of an offence under subsection (1) shall be liable –

***(a) in respect of cannabis, where the person satisfies the Court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to twenty years; and***

***(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the Court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.”***

The offending drugs named in the charge sheet were: (i) **bhanga**, which by the **Concise Oxford English Dictionary**, 11<sup>th</sup> ed (2006) is: “*the leaves and flower-tops of cannabis*”; and (ii) **Heroin**, which by the same Dictionary is: “*highly addictive analgesic drug derived from morphine, often used illicitly as a narcotic.*” These definitions are to be related to the provisions of the governing enactment, as a basis for determining the right sentence to be awarded in a case such as the instance one.

The trial Court held, in the first place, that the appellant had been found in possession of cannabis; and it is clear the Court took the view that this was not for personal use – a view that cannot be faulted, in the light of the quantities of the drug, and of all the circumstances in which the same was found. In those circumstances, the maximum applicable sentence would have been 20 years’ imprisonment.

On the second count, the trial Court held that, indeed, the appellant had been found in possession of a drug other than cannabis, namely Heroin, in 20 sachets. Twenty years imprisonment would, in this regard, have been applicable if the Heroin was for personal consumption, otherwise “a fine of not less than one million shillings or three times the market value of the narcotic drug ....., whichever is the greater, or to imprisonment for life or to both .....”

So, in place of 20 years’ imprisonment on the first count, the learned Magistrate imposed a sentence of **seven** years’ imprisonment; and in place of a fine of no-less-than one million shillings or life imprisonment or both, the learned Magistrate awarded a prison term of **seven** years; and the sentences on the two counts were ordered to run concurrently.

It is obvious to me that the sentences imposed by the trial Court are not only lawful, but also coincide with the appropriate principles applicable in sentencing. I find the sentences appropriate, as they well reflect my own understanding of the optimum setting of sentence in a case, within the continuum leading up to the statutory maximum. In **Yussuf Dahar Arog v. Republic**, H.C. Cr. App. No.110 of 2006 I expressed this principle thus:

***“Such is, of course, a maximum sentence, and within that constraint, the Court has a wide discretion which it exercises on judicial principles. Such principles would, I believe, take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury.”***

Those principles are, in my opinion, well accommodated within the sentences meted out by the trial Court.

Consequently, I dismiss the appeal, uphold conviction, and affirm sentence as pronounced by the learned Principal Magistrate.

**Orders accordingly.**

**DATED and DELIVERED at Nairobi this 30<sup>th</sup> day of January, 2008.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Odera**

**For the Respondent: Mrs. Kagiri**

**Appellant in Person**