



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 200 of 2006

DAVID MIYOMA LWIMBI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Migori Senior Principal

Magistrate's Court Criminal Case No.247 of 2005

by EZRA O. AWINO ESQ.,PM)

JUDGMENT

The appellant was charged with possession of Narcotic drugs contrary to Section 3(1) as read with section 3(2)(b) of Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994. The particulars of the offence were that on the 27th day of February, 2005 at Kakrao trading center, Migori District, the appellant was found in possession of one kilogramme of cannabis with a street value of Kshs.6000/=.

He was tried, convicted and sentenced to fourteen months' imprisonment.

The evidence that was tendered before the trial court briefly stated was as hereunder:

On the material day at about 10 p.m., Inspector Masengeli, PW1, and other police officers were on patrol along migori-Kisii road. At Kakrao market, they heard noise from people who were playing pool and the police ordered the players to end the game as it was after the allowed playing hours. The pool players were complaining about a bhang peddler who used to sell bhang to them. The police were shown the house of the appellant, who was said to be the bhang peddler. The police introduced themselves and proceeded to conduct a search. While the search was going on, the appellant forced his way out of the house and a polythene paper containing rolls of bhang dropped from his raincoat. His wife also took off into a sugar cane plantation.

The police managed to arrest the appellant's wife. The police were informed that some bhang was hidden in a banana plantation. They dug up the area and managed to recover bhang in some plastic paper bags.

While the police were recording their statement at their station, the appellant went there and reported to the officer commanding the station that thugs went to his house and stole some money.

The evidence of PW1 was corroborated by that of Administration Police Officer Motanya, PW2, and Inspector Ouko, PW3, who accompanied PW1 on the material night. PW3 produced a report by a Government Analyst that confirmed that the substance recovered from the appellant was cannabis.

In his defence, the appellant stated that on the material night police officers went to a house that was occupied by a lady friend of his. They began to conduct a search therein and as they were doing so he ran out of the house and hid himself. When they went away he got out of his hideout and went to his house. After a short while he decided to go and see what had happened to his lady friend but he did not get her. He alleged that there was Kshs.9000/= that he had kept under a mattress and he found Kshs.8, 000/= of that sum missing.

He decided to go and report about theft of that money but on arrival at the police station he was arrested.

The appellant called Mary Munasia, DW1, who stated that the appellant was her husband. She stated that the police went to her house and conducted a search but recovered nothing. She conceded that while the police were conducting their search the appellant ran away. The witness alleged that the police returned after some time with bhang in a paper bag. She added that on the material night some money got lost but was later recovered.

I have carefully evaluated the evidence that was adduced before the trial court, being conscious of this court's mandate as the first appellate court in terms of the Court of Appeal decision in OKENO VS REPUBLIC, [1972] E.A.32.

It was not denied by the appellant and his wife or lady friend that on the material night police officers conducted a search in a house where both of them were found. It was also not denied by the appellant and his witness that they both ran away while the police were conducting the search. Why did they have to do so if they were innocent and had nothing to hide or fear about the search? I believe they knew that they were going to be arrested as a result of the police findings.

From the evidence on record, I am satisfied that the prosecution proved its case beyond any reasonable doubt. The appellant's defence was unbelievable and was rightly rejected. The appellant's conviction was well grounded and the sentence that was passed cannot be said to be harsh. I dismiss the appeal.

DATED, SIGNED and DELIVERED at KISII this 26th Day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE