



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 21 of 2004

JACKSON MWANGI GITHAU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

*(Being appeal against the sentence and conviction by L. Nyambura Resident Magistrate, in the
District Magistrate's Criminal Case No. 504 of 2001 at Kigumo)*

JUDGMENT

During the trial at the lower court the Appellant herein was charged with three counts. On the first count the Appellant was charged with assault causing actual bodily harm contrary to *Section 251* of the Penal Code. On the second count the Appellant was charged with assault in resisting arrest contrary to *Section 253(a)* of the Penal Code. On count three the Appellant was charged with being in possession of *cannabis sativa* contrary to *Section 3(1)(2)* of the Narcotic Drugs and Psychotropic Substance Control Act, 1994. On being tried the Appellant was convicted on all counts and was sentenced to three years imprisonment on the first and second count and twelve months on the third count. The sentences were to run concurrently. The Appellant, being dissatisfied with the conviction and sentence, appealed against both. He raised the following grounds of appeal:

- 1. That the trial court erred in law in entering into conviction in an evidence which was very weak and uncorroborated to support a conviction.***
- 2. That the trial court erred in law in failing to consider the evidence of P.W.1 whose evidence contradicts that of his fellow officer. The evidence ought to have been disregarded as it lacked corroboration.***
- 3. That the trial court erred in law in acting on the evidence of P.W. 2 and 3 whose evidence was inconsistent and therefore unworthy to support a conviction.***
- 4. That the trial court erred in law in failing to find that I was arrested with a roll of bhang as alleged but when we come to quantity which was produced in court, it was half a roll.***

This being the first appeal this court is obligated to re-evaluate the evidence tendered at the trial court. P. W. 1 was P.C. Ezekiel Nzomo Chiengo. He stated that he is attached to the Murang'a Police Station but was formerly at Kiangochi Patrol Base. On the 29th May 2001 at about 10.30 a.m. in the company of Corporal Okundi and Police Constable Peter Mbugua they proceeded to a shop where the Accused person was pointed out to them. That they were looking for the Accused person who was wanted by Maragua Police Station for an offence of assault. That on arriving there they found the Accused person seated. He however tried to escape but the officers caught him and he began to fight the said officers. While P.W.1

attempted to handcuff the Accused, the Accused bit his middle finger on the left arm. The Accused was however arrested and taken to the patrol base. P.W.1 attended the nearest health centre where he obtained treatment and where a P3 was filled. He stated that on the Accused being taken to the patrol base he was found to be having one roll of half smoked bhang in his left pocket of his trouser. On being cross-examined P.W.1 confirmed that the Accused in an attempt to escape had tried to scale a wall. That the construction of that wall was incomplete. He further stated that the Accused had threatened to cut the corporal.

P.W. 2 was a District Clinical Officer Patrick Mwangi who is based in Muranga. In chief he stated that he was requested by Murang'a O.C.S to examine P.W.1 for assault. He confirmed that P.W.1 had been assaulted while on duty. He was treated at Muranga district hospital and in that regard he gave the reference number. He stated that he saw P.W.1 afterwards and he identified injuries on his left middle finger which injuries he confirmed were inflicted by human teeth. He confirmed that the injury was harm. He filled the P3 form for P.W.1 which he produced in court in evidence. He also confirmed that he had examined Moses Maina who is P.W.3 and found that he had been assaulted by people known to him. He said that he examined him on 31st of May 2001. He also filled in the P3 form. He confirmed that P.W.3 was bleeding when he was examined by him and that he was given antibiotics and pain killers. He produced the P3 in respect of P.W.3.

P.W.3 Moses Maina Njuguna said that he is a casual labourer. On the 12th December 2000 at 3.30 p.m. he was coming from his home near Mbombo. He said that he saw someone holding his aunt. He therefore approached them and his aunt told him that it was the Accused person who was beating her because she had prevented him from being given money. P.W.3 confirmed that the Accused was known to him before this incident. The Accused then held P.W.3 and began to beat him. That he hit him with a stone on his head. P.W.3 fell down and his aunt took him home and gave him first aid then later took him to Muranga district hospital. He stated that he was admitted in hospital for three days. He reported the matter at Murang'a Police Station. On being cross-examined P.W.3 said that his aunt saw the Accused beat him. Further he stated that he beat him in the presence of many people. On being re-examined P.W.3 stated that he knows of the fame of the Accused person that he is not a good person.

P.W.4 Jane Wanjiru Ngugi stated that she sells in a kiosk in Mbombo. That on the 12th December 2000 at about 3.30 p.m. she was at home. She took her visitors to Mbombo stage. She saw the Accused person. The Accused person then prevented the visitors from entering a certain matatu. That matatu moved on and another one came. Her visitors boded the matatu. The Accused held her and told her that she had prevented him from being given money. That he continued to hold her until P.W.3 came. That the Accused then slapped P.W.3. P.W.3 ran away but the Accused took a stone and hit P.W.3 on the head. That he was bleeding and she took him to hospital. He was admitted in hospital and later she reported the matter at Murang'a Police Station. On being cross-examined she stated that the Accused had held her because he had not been given money. P.W. 4 confirmed that the Accused was a tout.

P.W.5 P. C. Susan Mutisya stated that she is based at Kabati Police Station. That she had previously been at Murang'a Police Station. On 19th June 2001 she prepared an exhibit memo form and escorted a roll of bhang to the Government Chemist. She produced a report from the government chemist as an exhibit in court and also produced the *cannabis sativa* as an exhibit.

P.W.6 P.C. Peter Mbugua said that he is stationed at Muranga Police Station. That as at year 2001 he was based at Kiangochi Patrol Base under Murang'a Police Station. On 29th May 2001 at 10.30 a.m. he, in the company of Corporal Okundi and P.C. Kyengo proceeded to Kiangochi Patrol Base. That they were looking for the Accused person on the assault charge. While they were at the trading centre the Accused saw them and he began to run away. They met him at a gate because he was unable to run over the wall. They arrested him and he began to scuffle. He resisted arrest and threw objects at the officers. They eventually managed to handcuff him but he got hold of P.C. Kyengo's left hand and bit his left middle finger. The Accused however, was over powered and taken to Kiangochi Patrol base. He was searched and inside his left pocket was recovered one roll of a plant material. He said that it was suspected that the plant material was *cannabis sativa*. The Accused was placed in cells and taken to Maragwa Police

Station then charged. On being cross-examined P.W.6 stated that the Accused was found by them coming out of his house. That they met him at the gate. That he struggled to get out of the compound and tried to use a ladder to get over a wall that was half constructed.

P.W.7 Corporal Joseph Okundi said he was attached to Murang'a Police Station but was formerly at Kiangochi Patrol Base. That on the 29th May 2001 at 11.30 a.m. he in the company P.C. Kyengo and P.C. Mbugua were within Kiangochi area on patrol duties. That they had been informed that the Accused person was wanted by Maragua Police Station for assault. That he was in a certain plot, which they entered and he in turn tried to run away. He was warned to stop but refused and tried to jump over the wall. Before he could jump over the wall although he was very violent he was handcuffed. That he got hold of P.C. Kyengo's hand and bit his left middle finger. That P.C. Kyengo sustained injuries. The Accused on being taken to Kiangochi he was searched and found with one piece of plant material. On being cross-examined P.W.7 stated that the Accused was arrested by the three police officers. P.W.7 confirmed that he was the one who caught the Accused before he jumped the wall. That the Accused was violent but he did not have a panga. That they recovered a roll of bhang from the Accused person.

The Accused, on being found that he had a case to answer, chose to give an unsworn statement. He stated that he is from Gacharu village. That he is a casual labourer. He said that he denied the charge before him. That on 19th May 2001 he woke up early and went to Kiamucheru village to spray crops on his shamba. He thereafter went home to prepare to take a shower. Then the police officers came. In respect of the incident of 12th December 2000 he said that he was at the union group at Mbombo. He was going home at 2 p.m. that most people were not working on that day. That he was given work to do and he went home at 6 p.m. He went to Gacharu village. He said he did not meet the complainant P.W. 3 in this case. He said that the charges before him are fabricated by P.W.4 because she had refused to pay some workers and also had refused to pay the Accused and she had told the Accused person that she would ensure that he was jailed. In respect of the assault resisting arrest he says that he was at home having a bath and that when he got out of the bathroom he saw police officers. That it was P.C. Mbugua who handcuffed him. That he fell down and was beaten by the officers. He denied that he bit the officers. He also denied that he was in possession of *cannabis sativa*. The trial court summarized the evidence tendered during the trial and made a finding that the prosecution witnesses were very consistent and in respect of the assault charges the trial court considered the medical evidence and considered that the charge had been proven against the Accused. In respect of the charge of possessing *cannabis sativa* the trial court found that the Accused's mere denial which the court rejected. The court found that the prosecution had proved its case on all counts beyond reasonable doubt. The court therefore proceeded to convict and sentence the Accused person.

At the hearing of the appeal the Accused had indicated that he did not require to be present at the hearing. The appeal was opposed by the State on the basis that the evidence that the Appellant assaulted P.W.3 and P.W.1 as he arrested him was clear. That there was medical evidence to support the charge. That the evidence was indeed overwhelming which led to the conviction of the Accused and that accordingly the court should dismiss the appeal.

In respect of the charge of assault against P.W.3 the evidence of P.W.3 was corroborated by the medical evidence of P.W.2. It was also corroborated by the evidence of P.W.4. In considering the charge of assault against P.W.3 I find that the evidence tendered before court was to the required standard of proof of a criminal trial and that the court was correct in convicting the Appellant of that charge. In respect of the charge of resisting arrest, that is, the assault against P.W.1 the evidence of P.W.1 is corroborated by the evidence of P.W.2, P.W.6 and P.W.7. I find that I am in agreement with the trial magistrate that the evidence was consistent and was sufficient to prove the guilt of the Appellant in that regard. In respect of the charge of possessing *cannabis sativa* the Appellant raised the issue of what he called was inconsistency between the evidence of P.W.1 as opposed to the other police officers' evidence. P.W.1 stated that they recovered a half smoked roll of *cannabis sativa* from the Appellant. All the other police officers stated that they recovered a roll of *cannabis sativa* from the Appellant. Because of that difference the Appellant sought that the court would find that there was doubt and therefore the court should exercise that doubt in his favour. I find that in that regard the evidence of P.W.5, 6 and 7 was entirely consistent. The fact that P.W.1 stated that what was recovered was a half smoked *cannabis*

sativa cannot be said to bring any doubt in respect of count number three. I find that the evidence tendered in respect of that count is consistent and sufficient to uphold the conviction of the trial court.

I have considered all the prosecution evidence, the exhibits that were produced and I have also considered the Defendant's unsworn statement. I find that I am in agreement with the trial court and there is indeed sufficient evidence to convict the Accused for all the counts against him. The evidence in my finding sufficiently met the required standards of a criminal trial. I therefore hereby dismiss the Appellants appeal dated 10th August 2003.

Dated and delivered 23rd March 2007.

MARY KASANGO

JUDGE