REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 40 of 2005

PETER MUGO NDEGWA ……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Judgment and Conviction in Resident Magistrate's Court at Othaya in Criminal Case No. 207 of 2004 dated 11th February 2005 by T. K. Kimutai – R.M. – Othaya)

J U D G M E N T

On 10th May 2004, Peter Mugo Ndegwa hereinafter referred to as the appellant appeared before the then Resident magistrate at Othaya charged on one count of being in possession of Cannabis sativa contrary to section 3(2) (a) of Narcotic Drugs and Psychotropic substances control Act No. 4 of 1994 and pleaded not guilty to that charge. The particulars of the charge were that on the 15th day of January 2004 at Othaya township in Nyeri District of the Central Province jointly with others already in court were found in possession of cannabis sativa to wit 4 kilograms which was not in form of medicinal preparation.

Having pleaded not guilty to the charge, the trial of the appellant continued before the magistrate **(T. K. Kimutai, Esq.)** and on 10th February 2005 he found the appellant guilty in a rather pedestrian judgment. The judgment consisted only of one page and one is at a loss to know whether the learned magistrate subjected the evidence by four witnesses who testified to any serious evaluation. What emerges from the judgment is that the learned magistrate merely reproduced the evidence tendered by the four witnesses and the defence albeit in a summary form and concluded thus:

"…….. **Upon hearing and seeing the evidence in support of the charge and upon hearing the accused's defence this court is convinced that the exhibit bhang was recovered from the accused's house. That is the yellow paper bag (4 kg) was found under a drum outside accused's door and the 2 rolls were inside his house …….."**

With that finding the appellant was convicted. I repeat that the judgment of the subordinate court leaves a lot to be desired. It flies in the face of the mandatory provisions of section 169(1) of the Criminal Procedure Code. The learned magistrate did not at all have points for determination, the decision thereon and reasons for the decision. On this issue alone the appeal ought to be allowed.

However, I would wish to deal with some other issues raised by the appeal. Upon conviction, the appellant was sentenced to 3½ years imprisonment. Being dissatisfied with the conviction and sentence, the appellant preferred this appeal. In his Petition of appeal, the appellant lamented that the learned magistrate erred in law and fact in failing to consider the grudge that existed between the appellant, that in

convicting him on the evidence of a single witness, the court erred, that the learned magistrate erred in law and fact in rejecting his defence without assigning any reasons and finally that the learned magistrate failed to critically evaluate and analyse the evidence tendered.

From the record, the prosecution case seems to be that on 15th January, 2004, P.W.2, P.W.3 and five other police officers, received information that the appellant was selling bhang in his house. They proceeded to the house and when the appellant saw them, he fled. However when they entered the house, they found 4 suspects. They were smoking bhang. They also found 2 rolls of bhang on the table. On further search, they found about 4 kilograms of bhang in yellow paper bag just outside the door covered with drum.

The police officers called the O.C.S. (P.W.1) to the scene who arrested the 4 suspects and took possession of the bhang, some electronic goods and some money recovered from the house. Later on whilst on patrol within the same Estate P.W.1 and his officers encountered the appellant whom they arrested and was subsequently charged.

Put on his defence, the appellant in a sworn statement denied his involvement in the crime and stated that on the date of the alleged incident he was attending a funeral at Laikipia. He came back on 16/1/04 only to find his house broken into. He reported the matter to the police and he was informed that the police had his goods to wit, a deck, T.V. and money. The money was short of what he had left in the house. So he went to Nyeri and reported the incident to the Seniors of P.W.1. On 8th May 2004 P.W.1 caused the arrest of the appellant.

When the appeal came up fro hearing, the appellant had no submissions to tender in support of the appeal. He elected to leave everything to court.

The appeal was opposed. Mr. Mugwe, learned state counsel submitted that the prosecution proved its case against the appellant beyond reasonable doubt. That the appellant was well known to the P.W.1, P.W.2 and P.W.3. They even knew his house as they had arrested him 4 times before. That the evidence of the prosecution was well corroborated. Finally that the Government analyst report confirmed that the exhibit was indeed bhang.

I am mandated as a first appellate court to consider all the live issues in the case as a whole and reach my own decision or conclusion on such issues. However how this is done must depend on the circumstances of each case **(see Okeno v/s Republic (1972) E.A. 32).**

The appellant was charged with being in possession of cannabis sativa. The term "*possession*" is defined in the Penal Code to:

"……. **Include not only having in ones own possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person ……..**"

What appears from this definition is twin concepts of actual and constructive possession. However, before the appellant could be said to been in possession, either way in the circumstances of this case, the prosecution should have led evidence to show that the house in which the bhang was recovered belonged to the appellant. There was no such evidence. All that the witnesses said is that they knew the appellant and even his house. In my view this evidence was insufficient to connect the appellant to the house. The appellant was absent when the alleged bhang was recovered. There were however four people in a house who were found smoking bhang. None of this people was called to testify in support of the prosecution case. It is possible that perhaps this people and not the appellant owned the house. That possibility cannot be ruled out. Is it also possible that these very same people would have been the owners of the bhang (the 2 rolls on the table and the 4 kilograms found outside the house?) This possibility is not remote either.

The three witnesses claimed that when the appellant saw them approach the house, he took off. It is not lost on me that the offence was alleged to have been committed at 9 p.m. This was at night. How were these three witnesses able to determine that it was the appellant who was running away. The witnesses did not say whether there was light in the vicinity that would have enabled them to see the appellant. It did not also come out in evidence at what distance the witnesses were when the appellant purportedly fled. One of the witnesses stated that he saw the appellant's back as he fled but did not state at what distance. How could he have been able to recognize the appellant from the back? I am not satisfied that the conditions prevailing would have made it possible for the three witnesses to see and identify the appellant. It may well be that the person who fled was the fifth among the four found in the house and not the appellant. The prosecution having failed to establish with cogent evidence the ownership of the house in which the bhang was found and also the bhang having been recovered in the absence of the appellant, possession as defined as aforesaid cannot in the circumstances be attributed to the appellant. Further it is also claimed that the 4 kilograms of bhang in a yellow polythene bag was found outside the house by the door. If this be the case, what was the basis of connecting it with the appellant in his absence. It is possible that the bhang aforesaid could have belonged to any other person other than the appellant. This possibility was not eliminated.

It is of no comfort to me to note that although the offence is alleged to have been committed on 15th January 2004 it was not until 8th May 2004 that the appellant was arrested. The appellant according to P.W.1, P.W.2 and P.W.3 was well known to them. They knew his house. In fact they had arrested him four times previously. There is no suggestion from the recorded evidence that soon after he allegedly committed the offence he went under to avoid arrest.

All the police witnesses claim to have arrested the appellant four times previously. It would appear therefore that there was no love lost between the appellant and the said police witnesses and in particular the O.C.S., Othaya police station (P.W.1). As to why a whole O.C.S. should be called to the scene of crime at about 9 p.m. by his juniors and respond positively speaks volumes of the culpatibility of the said witnesses. There must have been something larger that meets the eye in the entire episode. I doubt therefore whether the said witnesses could be said to be credible. Everything considered, I think they were involved in fabricating the case against the appellant so as cover their backs due to the failure to account for the sum of money recovered from the appellant's house if any.

In all the circumstances of the case I would hold that the defence put forward by the appellant was plausible. It remained unchallenged and though it was given on oath, the prosecution did not at all bother to test the same by way of cross-examination. The alibi defence offered by the appellant was similarly not tested or challenged. It could have been true.

This being my view of the matter I am not satisfied that the appellant was convicted on sound evidence. His conviction was thus unsafe. It cannot be allowed to stand. I would therefore allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 24th day of May 2007

M. S. A. MAKHANDIA

JUDGE