



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 76 of 2006

(From Original Conviction and Sentence in Criminal Case No. 87 of 2006 of the Resident Magistrate's Court at Limuru – A. Aminga RM)

GEORGE MWANGI NJENGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

GEORGE MWANGI NJENGA, the appellant was charged before the subordinate court with the offence of being in possession of cannabis sativa contrary to section 3(1) of the Narcotics Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read with section 2(a) of the same Act. The particulars of the offence were that –

“On 6th January 2006 at Rironi village in Kiambu District within Central Province, was found in possession of cannabis sativa to wit 50 grams which was not in form of medical preparation”.

He was recorded as having pleaded guilty to the charge. He was convicted and sentenced to serve 5 years imprisonment. He has now appealed to this court against both conviction and sentence, through his counsel M/s Kangahi Associates Advocates. The grounds of appeal are that –

1. The learned magistrate erred in law and fact in failing to appreciate in evidence that the subject of the charges being cannabis sativa was never produced as exhibit before court to allow the court arrive at the decision it did.
2. The learned magistrate erred in law and in fact in failing to appreciate that the cannabis sativa was never subjected to analysis by the Government Chemist as no report was ever tendered in evidence for court to form opinion as to what the substance was.
3. The learned magistrate erred in law and fact in relying on his own conjectures and arriving at an unsubstantiated findings.
4. The sentencing of the appellant to five years imprisonment is manifestly grave and excessive in the circumstances of the case.

At the hearing of the appeal, Mr. Kangathi learned counsel for the appellant, submitted that the plea was equivocal as the facts did not establish the offence charged. It was counsel's submission that no Government Analyst's report was produced to prove that the substance alleged was cannabis sativa. The

alleged substance was also not produced in court. Therefore the conviction was improper and the sentence was illegal.

The learned State Counsel, Ms Gateru, opposed the appeal and sought to rely on section 348 of the Criminal Procedure Code. Counsel conceded that the substance alleged to be cannabis sativa was not produced in court, nor was a report from the Government Analyst produced in court. Counsel, however, submitted that the appellant understood the charge and pleaded guilty.

I have perused the subordinate court's record. The facts as given by the prosecutor were brief. They were that –

“On the 6th January 2006 at Rironi village, police officers received information that accused is a bhang peddler, they confronted him, then carried out a quick search and recovered 50 grams of plant material believed to be bhang and which was not in medical preparation. Accused was then arrested and charged”.

The burden is always on the prosecution to prove the charge against an accused person beyond any reasonable doubt. That burden never shifts to an accused person - See **MUIRURI – vs – REPUBLIC [1983] KLR 205.**

It is therefore imperative that, even where an accused person is purported to plead guilty, the prosecution must give particulars in the facts that disclose an offence to establish that an offence has been committed by the accused. In our present case, neither the substance alleged to be cannabis sativa, nor a report from the Government Analyst was produced in court, to establish that indeed, the substance or plant material found in possession of the appellant was cannabis sativa. The production of the Government Analyst's report was imperative. The failure of the prosecution to produce the Government Analyst's report in court means that the court could not say with certainty that the alleged plant material was cannabis sativa. Therefore, the appellant should not have been convicted of being in possession of cannabis sativa. It follows that both the conviction and resultant sentence cannot stand. Section 348 of the Criminal Procedure Code (Cap. 75) which was relied upon by learned State Counsel, cannot be applicable as the facts did not disclose the offence. The appellant could not be convicted, as no offence was established as having been committed. I have to quash the conviction and set aside the sentence.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence imposed by the learned trial magistrate. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 24th September, 2007.

George Dulu

Judge

In the presence of

Appellant

Mr. Kangahi for appellant

Ms Gateru for State

Eric – Court Clerk