REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 280 of 2006

EDWARD MBURU MUNGA ……..……....……APPELLANT

VERSUS

REPUBLIC…….……...…….RESPONDENT

(From original conviction and sentence in Criminal Case No. 898 of 2005 of the Principal Magistrate's Court at Kikuyu – Ms. M.W. Murage PM)

JUDGMENT

EDWARD MBURU MUNGA, 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 Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read with subsection 2(a) of the same Act. The particulars of offence were that on 10th August 2005 at Wangige Market in Kiambu District of Central Province was found being in possession of cannabis sativa (bhang) to wit one stone not in form of medicinal preparation. After a full trial, he was convicted and sentenced to serve three years imprisonment. Being aggrieved by the decision of the learned trial magistrate, he has appealed to this court. His grounds of appeal are that –

1. **The learned magistrate did not consider that the arresting officer colluded with the headman to plant an exhibit of bhang on him because he had a grudge with him.**

2. **The laboratory expert did not appear before court to testify and table a report.**

3. **It was not proper for the court to have relied on a report presented by the investigating officer.**

4. **Though he was arrested by four (4) officers only one of them testified in court.**

5. **He was asking for leniency.**

At the hearing of the appeal, the appellant submitted that he was not satisfied with the evidence in the trial as he was arrested by police officers who did not testify and the doctor also did not testify. No reason was given for failure to call those witnesses. The appellant also asked for mercy.

Learned State Counsel, Mrs. Gateru, opposed the appeal and supported conviction and sentence. Counsel submitted that there was adequate evidence on record to sustain the conviction as PW1 stated in evidence that he searched the appellant and found one stone of bhang. Lastly, Counsel submitted that though that the Government Analyst did not testify in court, the appellant consented to the production of

the report. The appellant, counsel contended, did not raise the issue of a grudge at the trial. Counsel lastly submitted that the sentence of 3 years imprisonment was lawful as the maximum sentence was 10 years imprisonment.

I have to remind myself that this being a first appeal, I am duty bound to review the evidence on record and come to my own conclusions and inferences – see OKENO –vs- REPUBLIC [1972] EA 32.

I have evaluated the evidence on record. The offence is one of possession of bhang, which is a narcotic drug. The evidence of possession is that of a single witness PW1 AP CPL. ISAAC HASSAN. That witness stated in evidence that he was not alone when he found the appellant with the stone of bhang. None of his colleagues was called to testify to corroborate his story. In my view, since the conviction of the appellant was predicated on the search and circumstances of arrest, there was need to call at least one other witness to testify as to how the appellant was searched and found with the one stone of bhang, especially when PW1 did not give any evidence on how they came to suspect the appellant. No explanation was given for the failure to call the other crucial witnesses to support or corroborate the evidence of PW1 did not give any evidence on how they came to suspect the appellant as possessing bhang. No explanation was given for the failure to call the other crucial witnesses to support corroborate the evidence of PW1. In BUKENYA & ANTOHER –vs- UGANDA [1972] EA 549, the court of Appeal for East Africa, held that the prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. In our present case, considering the evidence on record, I make that inference. On that ground alone, the conviction cannot be sustained.

Secondly, the substance found had to be proved by expert evidence that it was, indeed, cannabis sativa. PW2 PC SAMSON BOR produced the report of the Government Analyst. He did not state the section of law under which he produced the report. He did not say that the knew the handwriting of the Government Analyst. He also did not say that the Government Analyst had any problem with coming to court. He did not even say that he was the one who took the cannabis sativa to the Government Analyst. His evidence cannot be relied upon to found or sustain a conviction. The fact that the appellant did not have an objection to the production of the report, did not help the prosecution case.

Thirdly, the learned trial magistrate, with tremendous respect, misdirected herself when considering the defence of the appellant. The learned magistrate stated thus in the judgment –

"**I find that accused has not challenged the evidence of prosecution that he was found with the exhibit"**

From the evidence on record, the above findings of the learned magistrate on the defence of the appellant were an error. The appellant gave a sworn defence and was cross-examined. His defence was much more detailed than the evidence of any of the two prosecution witnesses. He claimed that he was arrested because the headman wanted him to pay for allegedly lost windows. In cross-examination he stated –

"**I had no grudge with Administration Police. They lied. I had no bhang. They lied."**

From the above defence it is clear that the appellant actually denied that he was found with the bhang or cannabis sativa as alleged. He did challenge the prosecution allegations, contrary to the observation of the learned magistrate.

Having evaluated all the evidence on record, I come to the conclusion that the conviction of the appellant is unsafe and cannot be sustained. I will therefore allow the appeal.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Dated and delivered at Nairobi this 31st of October 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Ms. Gateru for State - absent

Eric - court clerk