REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 357 OF 2006

BETWEEN

PETER NJOGU KAMAU.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage in Criminal Case No. 971 of 2005 dated 5th June, 2006 at the Kikuyu Law Courts)

JUDGEMENT

The charge brought against the appellant herein was: being in possession of *cannabis sativa* (bhang) contrary to s.3(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994 as read with sub-section 2(a) of the same Act. The particulars were that the appellant, on 21st August, 2005 at Gikambura Village in Kiambu District, in Central Province, was found being in possession of *cannabis sativa* (bhang), to wit, approximately one kg. not in the form of a medical preparation.

PW1, Assistant Chief ***James Njuguna***, had been doing his patrol duties, when he received word that the appellant herein had bhang in his possession. PW1, in the company of Administration Police officers, visited the appellant's residence, where they, indeed, found bhang, kept in a green paper bag. PW1 thereupon, had the appellant arrested and was later charged.

On cross-examination, PW1 testified that he and the policemen accompanying him, had arrested the appellant herein at 6.00 p.m, and had then taken him to the Police post. PW1 said he had been accompanied by one ***A.P.C. Gakuru*** and one ***A.P.C. Matheka***, at the time of arresting the appellant. PW1 denied the appellant's claim that he had not been involved in crime, and noted that on an earlier occasion, the appellant had been sent to jail when he had been found in possession of bhang.

PW2, Force No. 59307 ***P.C. Samson Bor***, of Kikuyu Police Station, testified that, on 21st August, 2005 he was at his office when Administration Police officers from Thogoto brought a suspect, the appellant herein, who had been arrested with bhang. PW2 was given 4 kg of a substance, in respect of which he prepared a memo form, before taking it to the Government Chemist for analysis. The substance, which was plant material, was examined and found to be bhang.

PW3, Force No. 65948 ***P.C. Peter Gakuru*** of Gikambura Administration Police Post, testified that he was accompanying the Area Chief (PW1) on patrol, on 20th August, 2005 at 7.00 p.m., when the two of them received information that the appellant had been carrying a paper bag suspected to contain bhang. They followed the appellant, and found him seated on a chair, with a paper bag placed on the table. When PW1 and PW3 did a search, they found bhang in the said paper bag.

When he was put to his defence, the appellant made an unsworn statement in which he said that, on the material date, he had met the prosecution witnesses, who were drunk and who demanded bribes from him, at 9.00 p.m. He stated that the officers who arrested him had taken him to the Administration Police post and, on the following day, they had taken him to the Police Station. He said the bhang which was the basis of the charge, had not been found on him.

After considering the evidence, the learned Magistrate found as follows:

> ***"Both [PW1 and PW3] witnesses are [mutually] corroborative, that, in the accused's house, they found the paper bag that had bhang. PW2 testified that he took the exhibit to the Government Chemist, and the report confirmed that it was bhang. [The] accused's defence is a mere denial. He does not challenge the prosecution case. I find the evidence of PW1 and PW2 [mutually] corroborative, [showing] that [the] bhang was found in [the] accused's house. I dismiss the accused's defence as baseless. I find him guilty as charged, and convict him accordingly."***

After hearing the appellant's statement in mitigation, the learned Principal Magistrate sentenced him to a five-year term of imprisonment.

In his grounds of appeal, the appellant contends that –

(i) the trial Court erred in law and in fact in convicting, as the proof adduced by the prosecution was not beyond reasonable doubt;

(ii) PW2 should not have been permitted to produce the memo form which had been prepared to accompany the bhang as it was taken to the Government Chemist for analysis;

(iii) PW2 as the arresting officer, did not place independent testimony before the Court;

(iv) that there was no evidence that the appellant had been found in possession of the bhang in question;

(v) that the learned Magistrate failed to attach due weight to the defence case;

(vi) that the learned Magistrate had ignored the appellant's mitigation statement;

(vii) that the term of imprisonment imposed was excessive, and the option of a fine should have been granted;

(viii) that the trial Court erred in fact and in law, by not placing the appellant on probation.

The foregoing grounds were urged by learned counsel, ***Mr. Seneti***, who submitted that the prosecution evidence was contradictory, as it was sometimes claimed that the bhang in question weighed 4 kg, and also that it weighed 1 kg. Counsel also contended that the sentence imposed by the trial Court was excessive.

Mr. Makura for the State, by contrast, submitted that there was overwhelming evidence in support of the trial Court's decision to convict. The Assistant Chief (PW1) had searched the appellant's house, and found the bhang; and his evidence was corroborated by that of PW2 and PW3.

Counsel urged that during the trial, no objection had been made to the production of the bhang analysis

report by PW2 – and consequently, it was now too late to challenge that evidence.

Learned State counsel submitted that the defence evidence had been duly considered, but rejected. ***Mr. Makura*** submitted that the trial Court had taken the conscious decision to award custodial sentence, in the circumstances of this case.

Mr. Makura noted that the maximum sentence that could be awarded, if the drug in question was not for personal use, was 20 years imprisonment; and he urged that the five-year jail sentence awarded was by no means, excessive. He urged that the sentence be upheld.

I have carefully considered the facts of this case, and come to the conclusion that there was sufficient evidence showing commission of the offence charged, by the appellant herein. The only question now left, as regards the merits of the appeal, is whether the sentence imposed by the learned Principal Magistrate can be faulted.

PW1, PW2 and PW3 gave testimonies which prove beyond reasonable doubt, I believe, that the appellant, indeed, committed the offence charged. There was no question at all that the *cannabis sativa* found in the appellant's position, was not part of any medical prescription, nor for personal use; and therefore, the maximum sentence applicable for the offence, under the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 was 20 years imprisonment. The learned Principal Magistrate, in her proper exercise of discretion, elected prison term alone, to a combination of imprisonment and fine, and duly awarded a five-year term after hearing the appellant's mitigation address.

I hereby dismiss the appellant's appeal, uphold the conviction, and affirm the sentence imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 31st day of October, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Applicant: Mr. Seneti

For the Respondent: Mr. Makura