



REPUBLIC OF KENYA

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

Criminal Appeal 333 of 2004

JOHN WAWERU WANJIKU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The Appellant was convicted of one count of **BEING IN POSSESSION OF NARCOTIC DRUGS** contrary to **Section 342** of the **Act No. 4 of 1994**. He was found guilty of possessing 47 rolls of bhang in his left socks and upon conviction was sentenced to serve 5 years imprisonment. He was aggrieved by the conviction and sentence and therefore lodged this appeal. He has raised four grounds of appeal in his filed petition. The Appellant gave written submissions. The Appellant challenges his conviction on the basis that there was no independent witness to corroborate the evidence of the two arresting officers, that the evidence of the two police officers was full of contradictions, that the Appellant's defence was not given due consideration and that the sentence was harsh and excessive.

The facts of the prosecution case were that PW1 and PW2, while acting on information stopped and searched the Appellant. From his left socks they recovered 47 rolls of bhang. PW3 produced a Government analyst's report which confirmed that the substance was bhang. The Appellant in his unsworn defence denied the charge and said that it was 7.30 p.m. and that he was boarding a matatu when the police officer arrested him. He said he was then charged with the offence which he denies.

The appeal was opposed. **MR. OBUO** for the State supported both the conviction and the sentence. Learned counsel submitted that the evidence on record was watertight and cogent and that the prosecution witnesses were credible. Learned counsel submitted that the prosecution witnesses did not know the Appellant before and therefore, had no grudge.

I have carefully considered this appeal and re-evaluated the entire evidence adduced before the learned trial magistrate as mandated in the case of **OKENO vs. REPUBLIC 1972 EA 32**, being the first appellate court.

There is a matter I wish to comment on first. The learned trial magistrate included in the proceedings hearsay evidence. PW1 and PW2 gave details of information which they received from someone not called as a witness. Those details were inadmissible and ought to **have been excluded from the record**. **Section 63 of the Evidence Act** is very clear on the kind of oral evidence which the court can admit. A witness should be allowed to testify to facts that he either saw or heard or perceived by any other sense or manner. In admitting details of information received by PW1 and PW2 from another not before court, the court acted in error.

I have disregarded that inadmissible evidence and upon so doing I find that the remaining evidence was strong enough to establish that the Appellant was found in possession of 47 rolls of a substance that was later tested and found to be cannabis sativa. I also considered the Appellant's defence and find that it did not shake the prosecution evidence adduced against him. I am satisfied that the Appellant did not suffer any prejudice in this case, in the inclusion in evidence of inadmissible evidence. Further I find that the admissible evidence on record was strong to sustain a conviction.

PW1 and PW2 corroborated each other's evidence. I find no contradiction or inconsistency in their evidence. The evidence is clear that the Appellant was in possession of the narcotic drug. His defence was a bare denial which did not discredit or shake the production case. The appeal against conviction is without merit and is dismissed.

On the sentence, being a first offender and a young person, I believe five years imprisonment is on the higher side. I will allow the appeal against the sentence in part by setting aside the sentence of five years and substitute the same with a sentence of four years imprisonment. Subject to the substitution of sentence the Appellant's appeal is dismissed.

Dated at Nairobi this 22nd day of March 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant present

Mr. Obuo for State

Huka CC:

LESIIT, J.

JUDGE