REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 585 of 2005

(From original conviction (s) and Sentence(s) in Criminal case No. 695 of 2005 of the Senior Resident Magistrate's Court at Githunguri (Lucy Mutai - SRM)

JOHN NG'ANG'A KARANJA……..…….....……..…..APPELLANT

VERSUS

REPUBLIC…….....…….…....RESPONDENT

J U D G M E N T

JOHN NG'ANG'A KARANJA was tried and convicted for **BEING IN POSSESSION OF NARCOTIC DRUGS** contrary to **Section 3(1) (2)** of the **Narcotic Drugs & Psychotropic Substance Act.** It was alleged that the Appellant was found in possession of 38 rolls of bhang which was not in form of Medical Preparation, on 24th April 2005 at Karia Village. The Appellant was sentenced to 2½ years imprisonment. He was aggrieved by both the conviction and sentence and therefore lodged this appeal.

The Appellant raised several grounds of appeal in his petition which can be summarized as follows: -

That the evidence adduced by the prosecution was contradictory and unreliable and therefore insufficient to sustain a conviction.

That the bhang in question was not found in the Appellant's house and was therefore not in his possession.

Mr. Ikioi represented the Respondent in this appeal and opposed the appeal on grounds that possession was proved as the evidence on record indicated that the bhang in question was recovered from the Appellant's house.

Going to the analysis and evaluation of the evidence, the prosecution called two witnesses who were also the arresting officers. There evidence was that they proceeded to Karia village where they found the Appellant and others in a coffee plantation taking illicit brew. That they arrested all of them then the Appellant took them to his house where upon a search, bhang was recovered. The Appellant's defence was that the house from which the bhang was recovered belonged to his late brother. The Appellant brought his niece as his first witness who said that Police searched the house of Appellant's deceased brother. The second witness called by the Appellant was his daughter who said Police searched three houses whose keys were kept by the Appellant. One of the houses belonged to them, one for Appellant's

deceased brother and a third belonging to a relative who was away.

In his submissions the Appellant contended that the bhang was not recovered in his house but in his late brother's house. That therefore, possession was not proved.

Mr. Ikioi for the State opposed the appeal. Counsel submitted that the bhang was recovered from the Appellant's house according to the evidence adduced before the lower court.

The Appellant's conviction was predicated on the finding that 38 rolls of cannabis sativa or bhang was recovered from the appellant's house. The issue of possession was very important in this case. In the learned trial magistrate's judgment at page J3, the court observed.

"***It was revealed that accused produced a key and did open that house which was searched and the bhang recovered. I found that the accused person was in control of the house from where the said bhang exhibit 1 was recovered from therein (sic). He had all the knowledge of what was inside that house a fact he did not dispute."***

The prosecution had to prove that the Appellant had knowledge that the bhang was inside the house where the police recovered it and further that he had control over the bhang to use it as owner. The evidence before court was that 2 police officers PW1 and PW2, together with others went to the Appellant's compound and arrested him and others with whom he was drinking illicit brews. The two policemen searched a house which the Appellant opened for them and found the bhang. It is clear that none of the police officers knew the Appellant's house. The fact that the Appellant had opened the house before the search is *prima facie* proof he had control over the house as the learned trial magistrate found. However, it was not proof that the house was his or proof that he had knowledge of what was inside. The evidence against the Appellant was circumstantial. The court had to be sure that there were no pre-existing facts that could negate an inference of guilt based on the courts conclusion that the Appellant had control over the house where the bhang was. The inference that he had control over the house was destroyed by DW2 in her evidence. The evidence of DW2 was a demonstration of two facts, one that the Appellant had the key to the houses which were not his and that he had been given the keys to keep by virtue of being the only adult relative living in the compound. That destroyed the inference that he had exclusive control over the house and more importantly that he may not have known that the bhang was in the house.

Bearing in mind the evidence of PW1 and PW2 that they did not know the Appellant's house before, the prosecution could not prove in the circumstances that the house in which the bhang was found belonged to the Appellant or that he had knowledge of the presence of the bhang in the house and control to use the substance as his own. For this reason I find that the learned trial magistrate misdirected herself when she found that the house belonged to the Appellant. Had the learned trial magistrate considered the evidence of the defence and particularly that of DW2 where she said that the Appellant had keys to all the houses in the compound even though the houses belonged to others. The learned trial magistrate would have arrived at a different conclusion of the matter. The evidence of DW2 created doubt whether the Appellant knew about the bhang and whether he had control over it. That evidence of DW2 also negated any inference of guilt that the court could have held on the basis of circumstantial evidence that the inculpatory facts pointed irresistibly at the Appellant's guilt, since the evidence destroyed that inference by demonstrating co-existing circumstances that could lead to a different conclusion other than that of guilt.

In **Kimeu vs. Republic [2002] 1 KLR 756** **Kwach, Shah** & **Bosire JJA** held: -

"***Before drawing the inference of accused's guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused."***

I find the conviction entered by the learned trial magistrate in the circumstances of this case was unsafe and should not be allowed to stand. I allow the appeal, quash the conviction and set aside the

sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 11th day of October 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Ikioi for the State

CC: Wambui

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LESIIT, J.

JUDGE