REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
Criminal Appeal 42 of 2003
(From Original Conviction(s) and Sentence(s) in Criminal Case No 75 of 2002 of the Senior Resident Magistrate's Court at Kangundo N.N Njagi (Esq.) on 28/1/03)

SEBASTIAN MUTHIANI KITIVO ……. APPELLANT

VERSUS

REPUBLIC ……... RESPONDENT

J U D G E M E N T

The appellant Sebastian Muthiani Kitivo was charged with the offence of Trafficking in Narcotic Drugs Contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 before Kangundo Court in Criminal Case 75/02. He was found guilty after the trial, convicted, and sentenced to serve 10 years imprisonment. He is dissatisfied with the conviction and sentence.

Briefly the facts of the case before the lower court were that PW 2 an Assistant Chief in Isinga sub-location from where the appellant hails, met the appellant. The appellant was carrying a green paper bag. The Chief stopped him so that he could see the contents of the bag. The appellant dropped the bag and ran. PW 2 chased him and on inspecting the bag, found it to contain Cannabis Sativa. Appellant was arrested and handed over to police. PW 2 took the exhibit to the Government Chemist and it was confirmed to be Cannabis Sativa.

In his defence the appellant said he met the Assistant Chief who ordered him to carry a paper bag and he refused. He was forced to do so upto police station where he was charged. In his Memorandum of appeal, the appellant raised 6 grounds that can be summed up as follows:-

That the court failed to consider that the assistant chief had a long standing land dispute with the appellant; that the people who were with the chief were never called to testify; that the evidence adduced was not sufficient to find a conviction and lastly, the sentence of 10 years is manifestly harsh.

The learned State Counsel partly conceded the appeal on the ground that no evidence was led in support of the weight and value of the drugs with which the appellant was charged and he urged the court to reduce the charge to one of possession of Cannabis Sativa Contrary to Section 3 (1) of Act 4 of 1994. He further submitted that the appellant's conduct upon being stopped is not consistent with appellant's innocence.

It is the appellant's contention that the assistant chief PW 2 was in company of people who were never called as witnesses. This is the first time that the appellant raises this issue.

In the evidence before the lower court, there was no indication that PW 2 was with others who could have been called as witnesses. The appellant never named them nor did he raise it in his cross-examination of

the witnesses or his defence. If it is his case that the people with the chief would have given adverse evidence to the prosecution evidence he should have raised it in the lower court.

The appellant alleges that the magistrate erred in his finding because he had a long standing land dispute with PW 2. At no stage in the lower court did the appellant raise the issue of there being a grudge between appellant and PW 2. He cannot raise it in his appeal.

Though the particulars of the charge are that the Cannabis Sativa weighed 1.2 kgs and was worth Ksh.7,200/= no evidence was led in support of the said charge.In the case of ***HAMAYUN KHAN versus REPUBLIC Criminal Appeal 159/00*** the Court of Appeal found the sentence to be invalid in a case where the drugs were not valued.

Though the appellant's defence is that he was framed but the magistrate did not believe him, I find no reason to depart from the trial magistrate's finding because of the evidence of PW 2 which has not been faulted. The material found with appellant was confirmed to be Cannabis Sativa which evidence corroborates PW 2's evidence.

The State Counsel urged the court to find that the appellant was found in possession of bhang Contrary to Section 3 (1) of Act 4 of 1994 instead of the Section under which he was charged which requires a valuation report from the authorized officer. Having believed the evidence of PW 2, the court would not have any problem reducing the offence to one of possession under Section 3 (1) of Act 4 of 1994. Since the conviction under Section 4 (1) is invalid that conviction is quashed and sentence set aside. However, I convict the appellant of the offence of possession of narcotic drugs Contrary to Section 3 (1) of Act 4 of 1994. The sentence of 10 years in my view was excessive in the circumstances.

The appellant was sentenced on 28/1/03. He has so far served one year, eleven months imprisonment. That is a fair sentence in the circumstances and the court will sentence the appellant to the sentence already served and order him released forthwith unless otherwise lawfully held.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH
JUDGE