REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

Criminal Appeal 22 of 2005

(FROM ORIGINAL CONVICTION LAMU CR.CASE NO. 540 OF 2003 BEFORE MR. BIDALI RM)

TIMA KOPI………………..………..……………APPELLANT

VERSUS

REPUBLIC……………....….…………………RESPONDENT

JUDGMENT

This is an appeal from the decision of the lower Court (Mr.Bidali, RM) sitting at Lamu, in which the appellant was tried and convicted of the offence of being in possession of a narcotic drug contrary to Section 3(1) of the Narcotic Drugs and Psychotropic Substance Control Act, No. 4 of 1994 as read with Sub-section 2 (A) of the said Act.

The appellant together with another were charged jointly. Her co-accused at the trial pleaded guilty and was sentence to 3 years imprisonment.

Being dissatisfied with her conviction and sentence, the appellant has preferred this appeal citing six grounds in her petition.

Briefly the grounds are

i) that the learned trial magistrate erred in law and in fact by admitting the government chemist report without the maker being called

ii) that there was no evidence linking the appellant with the drugs

iii) that the house where the drugs were found did not belong to the appellant

iv) important exhibits were not produced

v) the burden of proof was shifted to the appellant

vi) the sentence was harsh.

Learned counsel for the appellant argued grounds 2,34 and 5 together and 1 and 6 separately. Being the first appellant Court, it is imperative to evaluate the evidence adduced in the lower Court in order to arrive at an independent decision, always bearing in mind that the trial Court had the advantage of noting the demeanor and hearing the witnesses first hand.

The following are, therefore the facts of this case. P..C. Amos Omollo (PW1) and P.C. Naftali Mwirigi (PW2) together with some of their colleagues received information that a certain lady had bhang in a house in Langoni area of Lamu. They proceeded to the house in question where upon knocking on the door, the appellant opened. In one room, the appellant provided a key to a cupboard from which 60 stones of bhang were recovered. The appellant explained that the bhang belonged to her co-accused at the trial.

The two were consequently charged. The drugs were subsequently submitted to the Government Analyst who prepared a report.

The appellant gave unsworn statement and called one witness, Faraji Abdalla,(DW 2).

In her defence the appellant stated that her co-accused had a bag of potatoes which she was selling. She stored the bag of potatoes on the staircase leading to the house where the appellant and three other tenants lived.

At about 10 pm police officers went t the appellant's house to inquire about the bag of potatoes near the staircase. As the police were talking to the appellant her co-accused appeared and owned-up. The police, nonetheless, arrested both the appellant and her co-accused. She denied that the drugs were recovered from her house.

Her witness, Faraj Abdalla (DW2), from a neigbouring plot told the trial Court that he saw a sack of potatoes near the staircase to the building in which the appellant lived. He confirmed seeing 4 police officers standing nearby. He only noticed one lady, not the appellant, being arrested after the police had opened the sack and removed bhang.

In arguing the appeal for the appellant, Mr.Kamoti submitted that the evidence adduced did not show that the appellant was in possession of the drugs. That it was not shown that the cupboard from which the drugs were retrieved was not produced as an exhibit. The key to the cupboard allegedly provided by the appellant was similarly not produced. It was also argued that the drugs were found on the staircase which was a public place.

Mr.Kamoti further submitted that the Government Analyst report was not produced by the maker and no basis was laid for failure to call the maker. He referred the Court to case of **Fahim Salim V R.** On another ground it was submitted that the trial Court failed to take into account the defence.

Finally, it was submitted that the sentence was harsh considering the appellant's health.

Mr.Ogoti for the State supported both the sentence and conviction. He submitted that the Government Analyst report was properly admitted in evidence and that failure to produce certain exhibits was not fatal to the prosecution case. He further submitted that possession was proved as the drugs were found in a cupboard in the appellant's house. The appellant provided the key to the cupboard where the drugs were found.

On the sentence, it was submitted that 3 years out of a possible 20 years is lenient and within the law.

I have given due consideration to these submissions as well as the authority cited by Mr.Kamoti.

There is no doubt that the appellant lived in the house where the alleged drugs were found. I am persuaded by the evidence of PW1 and PW2 that they were found in the appellant's house.

The appellant was found all alone in the house having herself opened the door for the two witnesses. She proceeded to produce a key to the cupboard where the alleged drugs were found. The Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994 does not define what constitutes possession under the Act.

In the case of **Hussein Salim V R** (1980) KLR 139, the Court of Appeal adopted the definition of the word "possession" in **Stephen's Digest of Criminal Law**, 9th Edn at page 304 where it is defined as follows;

"**A movable thing is said to be in possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need"**

In adopting this definition their Lordship stated as follows**;**

"**We take this definition to mean, not that any legal title has to be proved, nor that access to the complete exclusion of all other persons has to be shown, but that a possessor must have such access to and physical control over the thing that he is in position to deal with it as an owner could to the exclusion of strangers".**

This definition has also been adopted in the more recent case of **Ahmed Mohammed Ali V R** Criminal Appeal No. (Msa) 21 of 1998 (unreported). The items were found in the appellant's house, in a cupboard, the key to which she had on her lesso. I am satisfied that she had control over the items in question. I find that possession has been proved. But the prosecution must prove that what the appellant was found to be in possession of was narcotic drug, namely, cannabis sativa.

It was the prosecution case that on 29th December, 2003 P.C. Nicholas Lewa took samples from the 60 stones of cannabis and submitted the same for the analysis. The Exhibit Memo form as well as the Government Analyst Report were exhibited.

The report was signed "for" J.K. Njuguna, designated as Government Analysis. In that report it is indicated that the samples submitted were found to be cannabis sativa. At the trial, P. C. Lewa produced the report. It is this report that formed the basis of the trial magistrate's finding that the appellant was guilty of being in possession of narcotic drug. It was submitted by Mr.Kamoti that this finding was a misdirection by the trial magistrate as P.C. Lewa could not produce the Analyst's report. He cited the case of **Fahim Salim** (supra) in which this Court (Onyancha, J) held that an analyst's report cannot be produced by any other person without laying the foundation as required by section 33 of the Evidence Act. The Court further held that the production of such a report must also comply with Section 77 of the Evidence Act.

This was a decision of a Court of concurrent jurisdiction and is therefore only of persuasive value. In my opinion there is sufficient provision in the Narcotic Drugs and Psychotropic Substance Control Act regarding admissibility of analyst's report.

One need not therefore make reference to Section 33 and 77 of the Evidence Act. Under Section 67 (1) of the Narcotic Drugs and Psychotrol is Substance Control Act Minister may designate a duly qualified analyst for purposes of that Act. Sub-section 2 states as follows;

"**(2) In any prosecution or other proceedings under this Act a certificate signed or purported to be signed by an analyst, designated under subsection (1), stating that he has analyzed or examined any substance and the result of his analysis or examination, shall be admissible in evidence and shall be prima facie evidence of the statements contained in the certificate and of the authority of the person giving or making the same, without any proof of appointment or designation or signature"**

My interpretation of this is that an analyst report can be produced by any person without necessarily calling the maker. It also does not require proof that the maker has been designated by the minister in accordance with subsection 1.

The contents of the report are admissible and presumed correct unless rebutted, hence the use of the word *prima facie* in subsection 2. It is only when the findings contained in the report are contested that it will be imperative to call the maker and only in his absence will Section 77 of the Evidence Act be

resorted to. In which case only another analyst who is conversant with the maker's signature and/or writing may produce the report.

The report in the instant case was properly admitted in evidence. The trial magistrate finding that the appellant was in possession of drugs was correct.

I do not find anywhere in the trial magistrate's judgment where the burden of proof has been shifted to the appellant.

The trial Court gave considerable attention to the appellant's defence in the judgment.

Regarding sentence, it is clear that the drugs (60 stones) could not have been intended for the appellant's own consumption. She was therefore liable to imprisonment for twenty years. Three years was clearly lenient.

The upshot of this is that this appeal is dismissed.

Dated and delivered at Malindi this 9th day of November 2005.

W. OUKO

JUDGE

9.11.2005

W.Ouko

Judge

Mr.Kamoti for appellant

Mr.Ogoti for state

CC: Gladys.

Judgment delivered.

W.OUKO

JUDGE

Mr.Kamoti: I apply for copies of proceedings and judgment.

W.OUKO

JUDGE

Court: May be supplied on payment of usual charges.

W.OUKO

JUDGE.