



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Criminal Appeal 7 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 1745 of 2003 of the Senior Principal Magistrate’s Court at Kiambu (C. Wakaba – DM II)

STEPHEN KARIUKI GICHINGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

STEPHEN KARIUKI GICHINGA was convicted for the offence of **BEING IN POSSESSION OF NARCOTIC DRUGS** contrary to Section 3(1) as read with 2(a) of **NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT 1 No. 4 of 1994**). He was sentenced to 7 years imprisonment. Being aggrieved by the conviction and the sentence, he lodged this appeal.

The Appellant relied on the amended petition of appeal. Even though 8 grounds were raised, the Appellant’s counsel argued only four, that is, grounds 2, 3, 4 and 8 which provide as follows: -

1. That the learned trial magistrate erred in convicting the appellant on heavily contradicted evidence.
2. That the learned trial magistrate erred in allowing prosecution to produce the Government Analyst Report through the investigating officer.
3. That the learned trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt.
4. That the sentence was heavy, harsh and manifestly excessive.

The Appeal was opposed.

I have considered this appeal and I have re-evaluated the evidence of the prosecution and the defence bearing in mind that I neither saw nor heard any of the witnesses and giving due consideration for it in line with the Court of Appeal case of **OKENO vs. REPUBLIC 1972 EA 32.**

In brief the facts of the prosecution case were that on 8th August 2003 PW1, an administration police officer, PW2, Assistant Chief of Kagwa sub-location and PW3, Chief of Riabai location and other administration officers were on patrol within Municipality location, Kiambu District. That they were on duty to arrest people dealing in illicit brew and narcotic drugs. They started at Kihingo area at the Appellant’s hotel because of information they had received. That they found the Appellant standing outside his hotel. They searched and recovered 3 rolls of bhang from his person. They went with him to

the Appellant's hotel where a further 49 rolls of bhang was recovered. In his house which he unlocked for them, they found four stones of bhang. The bhang was later confirmed to be a narcotic drug as per exhibit 4.

The Appellant in his unsworn defence not only denied possession or recovery of any drugs.

The Appellant also implicated the chief, PW3 of having a master key with which he opened his house.

MR. SENETI argued the appeal on behalf of the Appellant on the second ground of appeal in the petition. Learned counsel submitted that while PW1 said that they went to Karuha area, PW2 contradicted him by saying kihingo. **MR. MAKURA**, on behalf of the State submitted that in his own understanding of the evidence, the place called Kihingo was a sublocation while Karunga was within the said sub-location.

The evidence of both PW1 and PW2 mentioned that they found the Appellant at Karuha outside his hotel. Even if PW1 and PW2 may not have agreed as to the correct name of the place, they were clear that it was outside the Appellant's hotel. The Appellant was quite content with their evidence of the place where they alleged that they found him and he therefore did not visit that issue in cross-examination of both witnesses. There was no contradiction in the evidence of the prosecution as argued by the Appellant's advocate and nothing turns on this ground.

MR. SENETI submitted that the Evidence Act was clear that only makers of a document could in fact produce them in Court. He did not quote any specific provisions.

Learned counsel submitted that the police officer who produced the Government Analyst Report, exhibit 4, had no powers to do so. **MR. MAKURA** on his part submitted that PW4 had power to produce the Government Analyst Report as the investigating officer of the case as long as no objection was raised.

Section 77(1) of the Evidence Act provides:

“(1) In Criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.”

The Section does not provide for the person competent to produce the documents mentioned therein but does provide that once produced they may be used in evidence. That gives the Court the discretion to determine the admissibility of such documents and to determine the weight to be given to them. Even though the section does not specify who can produce the experts documents mentioned, in practice, the investigating officer of a case produces them and the Court could only require the maker of the document to be called as a witness to testify if it considers it necessary or where the defence requires the expert for cross-examination.

In the instant case, the court allowed the production of the document and no objections were raised or application made by the defence concerning the admission of the report. In the circumstances the Court was quite right to consider and use the report in its judgment.

Learned counsel for the Appellant submitted that the evidence adduced by the prosecution was insufficient in that it was based on hearsay. Learned counsel submitted that PW2, PW3 and PW4 acted on hearsay that the Appellant sold bhang yet they were neighbours and they never got search warrants. **MR. MAKURA** on his part submitted that there was sufficient evidence to convict. That the part of the evidence of PW1, PW2 and PW3 which was hearsay, could be severed without affecting the prosecution case.

PW4 was never part of the team which acted together with PW2 and PW3 to search and arrest the Appellant. Contrary to Appellant's counsel submission, it was PW1, PW2 and PW3 who arrested the

Appellant. PW4 was the investigating officer of the case and that was the only role he played in this case. **MR. SENETI** also made a submission which had no evidential backing, that PW3 shared a boundary with the Appellant. There was no such evidence given before the court and the same amounted to a statement from the bar and was inadmissible.

The Appellant's complaint that the three administration officers acted on hearsay is not without merit. The three informed the Court that the information they had received implicated the Appellant with drugs. Whereas no prejudice could have been occasioned to the Appellant by the three officers investigating the information they had received against the Appellant, the learned trial magistrate should not have allowed them to give the content of that information in Court. By allowing the witnesses to say the content of the information they were investigating against the Appellant at the time of arrest, the learned trial magistrate ignored the best evidence rule in evidence and also flouted Section 63 of the Evidence Act. That aside, I find that no serious prejudice was suffered by the Appellant for the simple reason that, upon investigating the matter, they found direct evidence that was the subject matter of the charge against the Appellant. The error or irregularity occasioned to the Appellant by admission of the hearsay information is curable under Section 382 of the Criminal Procedure Code. Accordingly I invoke Section 382 of Criminal Procedure Code to cure the said defect. I find that the evidence adduced by the prosecution in this case was strong and that the conviction was safe. I uphold the conviction entered by the learned trial magistrate in his judgment.

On the sentence, **MR. SENETI** submitted that the trial magistrate was a DMII and that he gave the case to the Senior Principal Magistrate for sentence. That the sentence of 7 years imposed by the Senior Principal Magistrate was excessive and harsh and urged this court to set it aside.

MR. MAKURA submitted that the DM II had power under Section 221 of the Penal Code to transfer the case to the more senior court for sentence. **MR. MAKURA** submitted that **Section 3(2) of the Narcotic Drugs and Psychotropic Substance Act** provided for a term of 10 years and 20 years imprisonment for such offence and that the sentence imposed was neither excessive nor illegal.

Section 221 of the Criminal Procedure Code in the marginal notes provides;

“Committal to higher court for sentence.”

Under that section, as learned counsel for the State correctly submitted, a court with lesser jurisdiction may transfer a case to a higher court for sentence. The learned trial magistrate was therefore quite in order when he transferred the case to the Senior Principal Magistrate for sentencing. The learned magistrate's jurisdiction was that of a DMII. Under **Section 7(3) of the Criminal Procedure Code**, a DMII has jurisdiction to pass a sentence of up to two years imprisonment and to impose a fine not exceeding Kshs.10,000/-. While laying a basis for the transfer of the case, the learned trial magistrate observed that the evidence adduced proved that the Appellant was a trafficker and or dealer in narcotics drugs and that the drug recovered from him was a great quantity.

Before passing sentence, Section 221(3) of the Criminal Procedure Code provides that the Court to which the case was referred for sentence:-

“Shall inquire into the circumstances of the case and may deal with the offender in any manner in which he could be dealt with if he had been convicted by that court...”

The record shows that the moment the Senior Principal Magistrate took over the case, she straight away sentenced the Appellant to 7 years imprisonment. The section is clear that the Court that takes over a case under **Section 221(1) or (2)** shall inquire into the circumstances of the case before passing sentence. The reason for this is pretty obvious, because that court did not try the accused person and so does not have any knowledge of the case or its circumstances. The Court had no material before it to assist it assess the kind of sentence to impose. As held in the case of **ADAN vs. REPUBLIC 1973 EA 445** at page 447 a statement of facts serves two purposes and one of which is it gives the magistrate the

basic material on which to assess sentence and further that the granting of any particular offence depends on all the circumstances.

The prosecution should have placed material before the Senior Principal Magistrate by briefly outlining the prosecution case, the circumstances of the case and the charge for which the Appellant had been convicted. Thereafter the Court would have given the Appellant an opportunity to give his mitigation indicating to him why he had been taken before the Court. It was then only that the Senior Principal Magistrate could have passed sentence.

Since the Senior Principal Magistrate did not do so, I find that the learned magistrate had not borne in mind any principles of sentencing and that the Court passed the sentence blindly. Accordingly I set aside the sentence. I have considered the circumstances of this case, the seriousness of the offence and the Appellant's mitigating factors both given before the DMII before the transfer of the case to the Senior Principal Magistrate and in his petition of appeal. I believe that taking all these issues into consideration five years imprisonment would be a fair sentence for him to serve. I therefore substitute the sentence against the Appellant from 7 years imprisonment to five years imprisonment from the date of sentence in the lower Court.

Dated at Nairobi this 20th day of December 2005.

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LESIT, J.

JUDGE