Mohamed v Republic (Criminal Appeal E063 of 2023)
[2024] KEHC 6638 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E063 OF 2023

DKN MAGARE, J

MAY 20, 2024

BETWEEN

KHADIJA YUSUF MOHAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and conviction and sentence of the Hon. Okuche given on 14/09/23.

2. The appellant was convicted to 10 million fine in default 8 years' imprisonment. The appellant had sought for leniency given that she is elderly. She turned out to be in her early 40s.

3. The appellant had been charged with trafficking of Narcotics contrary to Section 4 (a) (i) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 2022. She was found in possessions of 50 rolls and 200 grams of cannabis valued at Kshs. 12,250. The said drugs were not for medical preparation.

4. On 20/10/2022, plea was taken, the appellant was released on Kshs. 500,000/= cash bail while the co-accused was released on Kshs. 50,000/=. She was released on 12/11/22 on bond.

5. PW1 -Grace Nyakio Njenga, was a government analyst. She testified that she received exhibit memo and items which she examined. They were found to be Cannabis. The appellant did not cross examine at that point saying she had just received the exhibit.

6. PW2, PC Obat Stephen stated that he was tasked to organize a narcotics crackdown and he went to the accused area of business in Majengo and found 6 young men smoking bhang. They were searched but nothing was recovered on them.

7. The OCS led the team into the appellant's home where they recovered 50 rolls and 200 grams of cannabis. She was arrested together with other. There found a rolling flag and scissors. The appellant only asked one question to which the witness answered that they were outside a kiosk.

8. PW3, PC Samuel Wandia testified that he was called by Corporal Kamunde and were directed to one of the shops and they went to the compound and they met 6 young men. When they got into the shop, the window. She started screaming and causing commotion. There was a push and pull and a polythene bag dropped from the main bag. When they did a search they recovered scissors and a rolling flag. It also had 50 rolls and 200 grams of bhang. They also arrested the young men.

9. PW4 gave evidence that they were patrolling and got intelligence from an informer that there was someone selling bhang and they proceeded to the appellants. House and found people smoking bhang. The appellant caused commotion. A polythene bag fell from the main bag that she was triyng to throw though the window. Upon inspection they noted that it had had 50 rolls and 200 grammes of bhang that was not in rolls. The witness picked the cannabis and prepared an inventory. The Appellant did not sign the inventory.

10. On cross examination he stated the appellant did not sign. On cross examination he stated the other Accused were in the compound while the appellant was in the kiosk.

11. PW5 was the investigating officer who got report form the arresting officers. He prepared exhibit memo. He produced exhibits 1- 7. On being cross examined he said that there are several people who live near the houses and he said he does not know that the accused lived there. He then said the appellant had a case to answer and put her other defence.

12. She testified that she is a shopkeeper. The policemen knocked at the door and her son Rajab Kariuki opened the door. There were no recoveries made. She stated that the 5th accused person had come to their home to repair electricity.

13. On cross examination she stated that 3 officers entered to her house and did a search. They informed her of the search. Rajab, Patrick and Moses were in the house. Alex was outside. Alex, Patrick and Moses were the 3rd, 4th and 5th accused persons in the lower court.

14. DW2, Rajab Kariuki Thuo testified that police officers came to their compound and introduced themselves. 3 went to his mother's shop. He said that they just handcuffed them and arrested them. He stated that the house belonged to the mother.

15. DW3 – DW7 testified in regard with their cases. DW3 stated that he was arrested at the shop and was never told the reason. He stated that he was buying milk. DW4 stated that he was arrested on the way and was not at Khadija's shop. DW5 stated that he had gone to visit his aunt and no bhang was sold there. DW6 stated that he had gone to repair power and produced certificate.

16. DW7 stated that they search the appellant's house and did not make any recoveries. He stated that the police out of handcuffs and arrested the accused without handcuff. This appears to be a request for police to be supplied with more handicuffs.

17. DW8, Amina Muthoni is the appellant's daughter. She stated she was in the house, she never saw police recover bhang.

18. After hearing, the court convicted the appellant and sentenced her to 10 million fine in default, 8 years imprisonment. This was after taking into consideration the fact that she had been convicted in 1038 of 2019 for possession of Narcotics or some Narcotic related offence. where she was charged and alleged guilty on 18/09/ 2020.

19. She then set up the following grounds of appeal:-

    1. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant relying convenience of witnesses which was not sufficient or cogent enough to warrant such a conviction or sentence.

    2. That the learned Magistrate erred in law and in fact by sentencing the accused to 8 years imprisonment and or imposing a fine of Kshs. 10,000,000/= which sentence and fine were manifestly excessive for the charged offence.

20. It is not lost on the court that the time gap on the former conviction and the current one is 2 years.

Analysis

21. The duty of the first Appellate Court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

22. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

23. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have

already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

24. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

25. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

26. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that: -

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

27. Having evaluated the evidence, I note that the duty of the prosecution was to prove: -

a. That the substance was cannabis

b. That it was for purposes other than medical use

c. That the amount is as per the charge sheet.

d. That the perpetrator was the appellant.

28. Regarding the substance, the evidence of PW1 was succinct as to the substance and the amounts thereof. I am only disturbed that the court did not take into consideration the postulation that she had only received the exhibits at that point.

29. However, I am comforted by the fact that the appellant was represented by Mr. Ombongi who reviewed the evidence and did not call the witnesses for cross examination.

30. The evidence was in sync with the rest of evidence on in particular as to the quantity and type of substance. The state of cannabis was that it was not for consumption. It was being rolled and some had not been rolled. The consumers were just outside the kiosk. She could not have been sufficiently philanthropic to obtain cannabis for purposes of keeping.

31. The appellant did not plead that the substance was for medical use. Under Section III of *Evidence Act*, the burden is on the person wishing to rely on an exception under the general rule. Further, the appellant in her testimony confirmed that she does not smokes cannabis.

32. So it would be futile for a nonsmoking person to use it in any other way. The respondent on the other side said that the cannabis was accompanied by rolling flags, scissors and users and the appellant was not among them. It can only be imagined that they came to smoke another shop. Therefore, it is futile to say that the one she had in her possession was for her future use.

33. Lastly, the question on whether the appellant was the perpetrator of the offence. The evidence of prosecution and defence were consistent that the police came to do a search on the shops. No police officer was seen carrying cannabis as they worked in and there was not accusation.

34. The evidence of the perpetration of the offence was consistent and not impeached. I therefore find that the court was right in convicting the appellant. I dismiss the appeal on conviction.

35. On sentence the appellant stated the sentence is excessive. They stated that section 86 (1) of the Narcotics Drugs was not complied with. The section provides as follows: -

1. Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.

2. In this section "proper officer" means the officer authorized by the Cabinet Secretary by notification in the Gazette for the purposes of this section.

36. They were of the view that without a value thereof, there should be an option of a fine and they should be acquitted. I do not agree with the appellant that assessment this only applies where any fine is to be determined by the market value. In this matter, there were 2 grams and 50 rolls of cannabis. Even if the bhang was weightless, it still falls between the range of 1-1000 grams. What the submission show is that the court gave a more lenient case than expected.

37. The sentence meted out was proper except two aspects: -

i. The court does not indicate to have taken into consideration mitigation. Having found that the appellant was not a first time offender proceeded to give a fine of 10 million.

ii. The fine under this offence is 30 million and an award of less than 30 million is illegal. I therefore set aside the fine of 10 million.

38. The appellant is indicated to have been an elderly lady but she was not clear on how old she was neither was it indicated. I saw her in court. She is not so elderly as indicated. Nevertheless, it was the duty of the court to inquire into consideration mitigation, though the record shows she is in early forties.

39. Therefore, I set aside the sentence metered out. I shall therefore sentence the appellant to 6 years imprisonment without an option of a fine.

40. Pursuant to Section 333(2) of the Criminal Penal Code, I direct that the sentence shall run from 27/10/22, the date of arrest excluding the period between 4/11/22 to the date of judgment 14/09/ 23 when she was on bond.

Order

41. The upshot of the foregoing is that I make the following orders: -

a. The Appela on conviction is hereby dismissed.

b. The appeal on sentence is partly allowed. I set aside the sentence metered out the sentence of Ksh 10,000,000 in default 8 years imprisonment. In lieu thereof, I sentence the Appellant to 6 years' imprisonment.

c. Pursuant to Section 333(2) of the Criminal Penal Code, I direct that the sentence shall run from 27/10/22, the date of arrest excluding the period between 4/11/22 to the date of judgment 14/09/ 23 when she was on bond.

d. 14 days right of appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Appellant in person

Mr. Wahome Gikonyo for the Appellant

Ms Lubanya for the state.

Court Assistant –Brian