



REPUBLIC OF KENYA



**Muoki v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 7407 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E004 OF 2023
DR KAVEDZA, J
JUNE 20, 2024**

BETWEEN

BENJAMIN KINYANZWII MUOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court at Kibera Criminal Case No.601 of 2018 delivered by Hon. C. Njagi (PM) on 24th October 2023)

JUDGMENT

1. The appellant was charged with the offence of being in possession of cannabis sativa (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) No 3 of 1994. The particulars of the offence were that on the 7th day of May 2018 at Kangemi Gichagi area within Nairobi County, the appellant was in possession of Narcotics drugs namely bhang to wit 332 grams with a street value of Kshs 6,640 in contravention of the said Act. The appellant was tried and at the end convicted of the offence and sentenced to a fine of Kshs 100,000/= (Kenya Shilling One Hundred Thousand) in default to serve one (1) year imprisonment.
2. The appellant was aggrieved by the said conviction and sentence thus provoking the instant Appeal via Petition of Appeal dated 27th October 2023 as further expounded in his written submissions filed in court on 6th March 2024. The main grounds raised are as follows. In a coalized form in grounds 1, 7, 8, and 9 the appellant argues that the trial court erred in fact and law in holding that the offence had been proved to the required standard. In grounds 2, 3, and 6, the appellant argues that the trial court erred in relying on the prosecution's evidence that was scanty, inconsistent, disjointed unreliable, and full of glaring and material contradictions. In grounds 4 and 5, the appellant argues that the trial court erred in law and fact by not considering that vital witnesses were not called in contravention of the provisions of the [Criminal Procedure Code](#). The respondent did not file a response or submissions



despite being given time to do so by the order of this court on 27th February 2024; nevertheless, this court will proceed to render its judgment in the interest of justice.

3. As this is a first appeal, I am enjoined to consider all the evidence and reach an independent decision whether or not to uphold the judgment. In so doing, it is necessary to set out the facts as they emerged before the trial court. See *Okeno v Republic* [1972] E.A 32.
4. The prosecution's evidence was that on the evening of May 7, 2018, Corporal Peter Wanjohi Muriuki (PW1) and PC John Kiarie (PW2) were on patrol when a member of the public informed them about a suspect selling bhang in a barber shop. The officers followed the lead to the shop, identified themselves, and conducted a search, finding about half a kilogram of suspected bhang hidden under a table. They arrested the appellant, who was alone and claimed to own the shop, and took him to Kabete Police Station. In cross-examination, PW1 admitted not knowing the shop's name or having its registration certificate and mentioned another person arrested for selling bhang at Kangemi market.
5. PW3, James Michael Welimo, the Government Chemist Analyst testified that on 21st May 2018, they received Exhibit marked "A" from PC James Mutasi of Kabete Police Station. The exhibit weighed 330 grams of plant material and it was desired that they ascertain if the suspected plant material was bhang. He testified that upon examination, the plant material was found to be cannabis, a narcotic drug under the Act. That he marked the exhibit GCK 1398/18/MW for identification. It was also his testimony that he prepared a report. He tendered the Government Analyst Report as Prosecution Exhibit 2. On cross-examination, he stated that the difference in grams emanates from the mode of analysis as he did his weighing.
6. PC Alloice Ndile (PW4) testified on behalf of the investigating officer, who was unavailable. He presented the cannabis sativa and the Exhibit Memo as evidence. In cross-examination, he admitted he did not verify the ownership of the barber shop but was only responsible for producing the exhibits in court.
7. In his defence, the appellant called two witnesses. DW1, Joseph Musa, testified that on May 7, 2018, he visited his cousin, the appellant, at the barbershop. He stated that around 5:00 PM, three police officers entered the shop while the appellant was shaving customers. They searched everyone present, including two other people playing games, but found nothing. They were all arrested and taken to the Area Chief at Kangemi. DW1 claimed he was released after paying Kshs 2,000/=, while the appellant, unable to pay, was taken to the police station and later charged. During cross-examination, DW1 admitted he had no official record to prove his presence or arrest at the barbershop.
8. DW2, Samuel Munoru Kinyanzwi, testified that the appellant called him after the arrest, explaining that he was at the Area Chief's Office in Kangemi and that those who paid were being released. DW2 did not send money, believing his brother was innocent. He confirmed that the appellant was moved to Kabete Police Station and later charged. On cross-examination, DW2 admitted he was not at the scene and could not verify if anything was found in the shop.
9. DW3, the appellant, testified that on the day in question, he worked at the barber shop and gaming shop while another person managed the Mpesa shop. Around 5:00 PM, three plainclothes police officers entered, searched the shop, and accused them of selling drugs, which he denied. He stated that DW1 and another person were arrested but released after paying the officers. The appellant maintained his innocence, asserting that he was charged because he could not pay the officers. During cross-examination, he reiterated his claim of wrongful arrest due to his inability to pay.



10. Having evaluated the evidence, the issues arising for determination are whether the prosecution proved the offence of being in possession of cannabis sativa (Bhang) against the appellant to the required standard and whether the sentence imposed was proper.
11. As to whether the 332 grams of green substance produced by the prosecution was cannabis, PW3, the Government Analyst testified to the same and tendered a report. He testified that on 21st May 2018, he received Exhibit marked 'A' from PC James Mutasi of Kabete police station with a request to confirm whether the suspected plant was bhang. Upon examination, he found the plant material to be cannabis, a narcotic drug under the *Narcotics and Psychotropic Substance (Control) Act* No 4 of 1994. There was then no dispute that the green substance produced as exhibit A was bhang.
12. The next question that follows is whether the substance was in the possession of the appellant. The *Black's Law Dictionary* 10th Edition defines the term possession to mean –

The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls.
13. The prosecution was therefore required to prove that the bhang was under the physical control of the appellant and that he had knowledge of the existence of the bhang from where it was recovered.
14. It was the prosecution case that on the material date, PW1 and PW2 received information that there was a suspect who was selling bhang from a barbershop. The informer then led PW1 and PW2 to the barber shop of the suspect where they went in and introduced themselves as police officers. Indeed, the existence of the barbershop was not disputed as DW1 confirmed the same and additionally, the appellant testified that he was an employee of Kangemi Barber Shop.
15. As to whether the appellant was in possession of the bhang, PW1 and PW2 testified that upon entering the barber shop and introducing themselves as police officers, the appellant told them that he was the owner. PW1 and PW2 proceeded to conduct a search and found about a half kilogram of bhang in a black paper bag hidden under a table. The appellant was then arrested.
16. Although the appellant's counsel submitted that the bhang was not found in a bag belonging to the appellant and that he was just an employee in the barbershop shaving a customer who might have dropped the bhang there, the same was never raised on cross-examination and can only be an afterthought. The appellant in his defence denied that the substance was ever recovered from the barbershop.
17. Possession is defined in Section 4 of the *Penal Code* in the following terms:

“be in possession of” or “have in possession” includes not only having in one's own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;

if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed taken to be in the custody and possession of each and all of them.
18. From the above definitions, possession may be actual or constructive. Actual possession denotes physical custody or control of an item or object. In that case, the person in possession has immediate



contact. Whereas, in constructive possession, an individual has actual control over the goods or property without actually having physical control of the same assets. At law, a person with constructive possession stands in the same legal position as a person with actual possession. Upon recovery of the substance at the barbershop, the burden of proof shifted to the appellant to discharge the same, but he failed to do so.

19. The appellant in his defence, the appellant maintained that he was only charged with the offence after failing to bribe his way out, unlike the rest who had also been arrested including DW1 who paid Kshs 2,000/= to the police officers. Despite the same being very serious allegations, there was nothing on record to suggest that the appellant was set up by the police officers as there was no reason for them to do so. No grudge was alluded to between him and the arresting officers who testified that they only acted based on information received from a concerned member of the public.
20. In the circumstances, contrary to the appellant's contention that judgement was against the weight of the evidence, I find that the evidence in this case was, to say the least, overwhelming to sustain a conviction and I cannot fault the trial court on this.
21. As to the contention that there were inconsistencies as to the weight and measurement of the bhang recovered from the appellant, the same was sufficiently addressed by PW3 who testified that the difference in grams ordinarily emanates from the mode of analysis. In this case, he maintained that the substance weighed 330 grams. It is trite law that only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. In this case, the minor discrepancy as to the measurement of the substance did not cast doubt on the strong evidence against the appellant.
22. Similarly, the trial court evaluated the appellant's defence and gave reasons why she rejected the same and I find no reason to fault her on this and the subsequent conviction.
23. On the sentence imposed, it was contended that the sentence meted out has strained his relations and urged that the same ought to be set aside. The appellant was charged with being in possession of cannabis sativa (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 3 of 1994. Section 3 of the said Act provides as follows:
Penalty for possession of narcotic drugs, etc.
 - (1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
 - (2) A person guilty of an offence under subsection (1) shall be liable—
 - (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and.....
24. In this instant case, the appellant was sentenced to a fine of Kshs 100,000 in default to serve one (1) year imprisonment. In my view, the sentence imposed cannot be said to be harsh and excessive as it is within the law and is thus affirmed.
25. Accordingly, the appellant's appeal is found to be lacking in merit and is accordingly dismissed in its entirety.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JUNE 2024



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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Joy Court Assistant

