



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. E005 OF 2020

(Being an Appeal against conviction and sentence in Cr. Case no.687 of 2019

Wundanyi delivered on 7/1/2020 by Hon. E. M. Nyakundi, RM))

CLAUD MWANYUMBA MGHAZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant **CLAUD MWANYUMBA MGHAZO** was charged with the offence of being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Act No.4 of 1994. Particulars of the offence are that on the 3rd day of September, 2019 at around 5.30pm at Ivunyi village, Mwanda Location within Taita Taveta County, the Appellant was found being in possession of narcotic drugs to wit 16 kilogrammes of cannabis sativa with a street value of Kshs. 3,750/=. He pleaded not guilty to the charges.

2. To prove the case the prosecution called a total of 4 witnesses as follows:

PW1 was MWAKALA MOKA, a chief at Mwanda Location. He testified that on 3/9/2019 at 5.30pm he was with two police officers and the assistant chief when they went and arrested the Appellant who they found digging in his farm. In the farm was bhang planted together with maize. The Appellant was alone at the said farm. The farm belongs to his family. The said bhang was exhibited before the court in two sacks. The yellow sack was marked as MFi-1(a) and the white sack marked as MFi -1(b). They took a picture of the said bhang and also uprooted the same and took it to Wundanyi Police Station. PW1 knew the accused as a farmer and that he had arrested him before about three years earlier and he was charged with the same offence and that he was convicted. He positively identified the accused.

3. PW2 was DAVIT NGUMBAO, was the Government Analyst working for the Government chemist at Mombasa. He had a police exhibit memo form and his report, marked as MFi-2 and MFi-3 respectively. On 4/11/2019 PW2 received an exhibit from PC Gladys Kombe from Wundanyi Police Station. The exhibit was in Khaki envelope marked 'm' and contained loose dry plant material wrapped in white paper and it weighed 33.8 grammes. PW2 did two laboratory tests and found that the dry plant material was cannabis sativa and he produced the exhibit memo form as exhibit No.1 and his report as exhibit No.3. The accused did not have any questions for the witness.

4. PW3 was STEVEN KILILO MWANDIGHA, was the Deputy Chief at Mwanda Location. He testified that on 3/9/2019 at 5.30pm he had received information that the Appellant had planted bhang on his farm. They went to the scene with PW1 and two police officers to a place called Mwandagu and found the Appellant digging his farm and they found that he had grown bhang together with maize. On confirming the same was bhang, they arrested him and took pictures and then uprooted the said bhang. They took the Appellant to the Chief's Camp and the police officers later took him to Wundanyi Police Station. He positively identified the accused. The Appellant did not have any questions for the witness.

5. PW4 was PC ROBERT OYOLA stationed at Wundanyi Police Station and the Investigating Officer in this case. He reiterated the evidence of PW1 and PW3 and testified that they arrested the Appellant with 378 stems of bhang in two sacks. The same was produced as exhibit No.1(a) and (b). The Appellant cross-examined the witness.

6. In his unsworn evidence, the Appellant in his defence stated that on 3/9/2019 at 9 a.m. he met police officers and greeted them and they told him they had work for him to do. He escorted them to a farm that was in a forest and they left him with one police officer. They later went back with a sack and told him to carry the same to the chief's camp which he did. On getting there they said they did not have cash to give him. He waited there for the money. Instead he was arrested and taken to Wundanyi Police Station. He did not know the charges. The Appellant denied any knowledge of the bhang they were talking about.

7. After the hearing the Appellant was convicted of the offences and sentenced to 6 years in prison.
8. The Appellant being not satisfied with that decision appealed urging the grounds in the Appeal.
9. This being first appeal this court will now analyze and re-evaluate the evidence and make its own decision based on such evaluation.
10. The Appellant based his Appeal on the following summarized grounds:

That the learned Magistrate erred both in law and fact to convict the appellant with the evidence before him which was inconclusive.

The Appellant was charged with the offence of Being in Possession of Narcotics Drugs. The ingredients to prove in this charge are that the Appellant was in possession of narcotics drugs. Possession has been defined by Section 4 of the Penal Code as:-

(a) Being in possession of or have in possession includes not only knowingly having anything in actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person”.

11. In the case of **Ahamad Abulfathi Mohammed & Another v R [2018] eKLR**, the court of Appeal while discussing Section 4 of the Penal Code stated as follows:

“in our view, under that provision, being in possession of the RDX does not require that the appellants be in actual, person physical possession of it. So long as there is evidence on record, that they knowingly has the RDX at the gulf course for their own use or that of any other person, that will constitute possession within the meaning of the Penal Code”.

12. Therefore, possession under Section 4 of the Penal Code encompasses both actual and constructive possession.

13. Secondly, the Appellant was found in a farm cultivating cannabis sativa. The cannabis sativa was uprooted and subjected to tests in the Government Chemist at Mombasa. Pw2 was the Government Analyst who performed 2 laboratory tests on the plant material and he concluded that the same was cannabis sativa. The Appellant was the only person in the farm. He knew what the plant material was. In **Francis Mbugua M’ringera v Republic [2014] eKLR** it was held that:

“the prosecution did not need to prove that the Appellant occupied the house or that land in which the land was recovered. Neither did the prosecution need to prove that the appellant occupied the house or land in which the bhang was found; by finding the appellant in a house and on a land where bhang was recovered the prosecution had discharged there burden of proof”.

The prosecution submitted, and I agree, that the prosecution discharged its duty as regards to the offence. It was not necessary to prove ownership of the land.

14. The other ground was that **the learned magistrate erred both in law and fact in failing to find that the burden of proof was shifted from the prosecution to the Appellant.**

The burden of proof is well explained in the case of **United States states v Smith, 267 f. 3d 1154,1161 D.C 2001** (citing in **Re Winship 397 v.5 358, 370,905 t 1068,1076 (1970)** (Harlan, J, concurring). The same is quoted in **Republic v Ismail Hussein Ibrahim [2018] eKLR** where the court stated as follows:

“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant’s guilt, but it does not mean that a defendant’s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there’s a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”

15. According to the above extract, it is accepted that the State does not have to overcome every possible doubt, the duty is to prove every possible element by evidence that firmly convinces the court and leaves no reasonable doubt. What was important in this case was to prove possession and the same was proved beyond reasonable doubt. At no time did the burden of proof shift to the appellant. The prosecution called 4 witnesses to prove its case. The Act of possession of narcotics drugs by the Appellant was conclusively proved by the prosecution. The Appellant only had to tender his defence which he did by way of an unsworn defence. Therefore this ground also fails.

16. The other ground was that **the learned Magistrate erred both in law and fact when he convinced the Appellant yet failed to find**

that crucial witnesses were not summoned to clear doubts in the prosecution case.

In the case of **Keter v Republic [2007] 1 EA 135** the court held *inter-a-alia* thus:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

The witnesses that prosecution called were enough to prove the offence. It was not necessary to prove ownership of the land. The Appellant was found cultivating on the land, the cannabis sativa was growing on that land and he was the only one found there. The witnesses called testified to this fact. This ground too must fall.

17. The other ground was that **the learned magistrate erred both in law and fact by convicting the Appellant yet failed to subject the whole proceedings to an exhaustive re-evaluation as required by law.**

The Appellant’s case here is based on the allegation by him that an investigating officer different from the first investigating officer testified. However, record shows that Pw4 testified on his own behalf. He testified that he took over investigation from his colleague. He did not need to confirm his colleague’s handwriting or whether he knew him as he was testifying on his own behalf. On the 18/12/2019, the trial magistrate stated that she would be delivering her judgment on the 17/12/2020. She then placed the file for mention on the same day. This was procedural and the court did not break any rules as alleged by the Appellant. This ground also fails.

18. From the foregoing, it is the finding hereof that the appeal herein lacks merit as regards the conviction of the Appellant. On sentence there is no basis to interfere with the trial court’s sentence of 6 years. The entire appeal is dismissed.

Dated, Signed and Delivered in Mombasa this 13th day of May,

2020.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Appellant in person

Ms. Mukangu for DPP

Ms. Peris Court Assistant