REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 12 OF 2018

JOSEPH MUCHOKI GUCHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. M.W Kurumbu (Mrs.)- RM dated 23rd February, 2017 at the Senior Resident Magistrate's Court at Kandara in Criminal Case No. 804 of 2016)

JUDGEMENT

1. The appellant Joseph Muchoki Guchu was charged with **Trafficking in Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.** The particulars of which were that on the 27.9.2016 at Kagunduini Market in Kandara Sub-county within Murang'a County, was found in possession of dry green plant materials suspected to be bhang to wit 36 rolls and 250 grammes with a street value of ksh. 610 which was not in medical preparation form, 2 ½ packets of rizila papers, five rolling sticks, six pairs of scissors (sic).

2. He faced a second count of being in possession of 36 rolls and 250 gms of bhang worth Sh. 610 which was not medically prescribed.

3. The appellant was tried before M. Kurumbu, Resident Magistrate, Kandara and in a judgement dated 23.2.2017 was found guilty and convicted on both counts and sentenced to 10 years imprisonment.

4. Aggrieved by conviction and sentence, the appellant lodged this appeal and premised it on five grounds namely;

> **1. That the learned trial magistrate erred in law and facts by failing to observe that the investigation was poorly investigated shoddy and shallow which whose finding cannot amount safe conviction and sentence.**
>
> **2. That the learned trial magistrate erred in law and facts by failing to observe that the prosecution case was not proved beyond doubt as required by law pursuant to Section 107 of the Evidence Act.**
>
> **3. That the learned trial magistrate erred in law and facts by failing to observe contravention of Section 169(2) of the CPC on whereby the appellant defence was not adequately considered.**
>
> **4. That the learned trial magistrate erred in both law and facts by failing to observe the honourable court has wide jurisdiction power which has been conferred to and unlimited discretion on sentence.**
>
> **5. That I wish to adduce more grounds when I will be furnished with copy of trial records and be present during the hearing of this appeal.**

5. Directions were given that the appeal be disposed off by way of written submissions. The appellant filed written submissions while the ODPP through Mr. Waweru submitted orally in court at the hearing.

6. This being the first appellate court, it is my duty to re evaluate the evidence and reach my own conclusions all the while alive to the fact that it is the trial court that had the advantage to see, hear and observe the demeanour of the witnesses. This is in accordance with the principle in **Okeno –vs- Republic (1972) EA 32** , where the court stated;

> **"*The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilala M. Ruwala v. Republic [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 finding 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 –vs- Sunday Post (1958) E.A 424."***

7. The evidence on record is that PW 1 and PW 2 recovered the items particularized in the charge sheet upon conducting a search at the house of the appellant following information that the appellant was dealing in bhang.

PW 3 investigated the matter. He sent the exhibit to government chemist and a report from the analyst, confirmed that the exhibit was bhang.

8. In his defence, the appellant gave an unsworn statement in which he said that police officers just went to his place. They took him outside and took photographs of him. He was taken to the police station. The police took his clothes which he was given when he appeared in court.

9. I have considered the evidence and the submissions on record. The evidence of PW 1 and PW 2 was firm and consistent and explained in great detail the recovery of the subject material from the appellant. The plant material was examined and found to be bhang. The evidence remained firm even on cross examination. I have considered the defence put forth by the appellant. It was a mere denial. There is no explanation whatsoever why the police officers picked on him and framed him as he would want the court to believe. On the evidence on record, I am satisfied the appellant was found in possession of the subject material. The conviction was safe.

10. It is not lost on me that the prosecution in charging the appellant charged him with two counts, one on trafficking and the second, on possession of bhang. Surprisingly the trial court did not appear to note this anomaly as is the judgement conviction was on the two counts. This certainly was in error. One can only be either trafficking narcotics or be in possession for his own use.

11. I have considered the anomaly. I do not find it any prejudicial to the appellant as the framing of the charge did not deny him the opportunity to defend himself as the material subject of Count 1 was still the material subject of Count 2.

12. However, I note in sentencing, the court gave an omnibus sentence of 10 years imprisonment without indicating for which count among the two.

13. Having found the appellant guilty of trafficking in narcotic drugs, it was not open for the court to convict the appellant on the charge of possession.

14. Upon re evaluation of the evidence and noting the items recovered that is dry green plant material suspected to be bhang to wit 36 rolls and 250 gms, 2 ½ packets of rizila papers, five rolling sticks, six pairs of scissors, and the material having been certified as bhang by the government chemist, I am satisfied the charge of trafficking in narcotic drugs was proved against the appellant and I convict him on this count.

15. As regards sentence, the appellant was sentenced to 10 years imprisonment. The trial court had the benefit of a probation report on the appellant and this court too has had the benefit of perusing the report.

16. In light of the probation report, I am persuaded that sufficient grounds do not exist to warrant this court interfering with the sentence meted out.

17. With the result that, I find no merit in the appeal herein. The same is dismissed.

Dated, Signed and **delivered** at **Murang'a** this 11th day of **November, 2020**.

A.K NDUNG'U

JUDGE