REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 69 OF 2015

REBECCA MUTHONI NJOGUINI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 294 of 2014 in the Principal Magistrate's Court at Kangema by E. M. Kagoni, Senior Resident Magistrate, dated 30th June 2015]

JUDGMENT

1. The appellant was found in possession of *narcotic drugs* contrary to section 3 (1) as read with 3 (2) (a) of the **Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994**. She was fined Kshs 100,000; in default to serve *three years* imprisonment.

2. The particulars were that on 1st August 2014 at Kihoya Shopping Centre in Kangema Sub-County within Murang'a County, she had *five stones* of *bhang* with a street value of Kshs 1,500; and, which was *not* in the form of a medicinal preparation.

3. The appellant challenges her conviction and sentence. There are six grounds of appeal. Firstly, that the learned trial magistrate overlooked the mandatory procedures in section 74A of the Act. Secondly, that the trial court misinterpreted section 3 (2) (a) of the Act; and, the *First Schedule*. Thirdly, that the distinction by the learned magistrate between *Indian hemp;* and, *resin* of Indian hemp was misleading. Fourthly, that the report of the Government Analyst was inconclusive. Fifthly, that the burden of proof was unfairly shifted to the appellant; and, sixthly, that sentence was too harsh in the circumstances.

4. At the hearing, learned counsel for the appellant, *Mr. Gichuki*, addressed the court only on the *conviction*. He said the *sentence* could not be impeached.

5. The appeal is contested by the Republic. Learned Prosecution Counsel, *Ms. Gichuru*, submitted that all the ingredients of the offence were proved. I was implored to dismiss the appeal.

6. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] EA 32, ***Kariuki Karanja v Republic*** [1986] KLR 190.

7. PW1 was Administration Police Constable Jonny Ogondi. On 1st August 2014 at about 8:10 p.m., he was at Kihoya Camp. He was instructed by his senior to accompany the area chief, James Githii; and, the assistant chief, Stephen Mwaniki (PW2) to arrest a suspect.

8. They found the appellant standing at a door holding a carton. Inside the carton were 5 stones of dry plant material wrapped in a black nylon paper (exhibit 3). The witness said the substance was recovered by Corporal William Kiragu. It was the size of *"a roll of tissue paper wrapped in a khaki paper"*.

9. He was emphatic that the carton was in possession of the appellant at the time of the arrest. On cross examination, he said the substance could not be weighed because the officers did not have a weighing machine.

10. PW2 testified that he and the area chief received a tip from an informer that a woman had bhang in her house. The bhang was to be ferried to an unknown destination. He detailed the informer to keep tabs on the lady. PW1, PW2 and Corporal William Kiragu proceeded to the scene at about 8:00 p.m.

11. PW2 said they found the appellant at the door to her house holding the carton that contained the dry plant material. Corporal Kiragu took the carton and its contents. He confirmed on cross examination that the carton was not produced in court; and, that the substance was not weighed.

12. PW3 was Police Constable Isaiah Kirimi. He took over the investigations from his colleague Charles Munyao. He testified that a sample of the dry plant material was submitted to the Government Chemist for analysis. He produced the Exhibit Memo (Exhibit 1); the report by P. O. Nyaoke, the Government Analyst, dated 3rd September 2014 (Exhibit 2); the 5 stones of dry plant material (Exhibit 3); and, the Khaki paper (Exhibit 4).

13. On cross examination, he conceded that the analysis found that the substance was *"cannabis SP"*. He admitted that the *First Schedule* to the Act does not contain the word *bhang* or *cannabis SP*.

14. When the appellant was placed on her defence, she claimed that the house belonged to another woman, *Wairimu*. She said that she and Wairimu lived on the same plot but in different rooms. The rooms were not adjacent to each other. She said that in the evening Wairimu came to her place carrying a carton. The appellant said she was unaware of its contents. They went to Wairimu's place but there was no electric power.

15. She said Wairimu stepped out briefly. That is when the police budged in. She testified that-

> *"The carton was on the table. One of the men opened the carton and told me that it contained cannabis. They asked me to accompany them. I told them that that was not my house. They agreed to lead me to my place but told me I was under arrest. They took the carton. Got [sic] home and found my husband.*
>
> *"One of the officers, Kiragu, told my husband that I was under arrest. On the way we met with the chief. Up to that point I had not touched the carton or its contents. I did not see the contents of the carton being weighed. Wairimu ran away. She used to work in the bar belonging to the assistant chief. We live in rented rooms in a plot. Wairimu's house is No. 23 and mine is No. 45. They are not next to each other. I did not have the cannabis."*

16. From a re-appraisal of the evidence, I am satisfied that the appellant was residing in the block of rooms where the 5 stones of bhang was recovered. The appellant admitted that she and the person named Wairimu were together moments before the arrest. The appellant was standing at the *door* to the *room* where the carton with dry plant material was recovered. She was the *only* one there.

17. I agree with the learned trial magistrate that she was in *possession*; and, that the claim that the room belonged to Wairimu was a red herring.

18. Learned counsel for the appellant submitted that the *First Schedule* to the Act does not contain the word *bhang* or *cannabis SP*. In ***Daniel Nderitu Wachira v Republic*** High Court, Nyeri, Appeal 149 of 2003 [2005] eKLR, Khamoni J allowed the appeal on the ground, among others, that none of the schedules to the Act contained a drug known as *cannabis sativa* mentioned in the particulars of the charge. He also found that there was breach of the mandatory procedures provided in section 74A of the Act.

19. A similar line was taken by Kasango J in ***Paul Mwangi v Republic*** High Court, Nanyuki, Appeal 59 of 2016 [2016] eKLR.

20. But I have the misfortune to depart from the opinion of the two learned judges. The appellant in this appeal was found in possession of *narcotic drugs* contrary to section 3 (1) as read with 3 (2) (a) of the **Narcotic Drugs and Psychotropic Substances (Control) Act**. The particulars however referred to possession of *five stones* of *bhang.* A cursory glance of the *First Schedule* does not show *bhang*.

21. But that would be too simplistic. First, Section 2 (1) of the Act defines "cannabis" as *"the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted, by whatever name they may be designated*" [Emphasis added].

22. "Cannabis plant" on the other hand means *"any plant of the genus cannabis by whatever name called and includes any part of that plant"* [Emphasis added]. The *Third Schedule* of the Act designates it as a *prohibited* plant.

23. The ***Oxford Concise English Dictionary***, Oxford University Press, 12th Ed. (2011) defines "bhang" as *"the leaves and flower tops of cannabis, used as narcotics in India"*.

24. So much so that it matters little that cannabis in Kenya is referred by the slang term bhang. What is *material* is the chemical or scientific analysis of the substance that was recovered from the appellant. From the analysis by the Government Analyst it was *cannabis*. Again, the reference in the report to *cannabis SP* does not change the simple fact: it is cannabis *by whatever name it may be designated.*

25. Furthermore, the appellant was properly charged for possession of *narcotic drugs* contrary to section 3 (1) as read with 3 (2) (a) of the Act. There was only a variance between the charge and particulars by reference to *bhang*. I find the variance was *not* material. It was curable under Section 382 of the **Criminal Procedure Code**. See ***Martin Wanyonyi Nyongesa v Republic***, Court of Appeal at Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR.

26. I thus entertain no doubt that the appellant was found in possession of a narcotic drug. Ideally it should have been weighed in his presence before a sample was isolated for chemical analysis. Section 74A only applies *"where practicable"*. In this case PW1 and PW3 explained that the police did *not* have a weighing machine at the scene.

27. In the end, I concur with the learned trial magistrate that all the elements of the charge were proved beyond reasonable doubt. I *uphold* the conviction.

28. As I stated, learned counsel for the appellant abandoned the appeal on *sentence*. I would however add that the learned trial Magistrate considered the *mitigation*. The sentence was also well within the law. I cannot then say that the learned trial magistrate applied wrong principles or overlooked some material factors in arriving at the sentence.

29. The upshot is that the entire appeal lacks merit and is *dismissed.*

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of February 2019

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Njoroge holding brief for Mr. Gichuki for the appellant.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.