



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 2 OF 2018

AFLAH ATHMAN MUKURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku Senior Resident Magistrate in Lamu Criminal Case No. 345 of 2016 delivered on 19/10/2016)*

JUDGMENT

1. The Appellant Aflah Athman Mukuri was tried and convicted of the offence of being in possession of narcotic drugs **Contrary to Section 3(i)** as read with **Section 3(2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act no. 4 of 1994**. The particulars of the charge were that on 10/2/2016 at Mkomani area near Forest Offices in Lamu West Sub-County within Lamu County was found in possession of narcotic drugs to wit a half cut big roll of cannabis (bhang) of estimated value of Kshs. 100/= in contravention of the said Act.
2. He was convicted of second account resisting lawful arrest **contrary to section 25 3 (b) of the penal code**. The particulars of Count II were that he willfully and unlawfully resisted arrest by No. 74682 Cpl Ben Kiplagat Kipkemei who were acting in execution of their duties. He was sentence to serve 10 and 3 years respectively with both sentences running concurrently.
3. The Appellant was dissatisfied with the conviction and sentence hence the present appeal. His homemade amended grounds of appeal are to the effect that the judgment amounted to a bad and unjust decision; the sentence was disproportionate; that he resisted arrest; and; that the court did not consider his defence.
4. The Appellant filed submissions along with the amended grounds of appeal. His submissions are to the effect that the offences were not proved and that the sentences were harsh and not proportionate to the offences.
5. Mr. Kasyoka learned Counsel for the Respondent in submissions filed on 19/11/2011, submitted that the two charges were proved. With respect to count I, he submitted that the fact of possession was proved through the evidence of PW1 and PW3 who searched the appellant and found the rolls in his pocket which upon analysis were confirmed by Government Analyst (PW2) to be a narcotic drug namely cannabis or bhang which is substance prohibited under the schedule of the **Narcotic Drugs and Psychotropic Substances Control Act**.
6. This court being a first appellate court is required to analyse the evidence presented before the trial court and come up with its own findings while taking into consideration the fact that it has neither seen nor heard the witnesses who testified. See **Okeno v. Republic (1972) E.A 32**.
7. I have considered the evidence tendered in the trial court. PW1 and PW3 who were police officers testified that they were on their way to court when they met the Appellant near Forest office taking tea. They noted something on the right side of his pockets. PW1 stated that they approached the Appellant and asked to see what was in his pocket. The Appellant reacted by whipping out a knife with which he threatened PW1 and his colleague PW3. At that point a commotion ensued and PW1 drew out his gun but did not use it because of the crowd that had gathered and started hurling stones at the police. The Appellant escaped in the ensuing commotion.
8. The testimony of PW3 was similar to that of PW1 in all material aspects. While the testimony of PW2 Government Analyst confirmed she received dry plant material from PC Felix Koono on 15/8/2016 and upon her analysis found it to be bhang. The record shows that the evidence of these prosecution witnesses was not challenged in cross-examination. The suspect material was recovered from the pocket of the Appellant. I am thus satisfied that possession was proved. Besides the prosecution evidence, the Appellant admitted in his defence that he was at the scene. He said that he was taking tea when he was approached and searched by the two police officers. He however denied that he was found with bhang and admits that he was not arrested that day but on a different day CID officers sometimes in July.

9. On count II, the evidence tendered by PW1 and PW II was cogent. They testified that they could not arrest the Appellant because he screamed and caused a commotion and threatened the police officers with a knife. PW1 explained that though he was armed, he could not shoot as a crowd quickly gathered and pilted them with stones. I am satisfied that the Appellant resisted arrest. There is no logical explanation as to why he was not arrested once having been searched and found to have been in possession of prohibited drugs.

10. The Appellant admitted in his defence that he was arrested in July by officers from CID in a case in which someone was cut up. He stated that he did not know why he was arrested in respect of the present case. He further alleged that there was a grudge between him and the two police officers being PW 1 and PW 3. I have considered this defence. It does not ring true because the Appellant did not provide any factual basis for the allegation and neither did he raise the issue of a grudge while cross-examining the two witnesses. From my consideration of his defence, I make a finding that the learned trial magistrate was not in error when she dismissed his defence as lacking in merit.

11. Turning now to the sentence, I must confirm from the outset that the sentences on both counts were lawful. However, under the **Narcotic Drugs and Psychotropic Substances Control Act** the 10 year sentence meted by the trial court was not mandatory. It was open to the trial court to consider the proportionality of the sentence to the offence. It was not however a mandatory minimum sentence as the term “shall be liable” provides for the maximum and not minimum sentence. In **Daniel Kyalo Muema V. Republic, Criminal Appeal No. 479 of 2007** Court of Appeal sitting in Nairobi quoted with approval the decision of its predecessor (the Court of Appeal of East Africa) in **Opoya V. Uganda**(1967) E.A 752 in which it observed:

*“It seems to us beyond argument the words “shall be liable” to did not in their ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see it fit to impose it”*

Similarly the Court of Appeal sitting in Malindi in **Caroline Auma Majabu V Republic, Criminal Appeal No. 65 of 2014** in finding that the term “shall be liable” imposes a maximum sentence rather than a mandatory sentence stated thus:-

*Applying the above definition, the use of the word “liable” in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms*

12. I would therefore agree with the Appellant that the 10 years sentence was too harsh. I set aside the 10 years imprisonment and substitute therefor a 4 year imprisonment term on count I. On count II, I consider the 3 year sentence appropriate. Both sentences to run concurrently.

Orders accordingly.

**Judgment delivered dated and Signed at Garsen on 13<sup>th</sup> day of March, 2019.**

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**R.LAGAT KORIR**

**JUDGE**

**In the presence of**

S. Pacho Court Assistant

The Appellant

Mr. Kasyoka For the Respondent