



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 51 OF 2016

AFLAH ATHMAN MUKURI..... APPELLANT

VERSUS

REPUBLIC (DPP).....RESPONDENT

(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku Principal Magistrate in Lamu Criminal Case No. 77 of 2015 delivered on 2/12/2016)

JUDGMENT

1. The Appellant Aflah Athman Mukuri was tried and convicted of two counts in the Principal Magistrate's Court Lamu. In count one he was accused of trafficking in narcotic drugs contrary to **section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the offence were that on the 9th day of May 2016 at Mkomani area was found trafficking in Narcotic drugs by selling two big roles of cannabis (bhang) of estimated market value of Kshs. 2,000/=. In count II he faced the charge of resisting a lawful arrest contrary to section 3 (5) of the Penal Code. The particulars were that he resisted arrest by No. 74682 CPL Ben Kiplagat and No. 77997 PC Bonaya Kokane.
2. In the judgment delivered on 2/12/2016 the appellant was convicted and sentenced to serve 10 years imprisonment on count I and 3 years imprisonment on count II with both sentences running concurrently.
3. Dissatisfied with the judgment, the Appellant first filed his petition of appeal dated 9/12/2016 and subsequently amended the grounds of appeal on 26/6/2018. In support of his petition he filed submissions dated 26/6/2018. Four of the 5 grounds of appeal in the amended petition revolved around the one ground that the case was not proved beyond reasonable doubt ;while the last one is that the court did not consider the Appellant's defence which was credible and would have led to his being given the benefit of doubt.
4. As a first appellate court, I am required to subject the evidence to a fresh evaluation and come to my own conclusions while bearing in mind that I will not have the advantage of seeing the demeanor of the witnesses. See **Okeno vs Republic [1972] EA 32**. See also **Eric Onyango Ondeng vs Republic [2014] eKLR**
5. The evidence before the trial court was presented by 3 witnesses. Government Analyst Yahya Hamisi Maingu (**PW1**) testified that he received from PC Felix Koono a brown khaki envelope containing two rolls of dry plant material. He examined the same and found it was bhang. PW1 produced his report as Exhibit No 1.
6. No. 77997 PC Bonaya Kokane testified that he was on patrol on 9/5/2016 at about 10.30pm and in the company of Chief Inspector Kiplagat and PC Kemei when they met a man around Nema forest offices. The man looked suspicious and they searched him and found him with 2 rolls of what they suspected to be bhang. PC Kokane stated that the accused ran away as they did not have any hand cuffs.
7. No. 74682 Chief Inspector Ben Kiplagat testified as PW3. He said that he was on patrol on 9/5/2016 together with Chief Inspector Fred Muganda, PC Kemei and PC Bonaya. They found the accused along Harambee Street leaning on the wall. They had information that he trafficked drugs. They apprehended and searched him and found two big rolls of bhang hidden on his waist. Cpl Kiplagat further testified that the accused pulled out a knife and at that point P.C Bonaya who was restraining him released his grip. The accused ran away and was later arrested on 29/7/2016 by CID Officers for a different offence.
8. The only issue in this appeal is whether or not the case against the accused was proved to the required standard.
9. The appellant argued in his written submissions dated 26/6/2018 that there was no evidence that he was arrested while in possession of drugs and that the arresting officer was not called to testify. Further, he submitted that the charge must fail as the proper officer required under section 86 (i) did not testify or ascertain the value of the narcotics said to have been recovered from him. Responding for the Republic,

Mr. Kasyoka in brief oral submissions stated that the conviction was safe and the sentence legal. He submitted that all the ingredients of the offence were proved. He urged the court to reject the appeal and uphold the judgment of the trial court.

10. There is no doubt that exhibit 1 produced in court by PW1 was a narcotic substance namely bhang. The appellant argued that the drug was not found on him and questioned his arrest. I have looked at the evidence presented by the two police officers PC Bonaya Kokane (PW2) and CPL Ben Kiplagat (PW3). Both witnesses stated that they met the appellant on the material night and searched him and found him with 2 rolls of a substance suspected to be bhang. PC Kokane stated that when they returned to the station they booked the incident and retained the exhibit.

11. PW2 and PW3 did not produce the police OB to support their contention that they had booked the incident. This was particularly important since the two witnesses testified that they did not arrest the appellant. The failure to produce the OB leaves the question whether or not the bhang (exhibit 1) was found on the person of the appellant on the night of 9/5/2016. From my evaluation of the evidence, I find nothing to prove that exhibit 1 was recovered from the appellant on the material night. He was not arrested and no evidence in the form of an OB extract was produced in court to support the alleged search and escape from arrest.

12. The circumstances of the arrest of the appellant is a grey area in the prosecution case. Both PW2 and PW3 testified that the appellant escaped arrest on the night they searched and recovered bhang from him. While PW2 said that they failed to handcuff him because they did not have hand cuffs at the time, PW3 testified that they did not arrest him because he (the Appellant) pulled out a knife and PW2 who was restraining him released his grip. PW3's testimony suggests that the appellant threatened the police officers with a knife and escaped arrest. I find the contradictions in the officers' testimony material.

13. There was further contradictory evidence on whether the Appellant was alone or in company. The two police officers were on patrol together. PW2 said the Appellant was alone while PW3 in cross-examination said that there were many young people around the Appellant and that they all ran away

14. The contradictions shown above create doubt in the mind of the court as to whether the Appellant was actually accosted searched and later thwarted arrest by threatening two police officers with a knife. There is no evidence that the police officers faced with a threat employed any reasonable force as allowed by **section 21 (2) of the Criminal Procedure Code** to effect arrest.

15. In the end, I find that the case against the Appellant was not proved to the required standard. I give him the benefit of the doubt as required by law. Consequently I set aside the conviction and sentence of the trial court and substitute therefor an order for acquittal. He is set at liberty forthwith unless otherwise lawfully held.

Judgment delivered dated and Signed at Garsen on 6th day of March, 2019.

R.LAGAT KORIR

JUDGE

the presence of

Boy Njue Court Assistant

The Appellant in person

Mr. Kasyoka for the Respondent