REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 15 OF 2017

FAHAD FAMAU MAAUM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku Principal Magistrate in Lamu Criminal Case No. 592 of 2015 delivered on 23/06/2017)

JUDGMENT

1. The Appellant was charged 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 Substance Control Act no. 4 of 1994**. The particulars of the charge were that on 3rd October, 2015 at around 2200 hours at Ndau village Lamu East Sub-County within Lamu County was found in possession of narcotic drugs to wit half big roll of (bhang) cannabis sativa of street value of kshs. 1,000/= which was not in any medical preparation in contravention of the said Act. He was tried and convicted and sentenced on to serve 10 years imprisonment.

2. The Appellant was dissatisfied with the judgment of the trial court and filed the present appeal. The petition of appeal dated 28/6/2017 was filed through the firm of Mwaure and Mwaure Waihiga Advocates and cited the following grounds:-

(i) The magistrate misdirected herself in fact and law by not appreciating that the Appellant wasn't in possession of the said narcotic drugs claimed to have in his possession.

(ii) That magistrate misdirected himself in fact and law by not appreciating that the evidence of the prosecution witnesses **PW1, PW2,** and **PW3** wasn't incriminating on the Appellant.

(iii) The magistrate misdirected himself in fact and in law by not appreciating the fact that the exhibits produced in court were inadmissible which should have called for further investigations.

(iv) The magistrate misdirected himself in fact and law by abetting or allowing abrogation of the rule of law by ignoring clear implication that the Appellant was innocent.

(v) The magistrate misdirected himself in fact and law by not appreciating that the evidence of the prosecution didn't prove their case beyond reasonable doubt.

(vi) The magistrate misdirected himself in fact and law by not attaching requisite weight on the defence witnesses who testified in support of the Appellant's case.

3. Parties took directions to prosecute the appeal through written submissions which they filed and subsequently highlighted. Mr. Aboubakar learned counsel for the Appellant submitted that the charge sheet was defective for failure to indicate the penalty and that the same was not curable under **Section 383 of the Criminal Procedure Code.** He submitted that the prosecution did not prove the case against the Appellant beyond reasonable doubt and that failure to comply with **Section 216 of the Criminal Procedure Code** and **Section 86 of the Narcotic and Psychotropic Substances Control Act** was fatal to the prosecution case as the value of the narcotic drug was not proved and the "proper officer" did not testify.

4. The Respondent's submissions were to the effect that the charge against the Appellant was proved to the required standard. Mr. Kasyoka learned counsel submitted that possession was proved and that the government analysts report being report of the expert was properly produced in accordance with **section 77 of the evidence Act.** Further, they submit that **section 86 of the Act** did not apply to the case as the

sentence was not dependent on the market value of the narcotis in question. They cited **Anthony Mbithi Kasyula Vs Republic [2015] eKLR** support their submissions

5. It is my duty as the first appellate court to subject the evidence before the trial court to an independent review and draw my own conclusions see **Okeno vs Republic [1972] EA 32.**

6. From my consideration of the grounds the submissions and the record the key issue for determination is whether the case against the Appellant was proved to the required standard and whether the relevant law was complied with.

7. I observe that the Appellant raised a new ground to the effect that the charge was defective. This was not one of the grounds of appeal. Nonetheless I have looked at the charge sheet which reads "… being on possession of narcotic drugs contrary to section 3 (as read with Section 2(a) of the Narcotic Drugs and Psychotropic Substance Control Act. Indeed there is no Section 2 (a) in the Act but rather Section 3 (2) (a). In my considered view there was an error of omission of the number 3.

8. The applicable principle here is whether such an omission was prejudicial to the Appellant. I agree with the Respondent's submissions that no prejudice was suffered as the charge contained sufficient particulars to have adequate notice of the case he was facing. Indeed the record shows that the trial court addressed its mind to this omission and correctly came to the conclusion that the same was curable under **section 382 of the Criminal Procedure Code** and I affirm the same as stating the correct legal position

9. In ground one, which sums up grounds four and five, the Appellant states that the case against him was not proved as possession was not proved and the evidence of PW1 PW2 and PW3 did not incriminate him. It was his submission that possession was not proved and that the court admitted evidence in violation to **section 2(6) Criminal Procedure Code** and **section 86** of the **Narcotic Drugs and Psychotropic Substances Control Act.**

10. PW1 was one Henry Njagi a police officer based at Kizingitine police station and investigation officer in the case. He re-arrested the Appellant when he was brought to the station by AP officers who had arrested him in possession of a half cut roll of a suspected narcotic drug. PW1 prepared an exhibit memo with which he submitted the suspected drug to the government analyst. PW2 was No 20113540 APC Mohamed Aboud Bwana of Ndau Border Patrol Unit. He testified that he together with colleagues Nicholas Irungu, and APC Ochieng arrested the accused on 3/10/2015. He searched him and on finding a roll of bhang on him hand cuffed him. He testified that the accused escaped enroute to the station. The testimony of PW3 No. 2011343818 APC Nicholas Irungu was similar to that of PW2. He only added that the accused was re-arrested on 26/10/2015.

11. It is true as stated by the Appellant that the evidence of PW1, PW2 and PW3 was not sufficient to incriminate him. However, the court did not rely on the 3 witnesses alone. There was the evidence of PW4 who re-arrested the Appellant on 26/10/2015 after his initial escape and the evidence of PW5 who prepared the exhibit memo and submitted the exhibit to the Government analyst whose report after analysis showed that the substance was bhang. The government analyst's report [Exhibit 3] was produced by the investigating officer. An analysis of the totality of evidence before the court shows that there was sufficient evidence to prove the case against the Appellant. A trial court must evaluate all the evidence offered by the defence. The Appellant cannot therefore single out 3 witnesses and claim that there was no incriminating evidence.

12. With respect to the Appellant's contention that **section 215 of the Criminal Procedure Code** was not complied with, I have found no evidence of violation of the section. The record shows that the court arrived at the decision that the Appellant was guilty and convicted him.

13. It was the Appellant's further contention that **section 86 of the Narcotic Drugs and Psychotropic Substance Control Act** was not complied with. Section 86 provides:-

> **"Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as *prima facie* evidence of the value thereof."**

14. It is true that no valuation of the narcotic drug was done and no certificate of the "proper officer" was produced. However the Appellant in this case was charged and was convicted of possession of cannabis. There was no fine imposed which would have necessitated the valuation of the narcotic drug. Indeed under **section 3 (2) (a)** the Appellant benefited from the lesser sentence as the record does not show any evidence that the narcotic drug was for his own consumption.

15. Having re-evaluated the evidence, I have come to the firm conclusion that the appeal against conviction has no merit. I confirm the conviction.

16. On the sentence I observe that the Appellant did not set out sentence as a ground of appeal and that the issue of sentence was only raised in the submissions dated 5/11/2018 with a prayer for a lesser sentence. I observe that in handing down the 10 year sentence, the trial court took into account the nature of the offence, the prevalence of the type of offence and the attitude of the Appellant. The court recorded that the Appellant had absconded trial and displayed lack of remorse. Nonetheless, I consider the 10 year jail term though lawful harsh in the circumstances of this case. I reduce it to a term of 4 years imprisonment.

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

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R.LAGAT KORIR

JUDGE

In the presence of

S. Pacho Court Assistant

Ms. Wambui holding brief Aboubakar For Appellant

Mr. Kasyoka For the Respondent