



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 7 OF 2019

ALEXANDER GITONGA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant **Alexander Gitonga** was charged with being in possession of cannabis sativa (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 3 of 1994.

2. The particulars of the offence were that on the 16th day of July 2018, at around 7:30PM at Githongo Trading Centre, Marathi Location in Imenti Central Sub County within Meru County, he was found in possession of cannabis sativa (bhang) to wit 12 rolls of street value Kshs 240/= which was not prepared for medicinal use. The Appellant was tried and at the end convicted of the offence and sentenced to 2 years imprisonment.

3. The Appellant was aggrieved by the said conviction and sentence thus provoking the instant Appeal via Petition of Appeal filed in court 17th January 2019, raising the following grounds of Appeal:

- a) **The Learned Magistrate erred in law and in fact by convicting the Appellant in view of uncorroborated evidence, hearsay, grave contradictions and inconsistencies in the evidence tendered by the prosecution and a miscarriage of justice was thereby occasioned.**
- b) **The Learned Trial Magistrate erred in law and fact in not holding and finding that there were doubts in the prosecution case which doubts ought to have been resolved in favour of the appellant. A miscarriage of justice was occasioned.**
- c) **The Learned Trial Magistrate failed to consider the appellant's explanation in defence and dismissing it as wanting, inconveniencing, and a mere denial which did not challenge the prosecution's case.**
- d) **The Learned Trial Magistrate erred in law and fact by convicting the appellant whereas the case against the appellant was not proved to the required standard of proof beyond reasonable doubt to warrant the accused being convicted.**
- e) **The Learned Magistrate erred in law and fact by not finding that the prosecution failed to call crucial witnesses and thereby convicting the appellant on uncorroborated evidence of a single prosecution witness.**
- f) **The Learned Magistrate erred in law and fact by shifting the burden of proof to the accused whereas it trite that an accused person does not assume any burden to prove his innocence in a criminal case.**
- g) **The judgment of the Learned Magistrate is against the weight of evidence on record and is bad in law.**
- h) **Considering all the circumstances of the case, the sentence meted out against the appellant is manifestly harsh and excessive.**

4. When the Appeal came up for hearing on 27th February 2019, the court directed that the record of the lower court file be served on the State and Counsel for the Appellant for purposes of filing written submissions for determination of the appeal within 14 days. None of the

parties had however filed submissions as at the time of writing this judgment.

5. I am a first appellate court and as such I have subjected the evidence adduced before the trial court to a fresh evaluation and analysis and drawn my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of In the case of **KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174** the Court of Appeal stated thus;

i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

ii. 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 findings and 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.

6. PW1 was **Julius Kirimi Rimberia**. It was his testimony that he was a Senior Assistant Chief, Kaongo sub-location and that on 16th July 2018 at around 5:30PM, he was called by the chief who informed him that he had received information from members of the public that there was a person selling bhang. That, they proceeded to Mayarene area in Githongo market to go and trace the person allegedly selling bhang and they found the person standing at the door of his house alone whereupon the chief asked him to open his door and put the light on and that when they went inside the house, they saw a mattress which had been placed on the floor and a blanket on top of the mattress.

7. It was his evidence that the chief then asked him to lift the blankets one by one and when he did, a packet of *safari* cigarettes dropped and when the chief picked the packet, they found 12 rolls of bhang whereupon they escorted the Appellant to Githongo police post. His evidence towards this respect remained firm, strong and consistent and the same was never challenged in cross examination. In cross examination the Appellant only contended that he was assaulted and that the bhang had been planted on him.

8. PW2 was **Douglas Muthamia**, the area chief of Marathi location. He corroborated PW1's evidence that on 16th July 2018, they were patrolling Githongo market Mayanene area when they passed the home of the Appellant whom they found outside and asked him to open his house and he obliged and switched on the lights and that they saw a mattress on the floor and blankets and they asked him to lift the same and while so doing, a packet of cigarette fell down and on checking inside found 12 rolls of bhang. Again the evidence of this witness remained unchallenged throughout the trial and the same was never rebutted by the Appellant.

9. PW3 **Francis Njoroge** a police officer attached to Githongo police post corroborated PW1 and 2's evidence and stated that on the material day he was at the police post when PW1 and 2 came and reported that they found the Appellant with cannabis sativa. He subsequently booked the Appellant and took possession of the exhibit which was later taken to the government chemist which confirmed that the exhibit was indeed cannabis sativa. Again, the evidence of this witness was never challenged by the Appellant and he actually confirmed that he was arrested at his home in cross examination.

10. The Appellant in his defence stated that he did not smoke bhang or cigarettes as he was asthmatic. In cross examination he however stated that 12 rolls of bang were recovered from his house but they did not belong to him and that he did not know the owner and that he believed that the same came with PW2. He however did not say why PW2 would plant the same on him since he had no issues with both PW1 and 2, though he stated that both PW1 and 2 had asked him to buy them beer but he did not have money.

11. As alluded to earlier, the evidence of the prosecution's witnesses remained reliable, credible and consistent throughout the trial and the same was not even challenged in cross examination. Though the Appellant contended in his defence that the bhang was planted on him by PW2 after he refused to buy him beer, he never raised this issue in cross examination and the same can only be an afterthought. Contrary to the Appellant's contention that the judgment was against the weight of the evidence, the evidence in this case was to say the least overwhelming to sustain a conviction and I cannot fault the Learned Trial Magistrate on this. The contention by the Appellant that crucial witnesses were not called was without basis since the said witnesses were not even stated.

12. Similarly the Learned Trial Magistrate clearly evaluated the Appellant's defence and gave reasons as to why she rejected the same and I see no reason to fault her finding on this and the subsequent conviction.

13. With regard to sentence, it was contended that the sentence meted out on the Appellant was manifestly harsh and excessive. The appellant Alexander **Gitonga** was charged with being in possession of cannabis sativa (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 3 of 1994. Section 3 of the said Act provides as follows:

Penalty for possession of narcotic drugs, etc.

(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

(2) A person guilty of an offence under subsection (1) shall be liable—

(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and.....

14. In the instant case the Appellant was sentenced to 2 years imprisonment. In my considered opinion, the sentence meted out on the Appellant cannot be said to be harsh and excessive as it is within the law. However, considering that the cannabis recovered from the

appellant was valued at only Kshs 240/= (12 rolls) and considering that he has been in custody since 17th July 2018, this court will exercise its powers to revise sentence and find that time served is sufficient punishment for the accused. He is to be set at Liberty unless lawfully detained for a different offence.

15. Accordingly, the Appellants appeal is without merit and the same is accordingly dismissed in its entirety.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 15TH DAY OF MAY 2019.

In the presence of:

C/A: Kinoti

State:- Us Mbithe for state

Appellant:-N/A

Signal to Officer in charge GK Prison to release appellant.

HON A. ONG'INJO

JUDGE