



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 52 OF 2016

ZEID ABDALLA BWANA.....APPEALANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku principal Magistrate in Lamu Criminal Case No. 389 of 2013 delivered on 2/12/2016)

JUDGMENT

1. The Appellant Zeid Abdalla Bwana was charged with two offences before the SRM's Court Lamu. In count I he was charged with resisting lawful arrest contrary to **Section 253 (b) of the Penal Code**. The particulars were that on 23rd August, 2013 at Kiwayuu village in Lamu East District within Lamu County resisted arrest by PC Noor Hassan, a police officer who at the time of the said resistance was acting in the due execution of duty.
2. In count 2, the Appellant was charged with 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 were that on 24th August 2013 at Kiwayuu village in Lamu District within Lamu County was found in possession of one big roll of cannabis satiba (bhang) whose market value is Kshs 1000/= which was not in medical preparation form.
3. It was the prosecution case that the Appellant was in a group of youths who were engaged in a friendly match between Kizingitini and Kiwayuu teams when police got a tip off that some of the youths were engaged in trafficking. According to PC Noor (PW1), they were at Kiwayuu police post with PC Omuse, PC Sitati and PC Maloo when they were alerted that there were drug traffickers among the players. They laid an ambush and ordered the youths to undergo a search. PC Noor stated that the Appellant violently resisted the search and attempted to hit him with a walking stick before running into the ocean to swim along the beach. PC. Noor stated that he was left with the Appellant's jean trouser and vest top. They later tracked him to Shimo la Terah in Kiwayuu island where he was arrested and upon search found with a big roll of bhang.
4. The roll of Bhang (MFI 4) was escorted to the Government Chemist by PC. Dominic Omosa (PW 4) for analysis. George Lawrence Ogunja (PW 2) testified that he received an exhibit in a white polythene bag marked k-10 from PC Dominic Omosa. It contained dry plant material. Upon analysis, he found it to be cannabis. He produced the report (Exhibit 6) and the exhibit memo (Exhibit 5).
5. No. 92051 PC Albanus Maloo (PW 3) of Kiwayuu police post testified that, he knew the Appellant as a resident of Kiwayuu Island. His testimony was similar and corroborated that of PC Noor in every material aspect.
6. The court found that the prosecution had established a prima facie case against the Appellant. Put on his defence, the Appellant admitted that he was in a group of youths who had a football match on the material date. He alleged that he and PC Noor shared a girlfriend called Saada. The Appellant admitted that he removed his clothes and jumped into the river and swam towards Shimo La Terah from where he was arrested. He admitted that he left behind his clothes including a jeans trouser.
7. The Appellant said he was arrested in the company of two Luo speaking stone cutters and that the two were not arrested and that the roll of bhang may have belonged to them. He stated that he could not have escaped with the bhang since it would have been damaged by the ocean water.
8. The court found the case against the accused proved. He was convicted on both counts and sentenced to serve 3 and 10 years respectively. The conviction and sentence triggered this appeal.

9. In his home grown petition of appeal filed on 15/12/2016 the Appellant set out 7 grounds of appeal in which he stated that he was not searched and therefore there was no recovery; that there was a grudge between him and the arresting officer and that his case should be tried afresh. Reframed, these statements point to the one ground of appeal being that the case was not proved against the Appellant.

10. When the appeal came up for hearing on 14th March 2019 the appellant filed written submissions. He submitted that the two masons in whose company he was found were not arrested as suspects and neither were they called as witnesses. He submitted that he was not in possession arguing that he could not have been keeping the drugs when he knew that he had escaped search. The Appellant further submitted that his prosecution was instigated by PW1 with whom they were attracted to the same woman. He further submitted that the trial magistrate applied the law in an unusual manner and handed him a harsh sentence. He prayed that the court grant him a non-custodial sentence or reduce his sentence.

11. The Respondent in brief oral submissions opposed the appeal in its entirety. Mr. Kasyoka learned counsel for the Respondent stated that there was sufficient evidence that the Appellant resisted arrest. He submitted that there was evidence of possession and there was evidence to show that the substance that the Appellant was found in possession of was a prohibited substance. Counsel prayed that the appeal be dismissed.

12. I have considered the grounds of appeal and the respective submissions of the parties. As is expected of me as a first appellate court, I have reviewed and analyzed the evidence in the trial court. The one issue in this appeal is whether or not the prosecution proved the case against the Appellant to the required standard of beyond reasonable doubt.

13. On count one, I have looked at the evidence as presented in the trial court and which I have already reproduced above. I find that there was proof that the Appellant resisted arrest and in the scuffle wriggled out of his shirt. He also removed his trousers and dived into the water and swam away. The Appellant's clothes were produced as exhibits 2 and 3 PW 2's testimony corroborated that of PW1. The accused himself admitted that he abandoned his shirt which he was holding in his hand and removed his trouser and swam away. I find from this evidence, as the trial court did, that the prosecution proved count 1 beyond reasonable doubt.

14. Possession is defined in **section 4** of the Penal Code as:-

(a) "Being in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself of any other person;"

15. The Appellant admitted that he was arrested and searched at Shimo La Tera where he was sleeping with colleagues. He however denied that the police found any drug on him stating that the drugs would have been damaged by the ocean water. He also stated that the roll may have belonged to his two Luo colleagues who were not arrested.

16. Evidence of possession was given by the arresting officer No. 93191 PC Dominic Omosa (PW4). It was PW4's testimony that after the Appellant swam away they got intelligence that he was hiding at Shim La Tera and followed him there. PW4 testified that he personally found the Appellant sleeping in a house and woke him up and searched him. He found a big roll hidden in his private parts.

17. In the present case, it was common ground that the Appellant resisted arrest and swam away. Whether the swimming would damage a roll would depend on how it was packaged. The arresting officer stated that the roll was hidden under his underwear. It is therefore possible that the roll was in his person all along or even that he was found with a new roll. It is factual that the roll was submitted to the government analyst who after analysing found it to be cannabis a prohibited substance under the Narcotic Drugs and Psychotropic Substances Control Act.

18. The Appellant was sentenced to 3 and 10 years respectively. I have considered the sentencing vis-à-vis the sentencing principles enumerated by the trial court. I have also considered the Appellant's plea that his sentence be reduced.

19. I have considered the value of the drug and the sentencing guidelines. I have also considered that the 10 year imprisonment was not a mandatory sentence to be imposed in every case. I reduce the prison term from 10 years to the period already served. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered dated and Signed at Garsen on 18th day of June, 2019.

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R.LAGAT KORIR

JUDGE

In the presence of

The Appellant in person

S. Pacho - Court Assistant

