



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO.77 OF 2015

JULIUS MWAURA MUTURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kandara Principal Magistrate's Court

Criminal Case No.329 of 2015 by Hon. P. Nditika (SPM) on 30th of June 2015)

JUDGEMENT

1. **Julius Mwaura Muturi**, the *Appellant*, was charged with **Trafficking in Narcotic Drugs and Psychotropic Substances** contrary to Section 4 (a) of the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**.
2. Particulars being that on the **10th day of May 2015** at 1400 hours at **Kiranga trading centre** in **Kandara District** within **Murang'a County**, trafficked in Narcotic drugs by possessing 100 grams of bhang valued at Ksh. 200/= in contravention of section 4(a) of the **Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994**.
3. He was tried, convicted and sentenced to pay a fine of **Ksh. 1,000,000/=** and in addition to serve life imprisonment.
4. Aggrieved, he appeals against both the conviction and sentence on grounds that: the conviction was unsafe as the trial magistrate relied upon unreliable evidence; the case was not proved beyond reasonable doubt; section 169(1) of the criminal procedure code was not considered and that the onus of proof was shifted to the *Appellant*. However, during hearing of the appeal, with leave of the *Court*, he amended the grounds of appeal thus: That the charge was defective in contravention of section 214 of the CPC and could not be remedied under section 382 of the CPC and that the onus of proof was shifted to the *Appellant*.
5. Facts of the case were that PW 1 Isaac Kairu Njoroge, the Assistant Chief, Kiranga, received a call from Mrs Mwenje who reported that the *Appellant* had deterred her from picking avocados. Since *he had* information about the *Appellant's* alleged activity of trafficking in Narcotics, he notified PW 2, John Kamau Ng'ang'a, a village elder and they went to the *Appellant's* home, searched and recovered some substance. They *effected arrest* and took him to Kandara Police Station. Investigations were conducted which culminated into the *Appellant* being charged.
6. Upon being placed on his defence, the *Appellant* stated that they had a family dispute and his sister-in-law called the Assistant Chief who went, held his neck and stepped on his head. Later, he called PW 2 and they caused him to be tied prior to being taken to the chief's camp. He denied having possessed any narcotics. He attributed the charge to the grudge that existed between them.
7. The appeal was canvassed by way of written and oral submissions. It was the contention of the *Appellant* that the trial *Court* failed to consider that following the amendment of the Act as revised in 2012, the only legal sentence would have been life imprisonment. He pointed out the defect in the charge, namely, failure to indicate the mode of trafficking.
8. Further, he contended that if the Narcotic substance was 23 grams then such a small quantity could only be for medicinal purpose. That the grudge between him and Mrs Mwenje who wanted Avocado from his farm could only have prompted her to cause him to be charged so as to be in prison indefinitely and that there was no compliance with Section 74 of the Police Act.
9. In response, the Respondent (State) *through Ms Keya*, learned State Counsel, conceded to the appeal. She urged that evidence tendered did not support the charge and the charge was defective. She argued that after the *Appellant's* sister-in-law called PW1 and he went to their home with PW 2, following a disagreement she had with the *Appellant*, upon arrival, the *Appellant* started running away but was arrested. That it

was therefore not clear if he was found outside or inside the house where a search was conducted and the substance found. That it was stated by PW2 that the substance was being wrapped but it was not stated who was doing the actual wrapping. She pointed out inconsistencies in prosecution witnesses' evidence and the exhibits that were produced from the government chemist which were indicated as 23 grams while the charge sheet referred to 100 grams, that was not consistent with the evidence of PW 2. And that neither the charge nor evidence disclosed the dealing that constituted trafficking.

10. This being a first appellate *Court*, I am duty bound to re-evaluate *and re-consider evidence* adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (see **Okeno V Republic. (1972) EA32**)

11. In *determining this matter*, I do remind myself of what was stated in the case of **Odhiambo V Republic (2008) KRL 565** thus:

“The *Court* is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The *Court* has a duty to ensure it subjects the entire evidence tendered before it to a clear and fresh scrutiny and re-asses it and reach to its own determination based on evidence.”

12. It is urged that the charge in the instant case was defective. A charge is stated to be fatally defective if it does not allege essential ingredients of the offence (**Yosefu and Anor.Vs see Uganda (1960) EA 236**); In the case of **Sigilani V Republic (2004) 2KLR** it was stated that:

“The Principal of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and an ambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence. ”

13. The statement of the offence indicate that the *Appellant* was charged with the offence of trafficking. Section 2 of the Narcotic drugs and psychotropic substances Act,1994 defines trafficking as:

“...the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof...”

The particulars of the offence were that the *Appellant* allegedly trafficked in narcotic drugs by possessing 100 grams of bhang in contravention of the section 4(a) of the Act.

14. The *Court* of Appeal deliberated the issue of trafficking in the case of **Madeline Akoth Barasa and Anor Vs Republic CR Appeal No.143 of 2005** where it was stated thus:

“It is evident from the definition of “trafficking” that the word is used as a term of art embracing various dealing with narcotic drugs or psychotropic substance. In our view, for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking. In this case, neither the charge sheet nor the evidence disclosed the dealing with the bhang which constituted trafficking.”

15. The offence of possession of narcotic drugs is distinct and is provided for in section 3 of the Act that states thus:

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 10 years and in every other case to imprisonment for 20 years; and ...”

16. The conduct of the *Appellant* that constituted the act of trafficking was not specified.

17. In fact, what was stated in the charge sheet having not been clear and precise, amounted to duplicity. In the case of **Mwaniki Vs Republic (2001) EA 158** the *Court* held that:

“where two or more offences were charged in the alternative in one count. The charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he was convicted for.”

18. There was no way the *Appellant* would have known whether he was to answer the charge of trafficking in narcotics (section 4(a) of the Act) or being in possession of the narcotic (section 3 of the Act). This rendered the charge fatally defective.

19. Looking at evidence adduced, PW1 went to the home of the *Appellant* who was married and had children, to resolve a dispute between him and his sister- in- law that emanated from the *Appellant's* action of failing to allow her to pluck avocados from his farm. When the

Appellant saw the Chief and the Village elder, he ran towards his house. According to PW1, they entered the house, searched it and found bhang below the beddings. The bhang was in a polythene paper, there was a stick tied with cotton and papers packed in a red paper.

PW2 on the other hand stated that they went to the house and found bhang being wrapped in a piece of paper, stick and half smoked. As *correctly* submitted by the learned state counsel, there was no clarity as to who was wrapping the plant material and how it was under the bed if it was being wrapped.

20. PW3 No. 77001 Corporal Peter Nyadiga who took part in the investigations stated that at the outset they thought the bhang was 100 grams but after it was taken to the government chemist, it was established to be 23 grams and that the bhang was in powder form. Although the officer stated that what was recovered was in powder form, the evidence memo form that was adduced in evidence by the same officer indicates that what was desired to be was some plant material and following the report by the government analyst, the plant material examined was found to be Cannabis SP. Plant material does not include powder. These were apparent contradictions. In the case of Twahengane Alfred -Vs-Uganda, Criminal Appeal No.139 of 2001 (2003) UGCA 6, it was stated as follows

“with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

21. The contradictions herein were in respect to: what exactly was recovered, where it was recovered from and what was submitted to the government chemist for analysis. These contradictions affected the main substance of the prosecution’s case.

22. The duty was upon the prosecution to prove the case beyond reasonable doubt. Doubts that were apparent went to the benefit of the *Appellant*. *Therefore*, the conviction was not safe. Consequently, I quash the conviction and set aside the sentence imposed. The *Appellant* shall be released forthwith unless otherwise lawfully held.

23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 10TH DAY OF SEPTEMBER, 2019.

L. N. MUTENDE

JUDGE