



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 42 OF 2019

CHARLES KYALO KATIKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C. A. Mayamba (SRM) in the Senior Resident Magistrate's Court at Kilungu Criminal Case No.350 of 2016, delivered on 7th June, 2018)

JUDGEMENT

1. On Count I the appellant was charged with trafficking of narcotic drugs (bhang) contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The particulars of the offence being that on the 4th day of May 2016 at Nzukini village, Isovyva Sub-Location, Kyamuoso Location in Kilungu Sub-County within Makueni County was found storing cannabis sativa (bhang) to wit 23 rolls worth Kshs.460/= street value which was hidden in his bedroom and was not medically prepared.

2. On Count II he was charged with trafficking of narcotic drugs (bhang) contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The particulars of the offence being that on the 4th day of May 2016 at Nzukini village, Isovyva Sub-Location, Kyamuoso Location in Kilungu Sub-County within Makueni County, was found storing cannabis sativa (bhang) stashed in polythene bags and hidden in the shamba to wit 1000 grams worth Kshs.100,000/= street market value which was not medically prepared.

3. He pleaded not guilty and matter went into full trial.

4. After the hearing the appellant was convicted and sentenced to serve 10 years in prison.

5. Being aggrieved by the above verdict the appellant lodged instant appeal and set out 6 grounds of appeal. During hearing he introduced 5 amended grounds attached to submissions namely;

1. That the learned trial magistrate erred in both law and facts by convicting the appellant on evidence which was below the requisite standard of proof which is proof beyond reasonable doubt.

2. That the learned trial magistrate erred in both law and facts by shifting the burden of proof from prosecution to the appellant.

3. That the trial magistrate failed to caution himself/herself and thoroughly scrutinize and re-evaluate prosecution's evidence to notice that it was just but re-enactment of the previous case and just reading from the same script and lacked substance or evidence.

4. That the learned trial magistrate failed to be faithful to the law and appreciated the inconsistencies and contradictions in the prosecution's evidence and went ahead to give opinionated judgement and conviction.

5. That the trial magistrate did not consider the plausible submissions and defence of the appellant.

6. The parties agreed to canvass appeal via submissions but only appellant who filed the same. The respondent relied on the evidence on record in opposition to the appeal.

Appellant's Submissions:

7. The appellant submitted that the prosecution terribly failed to prove their case beyond reasonable doubt as required by the law. He cites the case of **Burunyi & Others vs Uganda [1968] EARL 123.**

8. The learned trial magistrate erred by giving an opinioned judgement without relying on materials facts or being backed by solid evidence.

9. It is contended that, the trial magistrate erred by finding that the money found in the appellant's house was proceeds of illegal trade yet the same was not proved since no one was caught buying the bhang. As a matter of fact, the appellant and the defence witness (DW2) denied that bhang was found in their premises.

10. On the same breath, the defence evidence was plausible since the appellant even produced the money lending agreement which was signed by the lender, borrower and witnesses. That the reason given by the trial magistrate that the contents of the agreement were under the hand of one person was far-fetched since the same agreement was legally binding. He submits that the money recovered was not positively connected to illegal businesses and should be released back to the appellant.

11. It he submitted that, vital witnesses were not procured to testify before court. Witness who was the investigating officer did not come to testify, which shows that the case was not investigated as the law demands.

12. At the same time, the arresting officer, a PC Nderitu who alleged to have recovered the bhang and the money as well as other exhibits was not procured to testify.

13. PW2 produced the photos of the area they said the bhang was buried. However, he is not a scene of crime officer, who must have been gazetted by the Government of Kenya and so what he did was illegal, null and void.

14. The same PW2 also went a notch higher by purporting to produce a report from the Government Chemist whereas he was not an expert and the author of the same report and therefore not authorized to produce it.

15. The law of evidence is very clear that only the maker of a document must produce it in court and not any other person. Allowing the police and PW2 to produce the said report was indeed a violation of the Evidence Act under section 77 of the Evidence Act Cap 80 Laws of Kenya.

16. The error and omission also violated the appellant's constitutional rights in this case. The authenticity of the report could not be ascertained and the magistrate made a grave error by allowing its production and also relying on it.

17. Likewise allowing the OCS who was PW2 to testify on behalf of the investigating officer was also a violation of the Evidence Act since the defence was denied the opportunity to cross examine him. He cites the case of **Nganga vs Republic [1981] KLR 483.**

The Duty of the First Appellate Court:

18. I am guided by the Court of Appeal case of **Okeno vs Republic (1972) E.A.32** where the Court set out the duties of a first appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) E.A. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, See Peters V. Sunday Post, (1958) E.A. 434”

EVIDENCE TENDERED:

Prosecution's Case:

19. PW1 stated that he was the Area Chief of Isovya Sub-Location. It was his testimony that he had planned with the Area Chief for crackdown on drugs within his area of jurisdiction. They met at Nzukini market at 5.35 am as he had intelligence from the public that appellant was involved in trafficking of cannabis.

20. They proceeded to the appellant and upon arrival found him asleep. They knocked the door and identified themselves before getting inside the house. They searched the house and, in the bedroom they recovered a nylon paper bag. Inside the paper bag were 23 rolls of bhang, rizlar paper, rizlar roller and money Kshs.108,500/= as confirmed at the police station.

21. It was his testimony that they recovered 10 litres of traditional beer namely Karubu of which the wife to the appellant admitted to have been the one who was trading in the same. They arrested both. He recorded his statement and went about his business thereafter. It was his

testimony that he did not enquire as to the source of money.

22. PW2 stated that on the 4/5/2016 he left Kilome Police Station at 5 am in the company of Inspector Kariuki, Senior Sergeant Grace, P.C Nderitu, P.C Jebet, P.C Gunnes and P.C Driver Mwangi. They proceeded to Nzukini area and met the Area Acting Chief namely Mr. Monyi. He shared information with the chief and proceeded to the home of the appellant. They knocked the door on arrival and identified themselves as it was early in the morning.

23. They conducted a search in his house in the presence of the appellant and his wife and therein recovered 23 rolls of bhang, 113 rizlar paper and rizlar roller. They arrested his wife as in her kitchen they had recovered 30 litres of illicit beer. He prepared an inventory which appellant signed together with his wife. It was his testimony that all other officers signed the inventory as well.

24. They escorted appellant to the police station and appellant was charged with drug trafficking with his wife being charged with being in possession of illicit beer. It was his testimony that while at the police station P.C Nderitu heard appellant calling another person in his mother tongue to change the position where they had hidden more bhang in the farm. He left the station and went back to the area one more time.

25. On arrival across the valley, they saw someone digging but run away when he saw them. Therein they recovered 1000 grams of bhang and a spade. They photographed the scene before they left. He stated that money was found at the place where bhang was.

26. He tendered 23 rolls of bhang as Pex1, 113 pieces of rizlar paper as Pex2, rizlar roller as Pex3, Ksh.108,500/= in cash as Pex4, 1000 grams of cannabis sativa as Pex5, spade as Pex6, 4 photos of the scene as Pex7, inventory as Pex8, certificate of prints as Pex9, and the report from Government Analyst as Pex10.

27. PW3 stated that on the 4/5/2016, she was with the OCS together with Inspector Kariuki, Senior Sergeant Grace Njenga, P.C Nderitu, P.C Gunnes and P.C Driver Mwangi. They went to Chamoso Location where they met the Area Chief who led them to the house of the appellant. It was her testimony that they entered into his house. In his house 100 booklets of rizlar, 113 rizlar papers, 23 rolls of bhang and cash money amounting to Kshs.108,500/= were recovered as exhibits. They also recovered 30 litres of Karubu beer.

Defence Case:

28. DW1 stated that on the 4/5/2016 he was asleep when police officers came to his house together with the Area Sub-Chief. He opened the door and the OCS insisted that he wanted to search for bhang and was asked to face the wall. He saw Chief Inspector Kariuki put something in his pocket something he had taken from his. He asked him why he was doing so. He was warned by the OCS to keep quite or else he will be shot.

29. It was his testimony that he asked for permission to take his money as he was afraid of theft when the OCS put something on his neck which shocked him. It was his testimony that he became unconscious and did not turn back. It was his testimony that he had 4 children who were in school and he had borrowed money through his wife to pay their dues.

30. It was his testimony that he had borrowed Kshs.200,000/= on the 1/5/2016. He informed court that he gave his wife Kshs.50,000/= and remained with Kshs.150,000/= before paying his debt of Kshs.1,500/=. He took Kshs.108,500/= and kept separately to give to his children and the balance was put in his jacket pocket.

31. It was his testimony that he was led out being followed by his wife and the OCS as P.C Nderitu remained back and was threatening his children by insisting that they will not return. He was led to Kilome Police Station and booked into the police cell after leaving his mobile phone and valuables.

32. He was called out of the police cell and money counted and recorded. He stated that he had an agreement for the money which he tendered as Dex1. He contended that P.C Nderitu is against him as well as the Sub-Chief who bought a parcel of land from his father and tendered a letter as Dex2.

33. DW2 stated that their house was raided and were arrested together with her husband who is the appellant herein. It was her testimony that she had borrowed Kshs.200,000/= from DW3. She stated that her husband gave her Kshs.50,000/= and then divided the same into Kshs.108,500/= which he placed in a yellow paper bag which he placed under the pillow. It was her testimony that the OCS took the money and placed under her armpit. It was also her testimony that the OCS took two knives.

34. DW3 stated that he had lent the appellant Kshs.200,000/= which was to be refunded back to him. It was his testimony that he gave the money but on the 4/5/2016 he was informed that the money had been taken.

35. After going through the evidence tendered and the submissions, I find the issues are; **whether prosecution proved its case beyond reasonable doubt? Whether appellant defence was ignored?**

Issues, Analysis and Determination:

36. Under section 2 of the Narcotic and Psychotropic Act No. 4 of 1994, it is provided that trafficking means, ***“the importation, exportation, manufacture, buying, sale, supplying, storing, administering contingency delivery or distribution by any person of a narcotic drugs or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance....”***

37. In the case of **Maldine Akoth Barasa & Another vs Republic [2007] eKLR** the Court of Appeal held that, **“it is evidence from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic**

substance.”

38. In the present charge, appellant is said to have stored cannabis sativa in his house which supports the definition under section 2 of the Act.

39. It was the prosecution’s case that 23 rolls of bhang were recovered in the bedroom of the appellant person in a paper bag. The prosecution alluded to the plant materials being cannabis sativa.

40. In expounding on the same, they tendered government analyst report which confirmed that the plant materials were actually cannabis sativa SP which falls under the first schedule of the Narcotic Drugs and Psychotropic Substances (Control) Act 1994.

41. The appellant did not contest the production of the report aforesaid. Thus it was therefore safe to conclude that exhibit tendered as Pex1 was banned narcotic drug for all purposes. The defence did not deny that contention save for his culpability.

42. The prosecution also tendered 113 pieces of rizlar paper used to roll the cannabis sativa which further corroborates the case on trafficking of cannabis sativa as charged. It is worth noting that the defence did not deny the usage of alluded to herein.

43. The star question was whether appellant was actually found in possession of the cannabis sativa. In deciding this issue, the trial court took into consideration the credibility of the evidence tendered, consistency of the witnesses as well as their demeanour. It made the following observations;

a. “It is admitted that PW2 led a group of police officers and administration of that area into the house of the appellant herein while acting on a tip off. They went to the house of the appellant and introduced to him their purpose of visit, which was to carry out search for cannabis sativa. The defence confirmed that indeed a search for bhang was mounted by the police officers together with area administration.

b. PW1, 2 and 3 all stated that they found bhang in a paper bag in his bedroom. The defence in cross examination of the witnesses did not dispute the recovery but was keener on who had given them the information as to whether he was dealing in bhang without actually denying. It is common knowledge such intelligence report is always confidential and so one is not expected to give identity of the informer for their own safety. DW1 also in his defence did not deny that 23 rolls of bhang had been recovered from his house but was raising issues majorly about money taken from the raid which was produced as Pex4.

c. DW1 insisted that he was shocked with a gadget while the raid was happening something even his own witness DW2 who was with him did not see. It was his testimony that he was sedated by that gadget, and yet DW2 denied that anyone touched him. It shows that he was not candid.

d. DW1 had initially insisted that the OCS took his Kshs.108,000/= at the time of plea and later changed the amount to Kshs.108,500/= before changing it again to Kshs.148,500/= and later reverting to Kshs.108,500/=. It just confirms that he was not a credible person who was out to taint names. In his defence, he gave a narration as to how he had separated his money and where the money was found by the police, he had only Kshs.108,500/=. It was clear that appellant admitted that he was lying when he alluded that he had Kshs.148,500/= and not Kshs.108,500/= which had been recovered. He was clearly misleading the court.

e. DW1 also insisted that C.I. Kariuki took something from his pocket and placed in his. It is worth noting that the same appellant had informed this court that he was asked to face the wall when the search was being carried out. It is not clear how he saw C.I Kariuki put something in his pocket whereas he was facing the wall. It is clear that he was not being candid.

f. Further to that DW1 insisted that something was taken and of which C.I Kariuki put in his pocket. He did not mention that thing since it was his pocket which shows that he was making up the story, as it was not possible for him to forget what was in his pocket.

g. DW2 who was present all that time when the raid was being conducted did not expressly deny that cannabis sativa was actually recovered therein but was only focused on the money seized and tendered as exhibits.

h. It was also to be noted that the prosecution tendered an inventory (Pex8) of what was recovered in the house of the appellant. I have perused the inventory and clearly appellant has signed the same. He did not dispute his signature therein and also raise the issue as to whether he was forced to sign. He was acknowledging that 23 rolls of bhang, 113 rizlar papers and cash Kshs. 108,500/= were found in his house.”

44. Having made the above observations, it also noted that appellant was only concerned with the money but at no time did he raise issue of fabrication. In his defence as well, he contended that the Area Chief had a grudge and tendered a letter marked as Dex2 as a proof. The letter he tendered was addressed to one Kyalo Katiku through the chief and at no part was the chief mentioned therein.

45. The aforesaid warning was directed to Kyalo Katiku. The chief was known as Stephen Mutua Munyi. It showed that alleged grudge was just made up by the defence. Further still, the alleged grudge was never raised with the witness (PW1) at the cross examination which clearly betrayed the intention of the appellant to misled court at this stage, since the same was being raised as an afterthought.

46. The evidence adduced pointed that 23 rolls of cannabis sativa were actually found in the house of the appellant. He had the legal constructive ownership of the same which satisfies the ingredients of possession. It was also clear from the determination herein that he was

dealing in the same going by the presence of apparatus used for that trade.

47. The ***Black's Law Dictionary 10th Edition*** defines the term possession to mean **“the fact of having or holding property in one’s power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. Something that a person owns or controls”**.

48. Section 4 (a) of the Penal Code offers the following definition for “possession”:

(a) “be 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 or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

49. The other question which was decided by the trial court was whether the 1000 grams tendered herein as Pex2 were also in possession of the appellant. This was in respect to count 2 in the charge sheet. It was evidenced by the prosecution that the appellant had the possession of the same as well. The trial court made the findings as follows;

a. “It was admitted that cannabis sativa being 1000 grams were actually not found in the house of the appellant where 23 rolls of bhang, 113 rizlar paper and Kshs. 108,500/= were.

b. It was contended that P.C Nderitu heard appellant person asking someone in his mother tongue to change the position of the cannabis sativa but of important to note P.C Nderitu did not come to unravel that fact, which denied this court an opportunity for corroboration of the testimony as led by PW2, since PW1 and 3 denied going back together with PW2 to the home of the appellant.

c. It was also contended by PW2 that they used the information by P.C Nderitu to go back to the home of the appellant. At a valley, they saw someone digging up something. The person ran away and when they went to that place, they found cannabis sativa of about 1000 grams. It is clear that appellant was not at the scene of the recovery and so it could not be said that he actually had possession of the same.

d. PW2 ought to have arrested that person and maybe that person could have led them to the appellant. It can be assumed that the cannabis sativa actually belonged to that person who ran away.”

50. Thus the trial court concluded that the evidence in regarding possession of the same could not be established beyond doubt. This court has gone through the record and agrees as much with the trial court conclusion and holding.

51. It was also the prosecution’s case that Kshs.108,500/= was recovered at the same place where 23 rolls of bhang were found. Appellant indicated that the money was a debt he had taken from DW3 being Kshs.200,000/=. The trial court analyzed the evidence agreement tendered herein and so is this court and clearly it was under the handwriting of one person which clearly raised doubts as to its authenticity.

52. It was also not contested that the aforesaid money was recovered in the same paper bag where 23 rolls of bhang and 113 razler paper were which begs the question as to why appellant had mixed his cannabis sativa together with his money, if he were to be believed. It was unusual for one to put genuine money in a container with contraband items as that was a credible pointer at something being a miss.

53. Though, the appellant may have borrowed the money from DW3 as alleged but same arouses an inference that the same was being used to carry out an illegal trade, and that contention could not sanitize the money.

54. Thus this court does not find the contention by the defence as credible, the claim was being made as an afterthought. It was clear in the circumstances that Kshs.108,500/= were actually proceeds from the sale of cannabis sativa, as one could not separate the money from the 23 rolls of cannabis sativa and 113 rizler papers and 2 rollers found in the same paper bag.

55. I have considered the defence tendered and I agree with trial court that clearly it did not challenge the evidence presented herein by the prosecution. It did not challenge the search which was carried in his house. He did not challenge the recovery of 23 rolls of bhang and also 113 rizler papers as well as Kshs. 108,500/= recovered therein. His contention was focused on the money and the source which clearly shows that he was not disputing the presence of bhang but the money.

56. This court has taken its time to read the testimony of PW1, and clearly he made it clear that he planned together with OCS a raid on the appellant on the 3/5/2016 and proceeded for the raid at around 5.35 am and so there was no inconsistency at all. The planning and the raid were conducted at different times.

57. The court therefore finds no merit in appeal and upholds the conviction and sentence in respect to count 1 in the charge sheet. The court thus makes the following orders;

i. The appeal is dismissed, conviction is affirmed and sentence is confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE