



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 4 OF 2017

JAMES MUGENDI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of being in possession of narcotic drugs contrary to section 3 (I) (a) of the Narcotic Drugs and Psychotropic substances (control) Act No. 4 of 1994. The particulars of the offence are that the appellant, on 17th March 20125 at about 12.00 hours at Runyenjes township, was found being in possession of four (4) rolls of “bhang” in contravention of the said Act.

The trial court convicted the appellant and sentenced him to serve four (4) years imprisonment. The grounds of appeal are THAT:-

- 1. The appellant pleaded not guilty before the trial magistrate.**
- 2. The learned trial magistrate erred in law and facts when he relied on uncorroborated evidence of PW1 and PW3 based on recovery of the alleged bhang which is contrary to section 163(1) cap 80 laws of Kenya.**
- 3. The learned trial magistrate erred in law and facts when he failed to consider that the appellant wasn't booked with the alleged offence when he was taken to the Police station thus proving that the appellant wasn't at all found in possession of the alleged bhang.**
- 4. The learned trial magistrate erred in law and facts when he failed to consider that no independent witness was called by the prosecution side to witness the said recovery.**
- 5. The learned trial magistrate erred in law and facts when he failed to consider that there was a long standing feud between the appellant and the officer who was in the company of PW1 & PW3 based on a love affair with the appellant's wife and the officer used PW1 & PW3 to frame the appellant with the offence.**
- 6. The learned trial magistrate erred in law and facts when he convicted the appellant on a defective charge sheet. The offence of bhang does not fall under section 3 (1) (a) thus proving that the offence charged with is not the same offence I was charged with in court thus provoking section 214 (1) of the Criminal Procedure Code.**
- 7. The appellant was detained for three (3) days in police custody before being availed in court thus provoking Article 49 (1) (f) of the new constitution.**

The appellant submit that the prosecution evidence is contradictory.

PW1 alleged that the house where the appellant was arrested was not rental but lodgings while PW3 alleged that the plot had other rooms that were occupied. PW3 alleged that the appellant was found sleeping in the house and the house was open while PW1 alleged that the house was locked. According to PW3 the house was searched and nothing suspicious was found. They asked the appellant to go with them to the station. It is therefore submitted that the evidence is contradicting and should not be relied upon.

The appellant further submit that crucial two criminal witnesses were not called to testify. The other people who were alleged to live in the plot were not called as witness. The appellant was not booked with the four rolls of bhang. The exhibit memo which escorted the exhibit to Nairobi. Government analyst, shows that it was for case no. 412/87 of 2015 while the police file for this case was 412 of 2014.

The trial court failed to consider that there was existing grudge between the appellant and one of the arresting officers. This was raised in the defence but it was not considered.

Miss Nandwa, prosecution counsel, opposed the appeal. Counsel maintains that police were on patrol when they received a report that someone was stealing and beating people in Runyenjes Township. They went to a certain house and found the appellant sleeping. A search was conducted and four (4) rolls of bhang were recovered from his trouser. The prosecution proved its case beyond reasonable doubt.

Before the trial court three witnesses testified, PW1 APC RICHARD NJAGI was attached to the EMBU East Sub county A.P Headquarter. On 17/3/2015 at 12.00p.m they were on patrol. They got information that someone was stealing and beating people and was living in a rental house. They went to the house and found the appellant sleeping. They searched and recovered four rolls of bhang on his jean trouser. He had seen the appellant previously in court in another case. They arrested him.

PW2 P.C JOEL LANGAT was stationed at Runyenjes police station. On 17/3/2017 AP officer took the appellant to the station. They told him that the appellant was arrested with bhang. He prepared exhibit memo and took the four rolls to the Government analyst. A report was received dated 27/3/2015 which confirmed the substance to be "bhang". He charged the appellant.

PW3 Sergeant NELSON TENSI was stationed at Runyenjes police station. He was with PW1 on patrol on 17/3/2015. They went to the house and found the appellant sleeping. PW1 did a body search on the appellant and recovered four rolls of bhang. He did not know the appellant.

In his unsworn evidence, the appellant testified that on 17/3/2015 he was in Runyenjes in a rented room. The door was opened and four Police Officer entered and identified themselves. They conducted a search but did not recover any stolen items. He was escorted to the Police station and booked as suspect for various offences. He denied that he was found in possession of the four rolls of bhang. He had a grudge with one of the police officer who did not testify, Cpl Kazungu over a lady. He was convicted in criminal case no. 50 of 2015 for two years without the option of a fine.

The issue for determination is whether the appellant was found in possession of the four rolls of bhang. The appellant has raised the issues of two different police files. Although the charge sheet gives the police case number as 412/87/2014, the person charged is the appellant. The exhibit memo gives the case no. 412/87/2015 and also gives the appellant's names as the accused. I see no issue in the differences in the charge sheet and the exhibit memo.

The appellant was arrested by police officers. Those were the crucial witnesses and two of them testified. There was no need to call members of public to testify. The appellant in his defence raised the issue of a grudge with Cpl Kazungu. The appellant's past records were that he was convicted in Runyenjes criminal case no. 50 of 2015 and sentenced to serve two years imprisonment. He was convicted on 30/5/2008 in Runyenjes criminal case no. 396 of 2008 for breaking into a building and committing a felony and sentenced to two years imprisonment on 28/8/2012. He was convicted in criminal case no. 498 of 2012 for shop breaking and stealing and was sentenced to four (4) years imprisonment. The evidence proves that the appellant was found in possession of the drugs.

Given the appellant's past record, it is clear that corporal Kazungu has nothing to do with the case. The appellant is a perpetual offender and was found in possession of the drugs. I do find that the prosecution proved its case beyond reasonable doubt. The appellant was arrested on 17/3/2015 and arraigned in court on 18/3/2015. The ground of appeal that he was detained for three days is misplaced.

The appeal lacks merit and is hereby disallowed.

Dated and signed at Marsabit thisday of June 2018

S. CHITEMBWE

JUDGE

Dated, signed and delivered at Embu this 11th Day of July,2018

F. MUCHEMI

JUDGE