



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS NOS. 73 AND 74 OF 2016

EDWARD MUNYOROKU KAROKI.....1ST APPELLANT

DAVID MAINA MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 186 of 2016 in the Principal Magistrate's Court at Kangema by D. M. Kivuti, Senior Resident Magistrate, dated 23rd September 2016]

JUDGMENT

1. The appellants were found in possession of *narcotic drugs* contrary to section 3 (1) as read with 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Act, No. 4 of 1994. They were sentenced to *seven years* imprisonment.
2. The particulars were that on 30th April 2016 at Kiria-Ini Sub-location, Mathioya District within Murang'a County, they jointly had *121 rolls* and *100 grams* of *bhang* with a street value of Kshs 3,420; and, which was *not* in the form of a medicinal preparation.
3. The appellants lodged separate petitions challenging the conviction and sentence. The petitions were consolidated on 4th October 2017. On the same date, the 1st appellant was granted leave to amend his petition.
4. The *amended petition* by the 1st appellant raises five grounds. They can be compressed into three: firstly, that the learned trial magistrate erred by admitting the report of the Government Analyst without calling the maker. Secondly, that the prosecution withheld some evidence that was favourable to the appellant. Thirdly, that the charge was not proved beyond reasonable doubt.
5. Learned counsel for the 1st appellant's submitted that the impugned report by the Government Analyst was irregularly produced by the Investigating Officer (PW3). He opined that the learned trial magistrate had a duty to explain to the accused of their right to call the maker. He also submitted that the only witnesses at the trial were police officers who gave hearsay evidence.
6. At the hearing of the appeal on 23rd July 2018, the 2nd appellant, who was acting in person, *abandoned* the appeal on *conviction*. He relied entirely on written submissions filed on the same date. Those submissions are a plea for *clemency*. The 2nd appellant said that he is diabetic; and, that he takes care of six family members who include his elderly mother. He said he is *remorseful*; has reformed in prison; and, has learnt some carpentry.
7. The appeal is contested by the Republic. Learned Prosecution Counsel submitted that all the ingredients of the offence were proved. He also submitted that the sentence was well within the law.
8. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
9. The evidence against the appellants was straightforward. On 30th April 2016, the O.C.S Kiria-Ini Police Station, Joseph Mwangi (PW2), received a tip-off that some suspects were preparing bhang for sale. The locus was "*Kiai's plot room 6*". PW2 assembled a team of officers who raided the premises. They included PW1 and PW3, Police Constables Muruku and Chepkwony.
10. When the officers opened the door to room 6, they found the two appellants. One of the suspects attempted to escape but was apprehended. The police recovered 121 rolls of bhang under a table. It was in some black paper bags. There were also 100 grams of unrolled bhang in a basin. The substance was green in colour. There was also a kitchen knife, a pair of scissors and some brown paper for processing the rolls (exhibits 1 to 6)

11. PW1 and PW2 placed the street value at Kshs 3,420. PW3 was the investigating officer. A sample of the substance was forwarded to the Government Chemist for analysis.

12. I have perused the *Exhibit Memo Form* (exhibit 7). PW3 took possession of the exhibits. The *Memo* indicates the exhibits were forwarded under escort of one Corporal Ekeno. The report of the Government Analyst is dated 6th May 2015 (exhibit 8).

13. When the 1st appellant was placed on his defence, he claimed that he was arrested at a backstreet; that he was in the company of two other persons (*Wagathi and Muthoni*); and, that there was a grudge between him and PW1 over a woman named *Wangechi*. However, the record shows that he did not cross-examine PW1 over the woman. On his part, the 2nd appellant claimed that he visited room 6 where he found the 1st appellant "*rolling bhang*". He claimed that the police arrested him outside the room.

14. The 1st appellant takes up cudgels on the production of the report by PW3. I have carefully studied the original report (exhibit 8). It was signed by J.M. Welimo, a Government Analyst. The report bears an embossed seal.

15. I remain alive that the appellants were unrepresented and raised no objection. True, the Government Analyst was not called to the stand. True, no basis was laid. But I find that power reposed in the court under section 77 of the Evidence Act to accept the report without calling the Government Analyst; and, to presume the signature to be under his hand.

16. I thus entertain no doubt that the substance recovered from the appellants was bhang. PW1, PW2 and PW3 were *all* at the *locus in quo*. I cannot say that any of the officers gave hearsay evidence regarding the arrests or recovery of the narcotics.

17. It is true that *all* the prosecution witnesses in this case were police officers. There is no provision in the law of evidence barring it. Furthermore, under section 143 of the Evidence Act, no particular *number* of witnesses was required to *prove* the charge.

18. From a re-appraisal of the evidence, I am satisfied that the two appellants were the persons found by the police in room 6 at *Kiai's Plot*; and, that exhibits 1 to 6 were in their possession. Their defences were unbelievable and a red herring. I thus concur with the learned trial magistrate that all the elements of the charge were proved beyond reasonable doubt. I *uphold* the conviction.

19. I will now turn to the appeal on *sentence*. Section 354 (3) of Criminal Procedure Code Section 354 (3) of Criminal Procedure Code empowers the High Court to "*maintain the sentence, or with or without altering the finding reduce or increase the sentence*".

20. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors.....The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence."

21. The learned trial Magistrate considered the *mitigation* tendered by the appellants. The 1st appellant said he was a casual worker; and, that his family relies on him. The 2nd appellant said he was asthmatic and that his only child and old mother relied on him.

22. The learned trial magistrate found that *each* of the appellants had *previous convictions* for stock theft and possession of narcotics respectively. He also took into account the *high number* of rolls of bhang found in possession of the two appellants; and, the need for *deterrence*. He nevertheless exercised his discretion and sentenced the appellants to only *seven years* imprisonment.

23. I cannot then say that the learned trial magistrate applied wrong principles or overlooked some material factors in sentencing. I thus decline the invitation to review the sentence.

24. The upshot is that the consolidated appeals lack merit. They are hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of September 2018

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The 1st and 2nd appellants.

Ms. Otieno holding brief for Mr. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.