



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 506 OF 2013**

**(Appeal from original Conviction and Sentence in Murang'a SPM Criminal Case No 810 of 2012 – B Ochieng, Ag CM)**

**WAWERU KINGORE TUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant **Waweru Kingore Tuma** was convicted after trial of ***cultivating prohibited herbs*** contrary to **section 6(a)** of the ***Narcotic Drugs and Psychotropic Substances (Control) Act, No 4 of 1994***. He was sentenced to four (4) years imprisonment on 10/10/2003. He appealed against both conviction and sentence. On 30/06/2014 he was admitted to bail pending disposal of his appeal.
2. The conviction is challenged mainly upon the ground that the evidence placed before the trial court did not prove the offence charged to the required standard. Learned prosecution counsel does not support the conviction.
3. I have read through the record of the trial court in order to evaluate the evidence adduced there and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses, and I have given due allowance for that fact.
4. The prosecution called 3 witnesses. PW1, the local chief, proceeded to the home of the Appellant after a tip-off that he was growing bhang there. Although PW1 says he found the Appellant in his home and that he managed to escape before he could arrest him, his evidence appears to suggest that the Appellant may not have been there and that PW1 merely suspected that the Appellant was there and had escaped as he (PW1) approached the home. He never stated that he actually saw the Appellant or how he escaped. PW1 further stated that he was accompanied by members of the community. But none of them testified.
5. PW1 and his entourage then proceeded to the shamba wherein they saw bhang growing. They uprooted the whole of it – over 170 plants - which was eventually produced in evidence by PW3 (a police officer) to whom it was handed.
6. PW2 (the local assistant chief) arrested the Appellant and handed him over to PW3 who re-arrested and charged him.
7. The Appellant gave sworn testimony in his own defense and called one witness. His testimony was that he lived and worked in Nairobi but had workers in his shamba back in the village. His workers had been arrested on 16/07/2012. On 17/02/2012 he went to see why they were arrested. He found that they had been arrested for cultivating bhang in his shamba. He visited them in court. In the evening he met the local assistant chief accompanied by his youth wingers. The assistant chief arrested him and called the local chief who came with the same bhang his workers had been arrested for. He was subsequently charged. He denied that he cultivated any bhang in his shamba.
8. DW2 was the Appellant's nephew. He lived in the Appellant's land and cultivated it with the Appellant's permission. He testified that he and his elder brother were arrested and charged with selling illicit brew and being in possession of bhang'. He denied that any bhang' was found growing in the Appellant's land.
9. The only witness connecting the Appellant to the alleged cultivation of bhang' was PW1. The Appellant was not present when the bhang was allegedly uprooted from his shamba. Why could PW1 not wait until the Appellant was arrested and then take him to his shamba and recover the bhang in his presence? Why were other persons who allegedly accompanied PW1 to the Appellant's shamba and saw the bhang growing therein not called?
10. The Appellant's testimony was entirely plausible. He learned that the persons taking care of his shamba had been arrested and proceeded there to find out why they had been arrested. He even visited them in court where they had been charged. That is what a responsible person would do! He was arrested and charged just because he was the owner to the shamba. There was no evidence that he was the one who cultivated the bhang. There was even no evidence that he had knowledge that the persons who were taking care of his shamba were growing bhang therein to bring the offence under section 6(b) of the Act.
11. The Appellant's conviction was entirely unsafe and learned prosecution counsel properly conceded the appeal.
12. I will allow the Appellant's appeal in its entirety. His conviction is quashed and the sentence passed against him set aside. He is hereby released from his cognizance. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 16<sup>TH</sup> DAY OF MARCH 2017**

**H P G WAWERU**

JUDGE

DELIVERED AT MURANG'A THIS 24<sup>TH</sup> DAY OF MARCH 2017