



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

HCRA No. 3 OF 2015

FAMAU MOHAMED AVUMAU.....APPELLANT

=VERSUS=

REPUBLICRESPONDENT

(An Appeal from the original conviction and sentence of 1 million Kenya shillings ID 10 years imprisonment on 9/05/2014 by Hon. J.M. MUNGUTI (Ag. SPM) at Lamu Law Courts in CR. Case No.105 of 2011)

JUDGMENT

1. The Appellant was convicted and sentenced to pay a fine of 1 million Kenya shillings ID to serve 10 years imprisonment for the offence of trafficking in Narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and psychotropic (substances control) Act No. 4 of 1994.

2. The particulars of the charge were that on 6/02/2011 at Faza area in Lamu District within Lamu County the Appellant jointly with another who was acquitted were found trafficking in Narcotic Drugs by conveying 76 big rolls of cannabis sativa (bhang) valued at Ksh. 38,000/= in contravention of the Act.

3. The prosecution evidence in summary was that PW1, PW2, PW3 and PW4 received intelligence reports that there were Drug traffickers travelling from Mombasa heading to Bwajumwali and Tchundwa area in Faza Island. The officers way laid the vehicle. Reg. No. KBK 63K at Mtagawanda Jetty side. The officers did a search and arrested the Appellant with his co-accused. The Appellant had a suit case containing 76 rolls of bhang. The Appellant's co-accused also had a suit case which contained personal clothing.

PW5 examined the plant material and confirmed it was cannabis sativa. The Appellant was subsequently charged in court.

4. In his defence, the Appellant said on the material day he was travelling from Mtagawanda going to Bwajumwali. He said the Nissan in which he was travelling was intercepted at Faza junction by four police officers who ordered everyone to disembark. He said he had nothing but his co-accused was arrested and detained for 5 minutes before police turned to him and arrested him after he gave out his name.

The Appellant said the following day at 9 a.m., police claimed there was a luggage belonging to him at Kizingitini police station.

5. The trial court acquitted the Appellant's co-accused but found the Appellant guilty as charged and sentenced him to pay a fine of Ksh. 1 million ID to serve 10 years imprisonment.

6. The Appellant has now appealed against both conviction and sentence on the following grounds:-

(i) That the Hon. learned Magistrate erred in law and fact in not considering that the appellant was not found with the alleged bhang at the place of arrest.

(ii) That the Hon. Magistrate erred in law and fact in not seeing that the appellant was not taken to witness the weighing of the alleged seized bhang in question.

(iii) That the Hon. learned magistrate erred in law and fact in noticing that the appellant was arrested by different Officers from those who seized the alleged bhang away from where he was arrested.

(iv) That the Hon. Magistrate erred in law and fact by convicting the appellant based on the evidence of an informer who was not called to testify in court.

(v) That the learned Hon. Magistrate erred in law and fact in not considering that the police Officers who seized the alleged bhang were never called to testify in court which resulted to miscarriage of justice.

(vi) That the learned Hon. Magistrate erred in law and fact by rejecting the Appellant's sworn defense without seeing that the appellant owned no onus of proving his innocence, thus the burden always is with prosecution side.

7. The Appellant during the hearing of the Appeal gave mitigation as follows:-

(i) That he is remorseful and fully and dully informed of the imminent dangers of drugs and substances abuse.

(ii) That he regret for wasting the courts time and that of his family as they could have engaged themselves in other meaningful tasks.

(iii) That he is the sole bread winner and a source of refuge in his family.

Though he has disabilities he believes it's not inability to a defined mind with the right attitude.

(iv) That the sentence meted upon him of serving ten (10) years imprisonment was harsh and excessive looking into the matter where his co-accused was acquitted of the same charges under the same circumstances.

(v) That he has served a third of the sentence.

(vi) That he has now reformed, armed with educative and rehabilitative information that his stay in prison was not that of a mourner but of a learner who graduated in many vocational trainings.

8. This is the first appellate Court and I have a duty to re-evaluate the evidence on record while bearing in mind that the trial court had the opportunity to see and hear the witnesses. In the case of *KIILU&ANOTHER —V REPUBLIC [2005] 1KLR 174* the Court of Appeal stated 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 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and its own conclusions.

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 findings and conclusions, 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.

9. My findings are as follows:-

(i) I find that the prosecution did not produce prove of the street value of the bhang as required by section 86 of the Narcotic drugs and psychotropic substances control Act No. 4 of 1994. In the case of **GABRIEL OJAMBO NABESI Vs REPUBLIC [2007] eKLR** the Court of Appeal stated as follows:-

“Section 4 (a) of the Act under which the appellants were charged and convicted provides that a person who traffics in any narcotic drug or psychotropic substance “shall be guilty of an offence and liable”.

“In respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater and in addition to imprisonment for life

Section 36 of the Act provides for valuation of goods for penalty, thus:

“86 (1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of a proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by court as prima facie evidence of the value.

(2) In this section “proper officer” means the officer authorized by the Minister by notification in the Gazette for purposes of this section”.

(ii) I find that section 86 was not complied with and in the circumstances I find that the conviction and sentence herein are not secure. I accordingly allow the Appeal and I quash the conviction and set aside the sentence.

I further order that the Appellant be set free unless lawfully held for any other reason.

Dated, Delivered and Signed at Garsen this 7th June, 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.