

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 45 OF 1987

NDUNGWA.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by the District Magistrate of being in possession of 1 roll of bhang (cannabis Sativa) contrary to section 10 (e) of the Dangerous Drugs Act Cap 245 Laws of Kenya and was sentenced to 8 months imprisonment without option of fine.

Three different versions were put before the District Magistrate as to the recovery of 1 roll of bhang from the house of the appellant.

The Assistant Chief (PW 1) testified that at about 2.20 pm whilst in his office, an elder reported to him that bhang was being sold in a house at the market. He sent Mutunga Musuni (PW 2) to that house and pretend that he wanted to buy bhang. The Assistant Chief and an elder (PW 3) entered the house where the Assistant Chief found Mutunga and another person discussing price of bhang with the appellant. Upon being questioned, the appellant told the Senior Chief that she was selling bhang and only 1 roll was left. The Senior Chief recovered I role of bhang in a packet of cigarette and arrested the appellant and her friend who were taken to Machakos Police Station. It is of interest to note that although this witness was not cross examined by the appellant, the magistrate allowed prosecutor to reexamine the witness, who said that he arrived at Machakos Police Station at 2.00 pm. A question may be asked how this Assistant Chief who was in his office at 2.20 pm when someone reported to him that bhang was sold somewhere, then went there, arrested two persons after recovering bhang and proceeded to Machakos Police Station could arrive at Machakos Police Station at 2.00 pm. Be that as it may. Mutunga testified that at 2.20 whilst in his house he smelt bhang and went to report to the Assistant chief, who told him to go and confirm that bhang was in the house. Mutunga went to that house, gave Kshs 3. and he was given 1 roll of bhang tied in a cigarette packet. Mutunga in his evidence in chief did not specifically say whom he paid Kshs 3 and who gave him the roll. Be that as it may, he took the roll to the Assistant Chief. The Assistant Chief proceeded to the house of the appellant. He did not accompany the assistant chief. Under crossexamination Mutunga said that he did not bother to know the price of bhang because he had no interest. It may be noted that in his evidence, the Assistant Chief said that he found the appellant discussing price of bhang with Mutunga and another gentleman. The contradiction in the evidence of Mutunga and assistant chief is more than obvious. The evidence of Mutunga that he took the roll of bhang tied in a cigarette packet to the assistant chief cannot be believed if the evidence of the assistant chief is accepted.

Then there is the evidence of a village elder (PW 3). According to him, Mutunga brought a report to the assistant chief that a lady and a gentleman were selling bhang at the market place. They went to the house of appellant where they found the appellant and a gentleman. They searched the house and found a roll of bhang contained in a cigarette packet. They arrested the appellant and took her to Machakos Police Station. There is not mention in his evidence of the gentleman being arrested and taken to Machakos Police station as claimed by the assistant chief.

The defence of the appellant was that she was asleep in her house, when the assistant chief and the elder

found Mutunga holding bhang. Upon being questioned, she denied that she sold the bhang to Mutunga. They searched her house and found nothing except the roll carried by Mutunga. Mutunga was released at the office of the assistant chief and she demanded why he was released. Thereupon, she was taken to Machakos police station.

From the above, it is obvious that the evidence of recovery of 1 roll of bhang from the house of the appellant is far from satisfactory. It is possible that Mutunga had this roll of bhang. It is possible that he may have bought it from the appellant or from the person who was in the appellant's house. This possibility can only arise if Mutunga's evidence is preferred as against the evidence of the Assistant Chief and the village elder though such evidence which is conflicting is far from satisfactory.

The principal state counsel indicated to me at the hearing of the appeal that he does not support the conviction because of material contradiction in the evidence for the prosecution. I subscribed to such view and held that it is unsafe to sustain the conviction.

The conviction and sentence thereon is quashed.

The appellant be set at liberty forthwith unless otherwise lawfully held

May 11, 1987

ABDULLAH

JUDGE