REPUBLIC OF KENYA

Wachira v Republic

Court of Appeal, at Nakuru September 24, 1985

Madan, Kneller,&Nyarangi, JJA

Criminal Appeal No 157 of 1984

September 24, 1985 **Madan, Kneller & Nyarangi JJA delivered the following Judgment.**

After hearing and considering the respective submission in this appeal, the court decided to allow the appeal on both counts it being desirable that the appellant should be released from custody without delay, the court made the order that the convictions be quashed, sentences be set aside and the appellant be set at liberty in respect of this case. We now give our reasons for the order.

The appellant Mwangi s/o Wachira was charged in count one as follows:

"On the 17th day of July, 1982 at Kamwana Village in Nyandarua district of the Central province, he was found being in possession of 3 grams of Cannabis Sativa (Bhang) which was not under medical preparation".

In count two, the appellant was arraigned with conveying suspected stolen property, contrary to section 333 of the Penal Code. The alleged particulars were that :

"On the 22nd day of July, 1982 at Kamwana Village in Nyandarua District of the Central province, having been detained by A P Sergeant Githaiga, P C Nakuru and I C Ondiek as a result of exercise of the powers conferred by section 26 of the Criminal Procedure Code was conveying one Radio Cassette make Philips, one blue suit case, one black brief case and one great coat reasonably suspected of having been stolen or unlawfully obtained.

The appellant pleaded not guilty to both counts, was tried, convicted and sentenced to two years" imprisonment on each count, the sentences to be servied consecutively. The High Court sitting at Nakuru (Masime J) dismissed his appeal. Undaunted, he has appealed to this court contenting that there were innumerable inconsistencies in the prosecution evidence, that he was denied an opportunity to call his witnesses, that the trial and first appellate court got it all wrong in their finding that the opium was in his house, that the magistrate and the judge erred in their conclusion that he was conveying goods suspected of having been stolen and that the prosecution did not prove its case beyond reasonable doubt.

Mr Etyang, Principal State Counsel, conceded the appeal on the second count. We agree that the conviction on count two is unsustainable. The evidence in support of this count was that the material property was found inside a house to which the appellant led Sergeant Githaiga (PW 1) and his police party. The appellant gave sworn evidence as proof that the various items of property belonged to him and furnished the court with details of the prices of the goods and the names of firms etc where he purchased them.

There was nothing about the possession to suggest that the appellant was conveying the property or that any of it could reasonably be suspected of having been stolen or unlawfully obtained. The account which the appellant offered under oath more than sufficed as possibly a reasonable explanation and it was a misdirection on the part of the trial court and the High Court to hold that the appellant's explanation of how he came by the same was unmeritorious.

Actually, the evidence relating to count two disclosed no offence for in any event the appellant was not found conveying the suspected property.

The cannabis sativa, the subject-matter of count one, according to Seargent Githaiga (PW 1), was found wrapped in a white piece of paper and “in the roof”. On that evidence the judge concluded that the appellant was in possession of the bhang. There was was no evidence that, the appellant kept or hid the bang in the roof so as to make it his possession; so it was uncumbent upon the prosecution to demonstrate by evidence that the appellant could reasonably be deemed to be in possession in terms of section 4 of the penal code where in the term ‘possession’ is defined and explained. The prosecution did not do so. One other matter has not escaped our attention. It is this. Just after PW 2 had testified, the Prosecutor informed the magistrate that the third witness (a prosecution witness) was in company with PW 1 and PW 2. The court snapped: “We do not need him”. The prosecutor thereupon ended his case and as a consequence the 3rd prosecution witness P C Ondiek was not called to give evidence and therefore the appellant had no opportunity to ask him questions. PC Ondiek would have been a material witness and as the appellant was not represented by an advocate all important witnesses for the prosecution ought to have been called on the trial: Republic v Fulabhai Patel & another (1946) 12 EACA 179. The magistrate acted irregularly, to say the least. But that was not all. The appellant was put on his defence, section 211 of the Criminal Procedure Code complied with and the appellant gave his evidence under oath and as regards the bhang his challenge was that it was found in his absence. Unexpectedly and almost inexplicably, the court records thus;

“Court: No need of the witness alleged for he has not been referred to by the accused”

The magistrate appeared at this stage to have been overwhelmed by indignation. He wasn’t going to hear any more witnesses. The attitude of the magistrate was unjudicial and prejudicial to the appellant, made the trial unfair, and occasioned a miscarriage of justice. Those are the reasons for the order of the court.