



**IN THE COURT OF APPEAL
AT MOMBASA**

CORAM: TUNOI, AGANYANYA & VISRAM, J.J.A.

CRIMINAL APPEAL NO. 33 OF 2010

BETWEEN

NASSIR HUSSEIN MOHAMMED APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a conviction and judgment of the High Court of Kenya at Malindi (Omondi, J) dated
16th December, 2009
in**

H.C.CR.A NO 48 of 2005)

JUDGMENT OF THE COURT

This is a second appeal by **NASSIR HUSSEIN MOHAMED**, the appellant herein, against both conviction and sentence recorded against him on 30th April 2009 by the Principal Magistrate, Malindi, pursuant to his being found guilty of being in possession of narcotic drugs contrary to **Section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994 as read with Section 2 (a) of the same Act**. His first appeal was dismissed by the High Court of Kenya at Malindi (Omondi, J) on 16th December 2009.

The appellant prior to his conviction was a tour guide and a beach boy. He operated in Lamu and Likoni. He was married but had separated from his wife. However, he had the custody of the young children of the marriage. He also owned some rental houses within the two towns.

On 20th August, 2006 at about 3.00 p.m. Cpl. Amos Muombe (PW1) of Lamu Police Station received information that the appellant, a popular beach boy who was known to them was selling narcotic drugs at the beach. PW1 assembled a team of police officers comprising of P.C. Ezekial Lucky (PW2) and P.C. Mwashirua Sheria (PW3) to go and investigate.

They found the appellant near Lamu County Council offices at around 1.30 p.m and explained to him why they were looking for him. The police officers then searched him and on finding nothing on him they led the appellant to his house at Bajivu in Lamu Town. They found the house locked from outside. As to the keys the appellant said his sons had them. He requested the officers to return later when his children would be available to open the door. The officers declined, saying they would wait. Eventually the appellant retrieved some keys buried under the soil near the door and he used them to

open the door telling the police that they would not find anything. After a thorough search police officers noticed a floor which was rough, not cemented but had two pieces of wood placed on the top soil. Using a metal bar they dug in and pulled out a yellow nylon paper bag containing a total of 513 rolls of bhang.

In his defence during the trial, the appellant averred that the drugs had been planted on him by his estranged wife and that the entire case was a frame up calculated to deny him the custody of his children. He denied that the drugs belonged to him and categorically stated that he did not know how they found their way into his house.

However, the trial magistrate rejected the story narrated by the appellant and in convicting him, the trial magistrate held:-

“All in all I find the accused person’s defence full of falsehoods and I dismiss it. I am satisfied that the accused person was in possession of 513 rolls of narcotic drugs to wit cannabis sativa. Exhibit 5 confirms that the substances contained in the sample rolls of bhang was cannabis sativa. I thus find the accused person guilty as charged and I convict him.”

The trial magistrate then sentenced the appellant to 10 years imprisonment.

Being aggrieved by this finding, the appellant preferred his first appeal. However, as shown earlier on in this judgment, Omondi, J affirmed that finding.

The appellant who was unrepresented in the appeal before us, presented a written submission challenging mainly the findings of facts by the two courts below, he reiterated that the case against him had been fabricated by the police and his divorced wife who *“lived under concubinage”* in that plot and she had had ample time to plant the drug in the house.

The appellant attacks the findings of the two courts below mainly on facts and says that the conviction cannot stand as some of the people mentioned in the proceedings were not called as witnesses and also that the prosecution case was full of inconsistencies. The learned Senior State Counsel supports the conviction and says the sentence was, in fact, too lenient when the drugs found with the appellant were massive.

As we have stated, this is a second appeal. That being the case, by dint of **Section 361(1) (a) of the Criminal Procedure Code**, we can only consider matters of law and not matters of fact. We cannot interfere with concurrent findings of the trial court and the first appellate court on matters of fact unless it is demonstrated that their concurrent findings on facts were so erroneous that no court of law, properly exercising its mind, could have made such a finding. **Section 361 (1) (a)** also militates against our hearing a second appeal on sentence as severity of sentence is a matter of fact. **Section 361 (1) (a)** states as follows:-

“361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the high Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

(a) On a matter of fact, and severity of sentence is a matter of fact.”

In the matter at hand, the appellant admits that the drugs were found in his house save that he shifts the mischief onto his wife. If he was innocent, as he claims, why did he hesitate to open the house when the police officers demanded that he does so? The appellant’s conduct on his being led to his house betrays him. It was definitely not that of an innocent person.

We have on our part anxiously considered the entire evidence on record; especially in trying to find out whether the case was a frame up. However, we are satisfied that there was sufficient evidence to sustain the charge that the appellant was found in possession of narcotic drugs and that the question of a frame up does not arise.

As there were concurrent findings of fact by the two courts below and as there was overwhelming evidence to support the decision of the said courts this Court cannot in the circumstances interfere with

the findings.

The conviction is safe and sound and we uphold it.

The appeal fails and is hereby ordered dismissed.

Dated and delivered at Mombasa this 4th day of March, 2011.

P. K. TUNOI

JUDGE OF APPEAL

D. K. S. AGANYANYA

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR