



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 56 of 2006

GERALD MUCHIRI KIRUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya eri (Okwengu, J.) dated 6th December, 2005 in H.C.CR.APP. NO. 445 OF 2002)

JUDGMENT OF THE COURT

The appellant, *GERALD MUCHIRI* who claims to be 75 years old was convicted by *Senior Principal Magistrate Murang'a* of the offence of being in possession of bhang contrary to *section 3(1)* as read with *section 3(2)(a)* of the *Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994* and sentenced to 10 years imprisonment on *18th September, 2002*. His first appeal to the superior court was dismissed.

This is therefore a second appeal.

The appellant, *Ann Wangui Mbao (PW6)*, and others were passengers in motor vehicle registration No. KAL 847R – A Nissan matatu driven by *John Mukundi Njau (PW4)*.

On *21st March, 2002*, the vehicle left Nairobi at *2:00 p.m.* for Gitugi via Kiria-ini in Muranga District. The vehicle arrived at Kiria-ini at about 4 p.m. and was stopped by *Pc Raphael Paul Mwita (PW1)* and *Pc Benjamin Kiswili (PW7)* who had information that the vehicle was conveying bhang. The vehicle was driven to Kiria-ini police station where the two police officers (*PW1 & PW7*) ordered the passengers to come out with their luggage. After the passengers left the vehicle, the vehicle was searched and four paper bags containing in total **21 kilograms** of **bhang** were recovered. None of the passengers claimed ownership of the bhang. Thereafter, the police instructed the driver of the vehicle to drive the vehicle and all the passengers to Muranga Police Station where the vehicle was detained and all the passengers locked in cells for three days. After the three days it was established that the bhang belonged to the appellant.

The appellant in unsworn statement denied that the bhang was his and stated that he had no luggage.

The trial magistrate believed that it was the appellant who had the bhang saying in part:-

“The court has no doubt that it was the accused who had the bhang as PWVI found him holding one of the luggage and he had to place it down for her to pass to a seat near the window. It is also true that the bhang was his because the other paper bags were under a seat.”

The superior court considered the evidence and made the following findings:-

“Investigations were carried out and Haron Kahuga the conductor of the matatu identified the appellant as the passenger who had boarded the matatu with 4 packages. One passenger Anne Wangui Mbao (PW6) also identified the appellant as the person she had seen with one of the packages which was in a yellow paper bag.”

The superior court then concluded:-

“It is evident that all the people who were in that matatu were locked in the cells while the police carried out their investigations. This did not however vitiate the evidence of PW3 and PW6. There were many passengers in the matatu and they had no reason to pick on the appellant and accuse him falsely. The trial magistrate who assessed the demeanour of the witnesses believed that these two witnesses spoke the truth. I have no reason to depart from this finding. In the circumstances, the defence of the appellant which was just total denial could not hold.”

The appellant who was not represented by a counsel appeals against the judgment of the superior court on **five grounds** but the important one is **ground 3** which states:-

“That the High Court Judge erred on points of law in upholding the 10 years imprisonment whereas the prosecution case was doubtful on the mode of recovery.”

The issue of law raised in this appeal is whether the superior court performed its duty as a first appellate as laid down in ***OKENO V. REPUBLIC [1972] EA 32*** at page 36 *para B-D*)

The first appellate court is required to subject the evidence as a whole to a fresh and exhaustive examination and make its own findings and draw its own conclusions making allowance for the fact that it does not have the advantage of seeing the witness.

This is a case where two police officers, ***Pc Raphael Mwita*** and ***Pc Benjamin Kiswili*** found four paper bags containing bhang in a public service vehicle after they had told all the passengers to alight from the vehicle. It is clear therefore that the two police officers did not find the appellant in possession of the bhang. The only evidence that the four paper bags belonged to the appellant was from two witnesses, ***Haron Kahuga (PW5)*** – the turn boy and ***Ann Wangui Mbao*** – a passenger.

The evidence of ***Haron Kahuga*** was sketchy and inconclusive. He merely said that he told the police that one luggage – the yellow paper bag belonged to the appellant. He did not explain why the luggage belonged to the appellant but he stated in his evidence in cross-examination:-

“I saw you with the luggage. Those who loaded it can come to testify.”

He does not say when he saw the appellant with the yellow paper bag and where. He does not say that he saw the appellant enter into the vehicle while carrying the yellow paper bag or that the appellant was holding the paper bag while inside the vehicle. The witness seems to suggest that he is not the one who loaded the luggage into the vehicle but another person who was not called as a witness. The witness does not say anything about the other three paper bags.

The evidence of ***Ann Wangui Mbao*** was that when she boarded the vehicle in Nairobi, she found one passenger – the appellant inside the vehicle – holding a yellow paper bag. The appellant then placed the paper bag down so that the witness could pass to the window seat.

The witness did not however clarify whether he found appellant seated or standing or whether she sat next to him.

The witness did not also mention the other three paper bags but in her evidence in cross-examination she stated:-

“This is what you were holding. The other luggages were under the seat.”

The witness did not say what the other luggages were or that it was under the seat of the appellant.

The two police officers who recovered the bhang did not explain where exactly in the vehicle the four paper bags were found. They did not say that the paper bags were either recovered on the seat or under the seat where the appellant was seated. **Pc. Raphael Paul Mwita** only said that they searched the vehicle and recovered bhang packet in four luggages. He said in his evidence in cross examination:-

“One luggage was under his seat. One of the passenger (sic) who saw the accused with those luggages as he entered the vehicle at Nairobi. That witness will testify.”

The evidence that one luggage was under the appellant’s seat is hearsay evidence. The passenger who allegedly saw the appellant with the luggages as he entered the vehicle in Nairobi was not called as a witness. If **Pc. Raphael Paul Mwita** was referring to **Ann Wangui Mbao**, the witness did not say so. **John Mukundi Njau** the driver of the vehicle testified that he did not see the appellant enter the vehicle.

If the evidence of **Haron Kahuga** and **Ann Wangui Mbao** is to be relied on, it only proved that the appellant was carrying the luggage in the yellow paper bag. There was no evidence at all that the appellant was in possession of the other three luggages. On this aspect of the case, the superior court seriously misdirected itself that **Haron Kahuga** the conductor identified the appellant as the passenger who had boarded the matatu with the 4 packages. There was no such evidence.

Lastly, the veracity of the two material witnesses, **Haron Kahuga** and **Ann Wangui Mbao** was seriously dented. They did not spontaneously give the name of the appellant to the police as the person who was carrying the yellow paper bag immediately upon the discovery of the bhang. They only mentioned the appellant after police had subjected all the passengers to communal punishment by detaining all of them in police cells for three days including detaining the motor vehicle. We, of course, strongly abhor this high handed manner of investigating crimes by police officers.

It is after the three days that the owner of the luggage was established as **John Mukundi Njau**, the driver of the vehicle correctly stated. It is highly probable that the evidence of the two material witnesses was conspiratorial and self-serving.

In the circumstances, the finding by the superior court that the detention of the witnesses had no impact on their credibility is, with respect, highly speculative and probably erroneous.

In the final analysis, we have come to the conclusion that the superior court failed in this case to subject evidence to a fresh and exhaustive examination.

It is our view that had the superior court duly performed its legal duty it would have found, as we have endeavoured to show above, that, the evidence against the appellant was scanty and discredited and that it could not support a conviction.

Mr. Orinda, the Principal State Counsel did not, correctly in our view, support the conviction.

Accordingly, we allow the appeal, quash the conviction of the appellant and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at NYERI this 18th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR