



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 110 OF 2015

(Appeal against original Conviction and Sentence in Kangema PM Criminal Case

No 263 of 2015 – J O Magori PM)

SIMON MWANGI IRUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Simon Mwangi Irungu**, was convicted after trial of ***being in possession of narcotic drugs*** 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***. It was alleged in the particulars of the charge that on 19/04/2015 at Gakira trading centre in Kangema Sub-County within Murang'a County, he was found in possession of various forms and quantities of ***cannabis sativa*** (bhang) as set out in the particulars. He was sentenced to serve 6 years imprisonment. He has appealed against both conviction and sentence.

2. The Appellant's self-drawn grounds of appeal are that –

(i) That the trial magistrate erred in fact in finding that the Appellant had been found in his own house with the contraband items, whereas the house in fact belonged to another person who had been arrested with him but later released by the police.

(ii) That the learned trial magistrate did not consider the Appellant's sworn defence.

(iii) That the sentence imposed was manifestly harsh and excessive.

3. At the hearing of the appeal the Appellant, who was unrepresented, put in amended grounds of appeal along with written submissions, which I have read. In these amended grounds of appeal the Appellant challenges the testimonies of the 3 prosecutions witnesses and their credibility.

4. Learned prosecution counsel for the Respondent supported the conviction and sentence. Counsel submitted that the case against the Appellant was proved beyond reasonable doubt in that his possession of the contraband was proved by the testimonies of PW1 and PW2 who had acted upon information received that the Appellant was dealing in illegal drugs. Counsel further submitted that the

Appellant was convicted upon good and sound evidence, and that the conviction was safe. As for sentence, learned counsel submitted that the sentence imposed was lawful and merited, noting that the maximum sentence for the offence charged was 20 years imprisonment as the quantities of bhang recovered were obviously not for the Appellant's own consumption.

5. I have read the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

6. Three witnesses testified for the prosecution. PW1 (APC Philip Mwiga) and PW2 (APC Phelix Sitati) were police officers on foot patrol within Kangema township when they were informed that the Appellant, whom they apparently knew, was selling narcotic drugs to members of the public. They proceeded to the Appellant's house and found him in the company of one Simon Githinji Gatwichi. The Appellant allowed them to search the house and they recovered the various quantities and forms of **cannabis sativa** set out in the charge. They then arrested him and that other Simon. Subsequently they were satisfied that the latter was only an innocent visitor in the Appellant's house. They then caused the Appellant to be charged.

7. PW3 (Cpl Dekow Nunu) was the investigating officer. He recorded the statements of the two arresting officers and received into his custody the contraband that they recovered which he subsequently submitted to the **Government Analyst**. He produced in evidence the Government Analyst's report (Exhibit 7) along with the exhibit memo form (Exhibit 6) and the contraband recovered from the Appellant's house (Exhibits 1 – 5). He further stated that he was satisfied that the other person arrested with the Appellant was merely an innocent visitor to his house and had him released.

8. The Appellant gave sworn evidence in his own defence. He stated that he met with PW1 and PW2 in Kangema town and they arrested and handcuffed him. They then took him to a house where they found Simon Githinji Gitwichi. They searched that house and recovered the contraband set out in the charge sheet. That other person bribed them with KShs 5,000/00 but they took both of them to Kangema Police Station where he was placed in the cells but the other Simon remained at the report office. Later that Simon was released while he (Appellant) was arraigned in court the following day.

9. That was the totality of the evidence placed before the trial court. PW1 and PW2 gave clear testimony that upon information received they proceeded to the house of the Appellant where they found him with a visitor. Upon searching the house they recovered the contraband which on examination by the **Government Analyst** was found to be **cannabis sativa** in various forms. The Appellant was known to PW1 and PW2; at least one of the officers knew generally where the Appellant lived. On the particular occasion his house may have been pointed out to them by their informer. The point is that they found him in the house and the contraband was recovered in his presence. PW1 and PW2, and later their superior officer PW3, were satisfied that the other person found in the Appellant's house with him was an innocent visitor, and he was therefore released.

10. Nothing in the evidenced place before the trial court (including the Appellant's sworn statement) suggested any credible reason why PW1 and PW2 would want to place the recovered contraband on the Appellant's head if indeed it belonged to the other person. Yes, there was the Appellant's allegation that the other person bribed PW1 and PW2 with KShs 5,000/00; but in his sworn evidence he never stated that he complained of this to PW3 (PW1's and PW2's superior officer). It is also instructive that the Appellant never once stated to the court that PW1 and PW2 demanded a bribe from him. It is also clear from his cross-examination of PW1 and PW2 that he never challenged them on any such demand for a

bribe. So, the question arises, if PW1 and PW2 sought for and received from the other person a bribe of KShs 5,000/00 in order to release him, why did they not similarly demand a bribe from the Appellant"

11. The Appellant's story about the contraband not being his and belonging to the other person, and that the other person bribed PW1 and PW2 to secure his own release, was clearly contrived and could not be true. There was no reason at all to doubt the testimonies of PW1 and PW2. The trial court properly rejected the Appellant's defence.

12. I am satisfied upon my own evaluation of the evidence that the Appellant was convicted upon good and sound evidence. His conviction is safe and cannot be faulted. As for the sentence, the same was lawful and well deserved as the quantities of bhang recovered from the Appellant were clearly not for his own consumption.

13. In the result I find no merit in the Appellant's appeal in its entirety. It is hereby dismissed. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 25TH DAY OF NOVEMBER 2016



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