REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI Criminal Appeal 48 of 2009

NASSIR HUSSEIN MOHAMED……..…….....APPELLANT

=VERSUS=

REPUBLIC……..RESPONDENT

JUDGEMENT

Nassir Hussein Mohamed (the appellant) was convicted on charge of being in possession of narcotic drug contrary to section 3(1) of the Narcotic and psychotropic Substances Control Act No. 4 of 1994 as read with section 2(a) of the same Act. Appellant denied the charge and after due trial where prosecution called four witnesses, he was convicted and sentenced to ten (10) years imprisonment.

The prosecution case was based on particulars that on 20th day of August 2006 at about 3.00pm at Bazuri Village in Lamu District within the Coast Province he was found with 513 rolls of bhang valued at Ksh. 102,600/- which were not in medicinal form.

The evidence presented to the trial court was that police officers from Lamu Police Station received information from an informer that appellant was trafficking drugs - his name being disclosed as Nassir Mohammed Hussein alias Nyaniba who was a known beach boy in Lamu Town. Pc Amos Mu…(PW1) and Pc Ezekiel Luckily went to look for appellant (whom they knew) at the beach. They found him near Lamu County council offices at around 1.30pm and explained to him why they were looking for him and that they would like to search his house for narcotics. So the officers went with appellant to his house at Bajivu in Lamu Town. The house was locked from outside and appellant said his sons had the

keys. Appellant requested police to return later when his children would be available to open the door. The officers declined, saying they would wait – eventually appellant retrieved some keys buried under the soil near the door and he used them to open the telling the police that they would not find anything. Indeed a search in the room in the house initially recovered nothing, until the police officers noticed a floor which was rough, not cemented and had pieces of wood placed on the top soil. The appellant gave them a metal bar to use in digging. The police officers pulled out yellow nylon paper bag containing bhang. According to PW1 he says:-

"There are two polythene bags – MFI 1. We continued digging then we found a white nylon sack with bhang inside. White nylon sack – MFI -2. The bhang was in rolls which were wrapped with khaki paper."

The 513 rolls of bhang were taken to the police station and produced in court. It was PW1's evidence that he removed a roll from every bag and took to the government analyst.

Appellant was present and witnessed the entire search.

On cross-examination, PW1 stated that appellant claimed to live with his children in the house and never alluded to there being tenants in the house. However when they got to the house, there was no one else inside.

This evidence was corroborated by that of PW2 and PW3 except that PW2 referred to the bag recovered was a white manila sack, but it contained 513 rolls of bhang. IP John Njenga (PW4) the government analyst confirmed receiving the dry plant material from PW1 and his analysis confirmed the same to be cannabis or bhang as per his report.

Appellant's sworn defence was that he was a tour guide in Lamu and he denied having been found in possession of the bhang saying he had just found two guests at Mkowe Jetty when he met three police officers who said they wanted to search his house. He confirmed that the police dug the floor and recovered the drugs but that he even wondered how the police knew that the drugs were in his house saying:-

"I asked them how they knew they (sic) were drugs in my house. I have tenants, Kalama and Kenga."

They entered in June 2005."

I was earning Ksh. 15000/- for each room and he showed the court receipts for rents as D.Ex 1. He informed the trial court that he had separated from his wife, and he had custody of his sons. He ended his defence thus:

"…..513 rolls were found at my house….I do not know the owner of those drugs…. I suspected my ex-wife"

On cross-examination he confirmed the testimony of police that the keys to the house were hidden in the ground and that police removed the bhang from the ground in the store but insists that the store was a common store, shared with his tenants.

The trial magistrate in considering the defence case said that if the appellant had divorced his wife in 2002 by consent, then why would she plant drugs on him in the year 2006 and found that there was no evidence to link accused's former wife with these drugs and the mere fact of divorce did not prove his former wife's mischief in this mater.

The trial magistrate did not think that an outsider jumped into the store and buried the drugs under the floor because evidence by prosecution witnesses clearly indicated that the store as roofed.

The trial magistrate too was satisfied that appellant was in possession of the 513 rolls of narcotic drugs which were confirmed by the government analyst's report, to be bhang.

The appellant challenged both the conviction and sentence on grounds that

(1) The trial magistrate failed to consider that the recovered items were not found in his possession.

(2) The prosecution failed to call some of the essential witnesses.

(3) The source of his arrest was not linked to the present case.

(4) His defence was not considered

(5) The trial magistrate relied on contradictory evidence of PW1 – PW4.

In his written submissions, he argued that the prosecution witnesses were inconsistent regarding the recovery of the drugs and that he was held in police custody for five days, which violated his rights under section 72(3) (b) of the

Constitution and he cites the case of **Albanus Mwasi Mutua v R Cr. Appl. 120 of 2004** to support his position.

The Counsel for the State, Mr. Ogoti complained that he was being ambushed as this was not one of the grounds listed in the petition of appeal. Indeed the Criminal Procedure Code at section 350(2) has clear provision that an appellant is restricted to arguing his appeal relying on the grounds set out in the petition of appeal and nothing else. My finding is that this limb of his submission is an ambush, being introduced at the submission stage and the State is prejudiced by this as counsel for the State needed to adequately obtain instructions on that to enable him respond. Be that as it may, I take note that the trial magistrate did obtain an explanation about the delay and accepted the same as reasonable.

Then there is the issue regarding recovery which appellant contests saying the 513 rolls were not found in his possession and demands to know why the police did not carry a search warrant as anticipated by section 120 (i) Criminal Procedure Code – would this make the search and recovery illegal and therefore void"

Mr. Ogoti's response to this is that the evidence led clearly showed that appellant was in constructive possession of the drug, drawing this court's attention to the evidence of the prosecution witness from the moment they got the tip off, looked for and found appellant, requested him to open the door to his house and they did a search in his presence and retrieved the subject matter inside his house.

Indeed appellant confirmed that the drug was recovered inside his house and in his presence. He did not deny that the house belonged to him and he was thus in constructive possession of the items therein – I cannot fault this argument, and indeed there was nothing on record to show that the drug belonged to anyone else other than appellant, despie his claims that the same belonged to this unnamed sons or his purported tenants– indeed there was no evidence that he lived in that house with his sons. I fail to appreciate how the question of failure to produce a search warrant would be fatal to the prosecution case and the section quoted is misplaced. In fact section 120(3) Criminal Procedure Code confirms that what the police did was legal.

Appellant also argues that in failing to summon Kichirchir to testify, then an essential witness was left out and this should militate against the prosecution case – his position is that the said witness who witnessed counting of the drugs should have been called to give evidence.

The two police officers confirmed that the drug was not counted at the scene of recovery, but was carried to the police station where the same was counted. Appellant also says that members of the public who witnessed the recovery should have been summoned as witnesses. In support of this he cites the case **Bukenya and Others v Uganda Cr. App. No. 68 of 972 EACA at page 549** which stated that the

(a) prosecution must make available all witnesses necessary to establish truth even if their evidence may be inconsistent evidence.

(b) Court has a right and duty to call the witnesses where evidence appears essential to just decision of the case.

Appellant topped this with the case of **Owira v R 965 EA page 144** which held that:-

"Wherever the name of a person appears as indictment then such person should be called as witness"

Further that since the police informer was not called to testify, then his evidence ought to be treated as hearsay.

Mr. Ogoti's response to this is that all the witnesses were called and none was left out. What prejudice did the accused suffer by the failure to call CIP Kirchirchir. He did not witness the recovery – which to my mind is the most material fact in this case and which fact appellant did not dispute, he only witnessed the counting and appellant did not dispute the quantity of drug recovered. The failure to call the police officer who witnessed the counting was not fatal to prosecution case. The same applies to the police informer – since the recovery was not disputed, then failure to call the informer was of no consequence. As for members of the public – I think appellant's our cited case of **Owira v Republic** comes to the aid of the State – there was no named member of the public and the police are not bound to call a superfluity of witnesses some of whom may have just been curious onlookers – that ground has no basis whatsoever.

Despite his complainant, the appellants defence was duly considered by the trial magistrate but found to be unpersuasive claims by appellant that the matter was fabricated against him by and found them to be far fetched as there was no evidence of the wife's hand in the matter.

My finding is that the trial magistrate properly considered all the evidence adduced and arrived at a well reasoned conclusion thus making the conviction safe. The sentence was legal and I confirm it.

The upshot is that the appeal is dismissed.

Delivered and dated this **16th** day of **December 2009** at Malindi.

H. A. OMONDI

JUDGE