

IN THE SUBORDINATE COURT OF THE FIRST CLASS

2PE/153/2014

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

THE PEOPLE

VS

LUCKY MUSUKUMA

ACCUSED

CORAM : HON. S. KALOBWE-MWEENE, MAGISTRATE CLASS I

FOR STATE : MRS BAULENI, NATIONAL PROSECUTOR

FOR ACCUSED : IN PERSON

---

JUDGEMENT

---

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia
2. The Narcotic Drugs and Psychotropic Substances Act Chapter 96 of the laws of Zambia.
3. Criminal Procedure Code Chapter 88 of the Laws of Zambia

Case law referred to:

1. *Kenious Sialuzi v the people (2006) z.r. 87*

In this case the accused persons stand charged with an offence of trafficking in psychotropic substances contrary to section 6 of the Narcotic Drugs and Psychotropic Substances Act Chapter 96 of the Laws of Zambia.

The particulars of offence state that Lucky Musukuma, on 4<sup>th</sup> August 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did traffic in psychotropic substances namely 9.8 grams of marijuana a herbal product of cannabis sativa without lawful authority.

The accused pleaded not guilty to the offence charged.

I warn myself that though the onus is on the prosecutor to prove that the accused was in possession of prescribed quantity of dangerous drugs, the accused has to explain how he got into possession of the psychotropic substance.

According to section 6 of the Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia:

*Any person who trafficks in a narcotic drug or psychotropic substance shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding twenty-five years.*

This means therefore that the elements of the offence charged are as contained in section 2 of the said Act, which defines trafficking in the following terms:

*"trafficking" means-*

*(a) being involved directly or indirectly in the unlawful buying or selling of narcotic drugs or psychotropic substances and includes the commission of an offence under this Act in circumstances suggesting that the offence was being committed in connection with buying or selling; or*

*(b) being found in possession of narcotic drugs or psychotropic substances in such amounts or quantities as the President may, by statutory instrument, declare to be trafficking for the purposes of this Act.*

The prosecution called three witnesses in building their case against the accused person. I will now consider the evidence in this case.

**PW1 was Emma Namutowe** the mother to the accused person, she testified her son had left home to live with his uncle but used to go back to his parents' home to visit. Then on 4<sup>th</sup> August 2016, the accused person went on to his parents' home and sat in his room for a while then left and went back to his room and locked himself in the room then after a while he got out of his room and started throwing away items that were in the make shift store belonging to PW1 after which he went away. PW1 then went into his room she found some cigarettes and when she searched further she found a match box and inside it was some seed and vegetable matter. PW1 then called

the wife to the uncle to the accused to help apprehend the accused in case he had gone there, upon confirming that he was there PW1 together with some other people followed up on the accused. The accused was found seated on the chair and his father tied his hands and they booked a taxi and took him to Drug Enforcement Commission. At trial PW1 identified the match box and its contents that she had referred.

In cross examination PW1 maintained that she found the match box in the accused room though she did not know what the accused person was doing in his room.

In re-examination she clarified that she found the match box and its contents in the room belonging to the accused.

**PW2 was Green Musukuma**, the father to the accused person, he testified that on the 4<sup>th</sup> of August 2016, he went to his home and found a lot of people at his house. The explanation he got for that was that the accused person almost beat up his mother PW1 after she had found him smoking. PW2 then entered his sons room and started searching it, that's when he found a ball of khaki paper amongst some papers and when he unwrapped the Khaki paper he found marijuana which was green in colour which he identified at trial. He added that his sons room was just a one room that was built for him to be sleeping in. After searching, PW2 followed up on his wife and the group of people she had hired and when he got there he managed to apprehend his son the now accused person with the help of the group of people. Thereafter they booked a taxi and took him to Drug Enforcement Commission offices

In cross examination PW2 maintained that he apprehended the accused with the help of other people because the accused was being stubborn and he took him to DEC offices after finding khaki ball of marijuana in the corner of the room belonging to the accused.

In re-examination PW2 emphasized that he that he found the drugs in Lucky s room.

**Pw3 was Florence Bwalya** an Assistant Security officer at DEC who testified that she had reported for work on 4<sup>th</sup> August 2016, then around 16hrs some people brought a man tied in electric cables and handed him over to her. PW3 later learned that that the people that brought the now accused person she came to know as Barrack Musukuma were his parents. Additionally, they brought with them a ball containing suspected marijuana wrapped in a khaki paper which were produced at trial as P1 and a match box containing suspected marijuana which were produced at trial as P2.

The suspected drugs were seized as per the notice of seizure produced as P3 and taken to UTH lab for testing and the accused person was detained. The test results were confirmed that the suspected drugs were indeed cannabis weighing 9.8 grams as per affidavit produced as P4. Thereafter PW3 charged and arrested for trafficking in psychotropic substances as per indictment. PW3 recorded a warn and caution statement from the accused person who denied the charge saying that he was not aware about what his parents had reported about him The accused also informed her that that his name was not Barrack but Lucky.

There were no issues raised in both cross examination and re-examination.

This was the close of the prosecution's case and the accused was found with a case to answer and put on his defense pursuant to section 207 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia. The accused person elected to give sworn evidence and did not call any witnesses.

In his defense Lucky Musukuma testified that sometime in 2016, in the month of the last general elections, he had moved from parents' home in Mandevu after a dispute and went to live with his Aunt in Chaisa. Then on a particular day in the same month he went to his parents' home to try and fix the door to his bedroom, when he got there he asked for a star screw driver from his father PW2 to use to repair the door but PW2 told him that did not have one and that is when Dw<sup>2</sup> decided to get a knife instead. At that point his father approached him with a screw driver and grabbed the knife away from him leaving him with a cut on the hand in the process and an argument broke out and his father told him to leave the house. After that he went to his Aunt's house in Chaisa, his aunt found him at her house and later his mother arrived in the company of three men who grabbed him and held down telling him that the use of marijuana was making him to cause commotion but according to DW1 he had no knowledge about the marijuana and he told them so. After that DW1 was taken to the DEC offices. In conclusion he stated that he had moved out of the room that the father spoke about in his testimony and that someone must have planted the drugs in there.

In cross examination, the accused person stated that he had lived with his Aunt in Chaisa for less than a month and PW1 was his biological mother. He confirmed that he had his own room at his parents' house where he used to sleep alone and it was locked and closed when he went to live in Chaisa and no one used it that period and he found it in the same state when he went back there. He further confirmed that it was the door to his room that he wanted to fix with the knife as it had no handle hence he wanted to unscrew and denied having intentions to attack his father with the knife. He admitted that he was only told that the marijuana was found in his room in a match box.

There were no issues raised in re-examination.

This was the summary evidence I heard in this matter. I must state that the trial of this matter delayed to reach its final conclusion because, I inquired on his ability to make a proper defence for himself by ordering for a mental medical examination at Chainama Hospital pursuant to S160 of the Criminal Procedure Code Chapter 88 of the laws of Zambia. This process took some substantial amount of time but a report from Chainama was subsequently received in February 2017 declaring the accused Lucky Musukuma fit to give a proper defence and a ruling on record was made for trial to proceed.

I now state my findings of fact, it is not in dispute that PW1 and PW2 the biological parents of the the accused person apprehended the accused with the help of other persons and took him to the DEC offices and together with him handed over to PW3 a DEC Office suspected marijuana produced and mark P 1 and P2.

To confirm whether the loose vegetable was indeed marijuana, PW3 stated that she took the suspected marijuana to UTH food and drug laboratory for testing and produced a public analyst report(P4) in form an affidavit which confirms that the said drugs were weighed to be 9.8grams of marijuana an herbal product of cannabis sativa which is in excess of 0.5grams in weight. Therefore, in the absence of any evidence to the contrary, I find that the said drugs are indeed marijuana.

What remains in dispute is whether the confirmed marijuana was found in possession of the accused being the person apprehend by his parents and later charged and arrested for drug trafficking by PW3. The accused person has denied the charge and claims that he was only told by his parents that the said drugs were found in his room and indeed the testimonies of PW1 and PW2 were given to such effect.

To settle this dispute, I will firstly define term possession and I rely on section 4 of the Penal Code Chapter 87 of the Laws of Zambia, which provides that;

*"possession", "be in possession of" or "have in possession"-*

*(a) includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;*

Based on the above definition, I must state that though the drugs were not found in the body of the accused person, the definition extends and qualifies possession as having the drugs in any place occupied by a person or not for the use and benefit of himself. The evidence adduced by both PW1 and PW2 revealed that the accused person occupied a room alone at their home and he kept locked the time he moved to stay live with his Aunt in Chaisa, this evidence agrees with that of the accused person where he clearly indicated in cross examination by the state that he occupied the same room at his parents' house alone and he left locked and found it locked on the day of the incidence. This is the same room the said drugs were found by the parents to the accused who even handed him over to DEC offices thereafter. I find their testimonies of PW1 and PW2 believable over his as I cannot make any other inference apart from concluding that the drugs P1 and P2 belonged to the accused person as he occupied the room where they were found alone and he kept it locked until he opened it on the material day. I draw authority from the case **KENIOUS SIALUZI v THE PEOPLE (2006) Z.R. 87** where it was held interalia that it was the duty of the court to draw the proper inferences from the evidence it has before it.

I find that this evidence sufficiently links the accused to the possession of the said marijuana. I therefore dismiss his defense of having no knowledge of it and suggesting that the drugs were planted in his room as I take into account his conduct on that day as revealed by PW1 and the fact that he was tied in cables when being handed over to the DEC officers an issue he did not dispute, demonstrate that the accused must have been under the influence of the said marijuana at the time of apprehension. I therefore opine that no parent would take their own

biological child to a security enforcement agency as PW1 and PW2 did if the conduct of their child was properly in order.

On the totality of the evidence in this matter therefore, I find that the prosecution has proved beyond reasonable doubt that the accused person did traffic in psychotropic substances contrary to section 6 of the Narcotic Drugs and Psychotropic Substances Act Chapter 96 of the Laws of Zambia. I accordingly find **LUCKY MUSUKUMA GUILTY** of the offence charged and I **CONVICT** him accordingly.

IRA WITHIN 14DAYS

**DELIVERED IN OPEN COURT THIS 1<sup>ST</sup> DAY OF MARCH 2017**

