



**Mohamed v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 7633 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CRIMINAL APPEAL E002 OF 2024
JN ONYIEGO, J
JUNE 25, 2024**

BETWEEN

LIBAN SHEIKH MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment and sentence of Hon. Mukabi Kimani (P.M.)
Delivered on 13-09-23 in SPM's Court at Mandera in Criminal Case No. E009 of 2023)*

JUDGMENT

1. The appellant herein was charged with the offence of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2)(a) of the [Narcotic and Psychotropic Substance Control Act](#) No.4 of 1994.
2. The particulars of the offence were that on 12.02.2023 at Rhamu Township in Mandera North Sub County within Mandera County he was found in possession of narcotic drugs to wit 200 grammes of cannabis at street value of Kes. 1000/- in contravention of the said Act.
3. During the trial, prosecution called a total of 4 witnesses in support of their case while the accused person chose to remain silent and await judgment. The trial court found him guilty of the offence and proceeded to sentence him to a term of 5 years imprisonment.
4. Being aggrieved by the decision of the lower court, the appellant filed a memorandum of appeal dated 25.09.2022 and filed in court on 13.03.2024 on the grounds that:
 - i. The trial magistrate erred in law and fact by convicting yet the prosecution did not prove its case beyond any reasonable doubt.
 - ii. That the trial magistrate erred in law and fact by directing that the amount of Kes. 77,640 be forfeited to the state.



5. Consequently, the appellant prayed that the appeal be allowed, conviction quashed and sentence set aside. The appeal was canvassed by way of written submissions.
6. The appellant submitted that prior to his arrest, he eked a living as a business man running a small shop in Manderu town. That apart from operating an m-pesa shop, he used to sell beverages and miraa. He stated that on the day of his arrest, the police confiscated from him Kes. 77,640 which money the trial magistrate forfeited to the state despite telling the trial court that the same were proceeds from his business.
7. He contended that the narcotic drug he was alleged to have been in possession of was not taken to the government chemist to determine the value hence the applicable sentence. He contended that his sentence was not supported as the trial magistrate simply plucked the five-year sentence from the air and slapped it upon him. It was his case that he was simply arrested as a result of business rivalry.
8. The learned prosecutor in his submissions dated 06.05.2024 urged that the prosecution proved its case beyond any reasonable doubt as it was established that the said drug was found in an establishment that was not only occupied but also controlled by the appellant. That the cannabis sativa is a prohibited drug as noted under the 1st schedule to the Act. Learned counsel contended that, the conviction and the resultant sentence was not only safe but also legal. The court was thus urged to uphold the finding of the trial court.
9. In determining this appeal, this court is minded of its duty to re-evaluate and analyze the evidence a fresh with a view of arriving at its own independent conclusion. This is done bearing in mind the fact that this court did not have the benefit of seeing and listening to the witnesses as they testified so as to assess their general demeanor.
10. From a cursory look at the appeal at hand, I find that there are only two grounds for determination:
 - i. Whether the prosecution proved its case to the required standard of proof.
 - ii. Whether the 5 year sentence was harsh and excessive.
11. Briefly, PW1, No. xxxx PC Tabolia Wakesa Kelvin testified that on 12.02.2023 at 1430hrs, he received information from one Dennis Ruto, a colleague police officer informing him that the appellant was found in possession of some substance in adash where he was selling miraa and cigarettes. He stated that upon visiting the scene with Dennis Ruto, they found the appellant seated in his dash and upon carrying out search, they found a red carrier bag containing cannabis sativa.
12. He recalled that upon the appellant becoming noisy and violent, they called some two officers who were on patrol to come to their help. Upon conducting a thorough search, they recovered Kes. 77,640/- which was taken to be proceeds of crime. The appellant was then arrested and thereafter charged with the offence herein.
13. PW2, No. xxxx PC Dennis Muchus stated that on the material day, he was on patrol together with his colleague, PC Sadik Dekow when he received a call from Cpl. Namus seeking reinforcement to help apprehend a suspect. Upon rushing to the scene, they found two police officers who had apprehended a suspect who was suspected to be a drug peddler.
14. It was his testimony that upon conducting search, they recovered cannabis sativa in a red carrier bag from the suspect. That considering the fact that the suspect was violent, they call Cpl. Namus for reinforcement. He confirmed that they recovered some money from the suspect in the amount of Kes. 77,640 which were recorded in an inventory. He stated that his duty was mainly to effect arrest upon the suspect.



15. PW3, No. xxxx PC Davis Ruto stated that on the material day, he received a call from an informer that there was someone selling bhang in town. In the company of his colleague, they visited the said dash and found the appellant herein with a customer chatting. Behind the chair, was a fence next to Rhamu DEB school. That upon instructing the appellant to stand up, he saw a red carrier bag. Upon opening the same, he found bhang a mid-resistance from the appellant complaining that he had been set up.
16. He told the court that, at that point, PC Michui and Dekow joined them and on further search, they found Kes. 77,640/- suspected to be proceeds of sale of bhang. On cross examination, he stated that he knew the appellant well and his business was that of selling miraa and not m-pesa as alleged. That previously, elders had reported that he was known for selling bhang to the young men of Rhamu.
17. PW4, No. xxxx, Cpl. Charles Namisi Wasike, the investigating officer stated that while at the police station, he received information from PC Ruto and Tabalia informing him that they had gotten a tip off that there was someone selling bhang in town along Rhamu DEB School. That he sent officers to the scene but after some minutes, he received a call from PC Ruto informing him that they had recovered drugs. He stated that he further sent two more officers who were on patrol to join PC Ruto and on reaching the scene, they found the suspect had been arrested.
18. It was his case that an amount of Kes. 77,640 was recovered bhang proceeds of sale of the prohibited drug. He stated that he prepared an exhibit memo forwarding a green substance in an envelope to the government chemist for analysis. That the report revealed that the substance was found to be cannabis sativa. On cross examination, he stated that in as much as the substance was found to be bhang, the value of the same was not determined.
19. On 11.08.2023, the trial magistrate delivered a ruling placing the appellant on his defence. The appellant opted to keep quiet.
20. The appellant was charged with the offence of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2)(a) of the *Narcotic and Psychotropic Substance Control Act* No.4 of 1994. The same reads as follows:
 1. Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
 2. A person guilty of an offence under subsection (1) shall be liable— (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;
21. According to the prosecution witnesses, they received information from an informer to the effect that the appellant a peddler of bhang had received a consignment of bhang which he was selling to people within town. PW1-PW4 confirmed by stating that they did arrest the appellant with the plant material in question which was confirmed to be cannabis sativa by the government chemist analyst. The evidence of PW1-PW4 is well corroborated in that respect.
22. There is no doubt that the substance was cannabis which is a prohibited drug. The production of the report was not challenged. I have no doubt it was cannabis hence a prohibited drug. The claim that the drug was planted on him is not convincing. He had the opportunity to tell his side of the story but he did not. He is actually raising his defence on appeal during submissions. The police had no grudge with the appellant hence the question of a frame up does not hold any water. In my view, the appellant was properly convicted hence the appeal challenging conviction is dismissed.



23. Regarding sentence, the appellant claimed that it was excessive. The law makes provision that where the person charged satisfies the court that the cannabis he alleged to have been found in possession was intended solely for his own consumption, he is liable to imprisonment for ten years and in every other case to imprisonment for twenty years.
24. In the instant case, the learned trial magistrate in his wisdom found the appellant guilty of possession of the said drug and sentenced him to 5 years' citing reasons that drug menace in the county was high and added to the fact that the appellant was a repeat offender with three previous convictions. He further directed that the amount Kes. 77,640/- be forfeited to state.
25. The Court of Appeal in the case of *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime.

The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence.

As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

26. I have considered the fact that the appellant is a repeat offender having a record of two previous convictions in other offences. He was not remorseful. However, considering the value of bhang which was 200 gms, I find the sentence of 5 years excessive hence substitute the same with three years-imprisonment.
27. In regards to the directions that the money Kes. 77, 640 /- be forfeited to the state, the appellant urged that he was a business man operating inter alia an mpesa shop, selling miraa and beverages. PW3 on the other hand testified that he knew the appellant well and his business was that of selling miraa and not m-pesa as alleged.
28. There was no proof that the bhang was for sale and not for personal consumption. Given the quantity he was found with, one would only conclude that the amount could not have been for sale. Since it was admitted that the appellant was a businessman dealing with the sale of Miraa, there was no basis upon which the amount recovered from his shop could be taken to be proceeds of crime. There is doubt therefore that the money was out of peddling narcotics. With that doubt in mind, it is my finding that the forfeiture of the amount in question was not justified hence the same should be refunded to the appellant.
29. From the foregoing, I find that the following orders are commendable in the circumstances herein:
 - i. The Appeal on conviction is hereby affirmed.



- ii. The appeal against sentence partially succeeds to the extent that the sentence of 5 years is substituted with 3 years.
- iii. The amount Kes. 77,640 /- be refunded to the appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JUNE 2024

J. N. ONYIEGO

.....

JUDGE

