



**Muriithi v Republic (Criminal Appeal E128 of 2022)  
[2024] KEHC 11806 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11806 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E128 OF 2022  
LW GITARI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**AMOS MURIITHI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appeal arises from the proceedings in the Chief Magistrates court at Isiolo Criminal Case No E081/2021 where the appellant Amos Muriithi (who was the 2nd accused) was charged with the offence of trafficking Narcotic Drugs contrary to Section 4(a) of *Narcotic Drugs and Psychotropic substances control* No 4/1994. The particulars are that on 15/6/21 at around 13:00 hours at Sabachu area along Isiolo Marsabit Highway within Samburu County were found trafficking in Narcotic drugs cannabis sativa to wit approximately 1kg with a street value of Kshs 20,000/= using motor vehicle KCE 285B make Isuzu FSR Lorry which was not medially prepared. The appellant denied the charge. The appellant pleaded not guilty. A full trial followed and in the end the appellant was found guilty and sentenced to serve five years imprisonment.
2. The appellant was dissatisfied with both the conviction and sentence. And preferred this appeal based on the following grounds:-
  1. That the learned trial magistrate erred in law and fact by failing to find that there was no evidence connecting the appellant with the crime alleged to have been committed.
  2. That the learned trial magistrate erred in the law and fact by convicting the appellant on the basis of circumstantial evidence which did not irresistibly point towards guilt on the part of the Appellant to the exclusion of any other person.
  3. That the learned trial magistrate erred in law and fact by failing to find that the prosecution had failed to prove the charges against the appellant on the standard of beyond reasonable doubt.



4. That the learned trial magistrate erred in law and fact by failing to find that the gaps in the prosecution case with regard to non-compliance with the requirements of Section 74 of the Drugs and psychotropic substances (control) Act and the failure to avail and produce a certificate of valuation were fatal to the prosecution case and resolve such gaps in favour of the appellant.
  5. That the learned Trial magistrate erred in law and fact by resorting to extraneous considerations to fill the gaps in the prosecution case instead of applying himself to the law and the evidence presented to him
  6. That the learned magistrate erred in law ad fact by imposing a harsh and severe sentence on the appellant in the absence of any aggravating circumstances.
  7. That the conviction and sentence of the learned trial magistrate is against the law and weight of evidence on record.
3. The appellant prays that the appeal be allowed, the conviction be quashed and the sentence be set aside.
  4. The state opposed the appeal and prayed that it be dismissed.

#### **Prosecution's case**

5. Emmy Otieno (PW1) is a Government Analyst from the Government Chemist – Nairobi. She testified that she received a red bag bearing the names of Alex Mutegi and Amos Muriithi, Edwin Muriuki. The bag contained two seal taped bundle weighing 980 grams of plant material. She proceeded and analyzed the plant material and found that the plant material was cannabis sativa which is listed under the *Narcotic Drugs Act* of 1994. PW1 produced her report as Exhibit No 1a and the exhibit memo form which accompanied the exhibit as exhibit 2a. she also identified the cannabis sativa which was marked as MF1-2 a red carrier bag as MF1-3.
6. PC Njeru Njoroge (PW2) testified that on 15/6/2 while attached at Isiolo Multi Agency Team was at a road block at Sabachee area when they stopped a motor vehicle KCE 285B a lorry which was coming from Moyale direction heading to Isiolo. The appellant was in the said lorry as its conductor and his co-accused were the driver and conductor. Upon conducting a search in the said motor vehicle she recovered two bundles of plant material in a carrier bag and had been put behind the lorry and covered with sand. The spare tyre was placed on the sand to conceal the drugs. The two bundles of plant material were wrapped with yellow seal tape. PW2 recovered the drugs weighing about one Kilogram arrested the occupants and charged them with this offence. She produced the lorry in court and pointed out the carrier section of the lorry as the place were the drugs were recovered. The sand had been partly off loaded. The lorry was registration number KCE 285B. In cross-examination PW1 testified that unless one of the occupants owns up the the drug was his they could not say who owned the drug.
7. No 110861 Police Constable Samuel Maxwell (PW3) testified that on 15/06/2021 he was on duty with Multi-Agency team at Sabache along Moyale Isiolo road when they stopped the said lorry which had three occupants. The vehicle was searched and what was suspected to be drugs was recovered from the carrier of the lorry concealed under a spare tyre. The three occupants were arrested and charged with trafficking one kilogram of he drugs.
8. In cross-examination PW3 testified that it is the driver and the turn boy who were responsible for what was carried int eh lorry. He further stated that none of the three accused admitted to be the owner of the drugs.



9. No 113060 Police Constable Josephat Rukwari (PW4) testified that the lorry and its occupants were taken to Archers Post Police Station on allegation of trafficking in Narcotic Druga in motor vehicle KCE 285B. the two bundles of the drugs weighing about one kilogram and a street value of Kshs 20,000/= was handed over to him. He prepared a memo form and escorted the drugs to the government chemist for analysis. He later received a report confirming that the plant material was cannabis. He then charged the suspects. According to him the appellant was the driver of the said lorry.

### **The Defence Case.**

10. The appellant testified that they had travelled to Marsabit and on the way back the vehicle was stopped at the road block and the drugs were found in the vehicle, he denied any knowledge of the drugs. The learned magistrate found that the appellant and the two loaders are the ones who put the drugs in the vehicle.

### **The Appeal**

11. The appeal was canvassed by way of written submissions.

### **The Appellants Submissions**

12. He submits that there were gaps in the prosecution case as there was none compliance with Section 74 of the *Narcotic Drugs and Psychotropic Substances Control Act* which was fatal to the prosecution case. The appellant submits that the prosecution had a duty to prove the charge against the appellant beyond any reasonable doubts. He relies on the court of Appeal decision in *Joahn Chebichi Sawee* [2003] eKLR where the court stated that the suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubts. As the court made it clear in the case of *Mary Wanjiku Gichira v Republic* Criminal Appeal No17/1998 (unreported) suspicion however strong cannot provide a basis of inferring guilt which must be proved by evidence.
13. The appellant submits that the learned magistrate ignored and overlooked this cardinal rule and resulted to infer guilt on the basis of suspicion thereby occasioning a grave injustice to the appellant. It is further contended that the trial magistrate resulted to extraneous considerations to fill gaps in the prosecution's case. The appellant further submits that the evidence was not only unsustainable circumstantial evidence but was also tainted with gaps and inconsistencies that certainly renders a reasonable doubt.
14. The appellants pointed the gaps and inconsistencies on the prosecution's case the learned trial magistrate relied on circumstantial evidence to convict the appellant which did not meet the required threshold laid down in *Abanga alias Onyango v Republic* CR. Appeal No 32 of 1990 (UR) when the court of appeal held that:-

“It is settled law when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. The circumstances from which an inference of guilt is sought to be drawn must cogently and firmly established,
- ii. Those circumstances should have a definite tendency unerringly pointing towards guilt of the accused.



- iii. The circumstance taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

15. Further the Court of Appeal in *Sawe v Republic* [2003] KLR 364, amplified on the above thus:

“... in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.....”

16. The appellant submits that the circumstantial evidence does not meet the above test and that he was convicted on evidence that does not infer any guilt on the appellant. On the sentence, the appellant submits that the sentence was harsh and severe and ought to be set aside.

### **Respondents Submissions**

17. It is submitted that the respondent proved its case against the appellant beyond any reasonable doubts. On failure to produce the certificate of prove that the market value of the narcotic drug, the respondent cited that case of *Kabibi Karume Katsui v Republic* [2015] eKLR and *Prisca Jemutai Kalongei v Republic* [2005] eKLR and submits that the sentence was not based on the value of drugs. The respondent submits that the sentence was reasonable and legal.

### **Analysis and Determination**

18. I have considered the proceedings before the learned Magistrate the grounds of Appeal and the submissions by the parties. The issue which arises for determination is whether the charge against the appellant was proved beyond any reasonable doubts.

19. This is a first appeal and this court has a duty to analyse and evaluate the evidence which was adduced before the trial court and come up with its own independent finding. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellate court’s own independent finding. This principle has been considered in various decisions of this court and those the court of appeal. The leading authority on the subject is *Okeno v Republic* [1972]E.A 32.

20. In the case, the court stated:-

“The duty of the 1st appellate court is to analyse, re-evaluate the evidence which was before the trial court and itself come up with to its own conclusion o that evidence. However, it must warn itself that it did not have the benefits of seeing the witness/the witnesses when they testified and must leave room for that. The court of Appeal in the case of *David Njuguna Wairimu v Republic* [2010] while citing with approve the case of *Okeno v Republic* (supra), stated as follows: The duty of the first appellant court is to analyse, re-evaluate the evidence which was before the trial court and itself come u with its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may depend on the facts and the circumstances of the case come to the same conclusion as those of the lower court. It may reverse those conclusions. We



do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision”

21. The Court of Appeal further stated that:

“an appellant on a 1st appeal is entitled to expect the evidence as whole to the subjected to afresh exhaustive examination (*Padya v Republic* 1975 EA) 336 and the appellant courts own decision on the evidence. The appellate court must itself weigh the conflicting evidence and draw its own conclusions. In doing so it must make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses, see *Peter v Sunday Post* 1978 EA 424”

22. The learned trial magistrate convicted the appellant based on the following reasoning :-.

“Firstly, and from the onset, it is important to point out that the evidence herein is purely circumstantial as there is no witness who saw who put the cannabis in the subject lorry.

As for the 1<sup>st</sup> accused he had been newly hired and it was his first trip to Marsabit as is also confirmed by the 3<sup>rd</sup> accused he thus would not be so familiar with the town and where to get the cannabis. It is also apparent that at no time did the 1<sup>st</sup> accused leave the lorry and possibly go and collect the cannabis. When money was being collected he was with the 3<sup>rd</sup> accused and the 3<sup>rd</sup> accused did not see him collect any suspicious cargo. Also when the off-loading was being done, this witness remained in the lorry sleeping. Based on the foregoing, I find the 1<sup>st</sup> accused could not have been the one who had loaded and concealed the cannabis on the subject lorry.

Turning to the 3<sup>rd</sup> accused, he had also been present in the lorry and at no time did he leave the said lorry alone to go and collect the bundles. The only time he left the lorry was when he went to collect the money and by which time he was in the company of the 1<sup>st</sup> accused. He would also leave and have tea in hotel and in the company of the 2<sup>nd</sup> accused.

Regarding the 2<sup>nd</sup> accused person, he is confirmed by the 1<sup>st</sup> and 3<sup>rd</sup> accused person to have left the lorry at Marsabit barrier and opted to go and sleep at a relative’s place. He would be picked up in the morning by the 1<sup>st</sup> and 3<sup>rd</sup> accused in Marsabit town. This would ultimately have provided him with the opportunity to procure the said cannabis.

The 2<sup>nd</sup> accused was also the person left to clear the remains of the stones after they had been offloaded while the 3<sup>rd</sup> accused was counting the stones after they had been offloaded and the 1<sup>st</sup> accused was sleeping in the driver’s cabin, the 2<sup>nd</sup> accused and the 2 loaders are the ones who had put back the spare wheel. This is so because the 3<sup>rd</sup> accused confirmed he is not the one who was putting the wheel back but found it already put back while he was counting the stones. The two new loaders would not be the ones who put the bhanga below the spare wheel as they could have had the opportunity to retrieve it once it reached the destination as they did not travel back with the lorry. The 2<sup>nd</sup> accused person-based On the above consideration, the court concludes is the one who had concealed and conveyed the narcotics the subject of this proceedings”.



23. This finding is faulted on two fronts.

Firstly, it is not borne out by the evidence which was tendered by the prosecution. The witnesses testified as follows:

“PW2 PC Njeri Njoroge stated in Cross-examination “Unless one of the occupants owns up that the drugs was his, she could not say who owned the drugs”.

PW3 Police Constable Samuel Maxwell stated “It is the driver and the turn boy who were responsible for what was recovered in the lorry. That none of the accused admitted to be the owner of the drugs”.

24. The finding by the learned trial magistrate is not supported by the evidence. The learned trial magistrate erred by relying on matters which were not in the evidence of the witnesses. The evidence by the witnesses which I have analysed above was that all the three accused were culpable unless any of them owned up as the owner of the drugs. The appellant never owned up. The learned trial magistrate erred by arriving at conclusions which were not supported by the evidence. The learned trial magistrate showed bias against the appellant as she convicted him based on the testimonies of his co-accused. The learned magistrate resorted to extraneous consideration to fill the gap and inconceivable inconsistencies in the prosecution case as opposed to applying the law and the evidence as presented. The defence of the accused was just a narrative of what happened. Though DW3 stated that 2<sup>nd</sup> accused owned up that the luggage was his, it was not confirmed by the PW1<sup>nd</sup> and PW3<sup>rd</sup> who were the arresting officers. Where an accused person implicates a co-accused such evidence is untrustworthy. Scott J in *Emperor v Magantal* 14 Bom 119 it was stated that though there may be cases of exceptional character in which accomplices evidence convinces the judge of the fact required to be proved the uncorroborated evidence of such a witness should general be held untrustworthy for three reasons:-

1. The accomplice is likely to swear falsely in order to shift the guilt from himself
2. Because the participator in the crime is an immoral person who is likely to disregard the sanctity of an oath.
3. Because he gives his evidence under promise of pardon and is therefore liable to favour the prosecution.

25. In *Caanisio S.O Waluwa v Republic* [1956] EACA 23 the court stated that, generally speaking it is a practice founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified...” In this case the learned magistrate relied on accomplice evidence which was not corroborated.

26. Secondly, it is clear from the judgment the magistrate relied that she on suspicion to conclude that the appellant was guilty. It is trite law that suspicion no matter how strong cannot form a basis of a conviction. In *Joan Chebii Sawe v Republic* [2003] eKLR (*supra*) the court stated that:

“suspicion however strong cannot provide a basis for interfering guilt which must be proved by evidence”.

27. The prosecution witnesses were categorical that they could not pin any of the accused as the one who had the drug. This infers that the witnesses were in doubt as to who was the owner of the drug. It is cardinal rule of Criminal Justice that in a trial the prosecution bears the burden of proof the guilt



of an accused beyond any reasonable doubts. The guilt of an accused may be proved by direct or circumstantial evidence where the prosecution relies on circumstantial evidence, it must be cogent and firmly established and unerringly point to the guilt of the accused, it must lead to the conclusion that the accused is guilty of the crime. See court of Appeal *Sawe v Republic* (*supra*). The circumstantial evidence relied by the learned magistrate fell short of the test of circumstantial evidence. The learned magistrate concluded that the appellant obtained the drug when he went to sleep with relatives. This was not borne out by the evidence. A trial judge is an impartial arbiter and should not descend in the arena of conflict.

28. This finding was not based on any evidence, either from the prosecution or the defence. I agree with the appellant that it was unfortunate speculation which led to miscarriage of justice. I believe I have said enough. There was no evidence to support the finding of guilt on the appellant”. The charge against him was not proved to the required standards, that of beyond any reasonable doubts, like his co-accused, the appellant was entitled to be given the benefits of doubts as the evidence adduced was insufficient to prove his guilt.
29. I find that the appeal has merits. I need not consider the issue of the sentence in the circumstances.

**Conclusion:**

30. The appeal has merits. I allow the appeal, I quash the conviction and set aside the sentence the appellant shall be set at liberty unless he is otherwise lawfully held.

**SIGNED, DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER, 2024.**

**HON. LADY JUSTICE GITARI**

**JUDGE**

In the presence of:-

Court assistant – Tupet

