Maalim & another v Republic (Criminal Appeal 3 & 27 of 2023 (Consolidated)) [2024] KEHC 13276 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 3 & 27 OF 2023 (CONSOLIDATED)

DR KAVEDZA, J

OCTOBER 29, 2024

BETWEEN

HASSAN ADAN MAALIM ..... 1ST APPELLANT

SHADRACK MAANGI KATUA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. C.M Njagi (S.R.M) on 6th April 2023 at JKIA Chief Magistrate's Court Criminal case no. E006 of 2021 Republic vs Hassan Adan Maalim and Shadrack Maangi Katua)

JUDGMENT

1. The appellants were charged and after a full trial convicted for the offence of trafficking in narcotic drugs, contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No. 4 of 1994. The facts as per the charge sheet are that on the 31st day of October, 2021 at Thika Road along Thika-Garissa Road in Kiambu County jointly with others not before the Court trafficked narcotic drugs namely Cannabis (bhang) to wit 474Kgs with a market value of Kshs. 14,220,000/= by conveying in a lorry registration number KBS 601M make Mercedes Actross with a trailer Reg No. ZE 0056 while concealed in a false bottom of the said trailer in contravention of the provisions of the said Act. They were each sentenced to serve forty (40) years imprisonment. In addition, they were each fined Kshs. 42,660,000 in default to serve 12 months imprisonment running consecutively.

2. Dissatisfied with the conviction and sentence, the appellants filed their respective appeals challenging their conviction and sentence. The consolidated grounds are as follows: The appellants challenged the totality of the prosecution's evidence against which they were convicted. In their petition of appeal, the appellants challenged the totality of the prosecution's evidence against which they were convicted.

In addition, they contended that the trial court failed to consider their defence. They urged the court to allow this appeal, quash their conviction, and set aside the sentence imposed.

3. In response, the respondent filed grounds of opposition. It was contended that the prosecution adequately proved the offence charged and discharged the burden of proof. That the appeal is misconceived and not merit. They urged the court to dismiss the appeal.

4. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).

5. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* provides as follows;

> " Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable:-
>
> (a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life;"

6. The term trafficking is defined in Section 2 of the *Act* as:

> " The importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof..."

7. In *Gabriel Ojiambo Nambesi vs Republic*, [2007] eKLR, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs. The court stated thus:

> " It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking."

8. The case against the appellants was as follows. PW 4, Corporal Bethuel Langat, testified that he received intelligence about a trailer, KBS 601M, occupied by two individuals traveling from Garissa to Nairobi. Acting on this tip-off, PW4 and his team set up an ambush along the Thika-Garissa Highway and stopped the vehicle. Initially, a quick search revealed nothing, but further investigation uncovered concealed items hidden in false bottoms.

9. PW4 identified the driver as the first appellant and the second appellant as the tout. After securing the trailer, they booked it at Thika Police Station and transferred it to the DCI headquarters for a thorough examination. It was there that they discovered 89 bales of suspected narcotic drugs concealed in various compartments: one compartment was empty, while others contained 23, 23, and 43 bales, respectively. He provided the search certificate and inventory related to the operation.

10. PW6 Corporal Samuel Kamiti, corroborated Langat's account and produced the mobile phones of the appellants. He noted that they booked the phones at Thika Police Station before moving them to DCI headquarters.

11. At the DCI headquarters, PW2, Sergeant Josiah Nyabera, encountered the appellant and other officers. During the search of the trailer, they discovered 89 bales of green dry plant material hidden in false bottoms. The court observed these compartments, and PW2 produced various exhibits: the vehicle and trailer, the first appellant's driving licence, and the second appellant's identity card. He prepared an inventory and produced the search certificate and the weighing certificate. PW2 clarified he did not participate in the arrest of the appellants.

12. PW3 Dennis Owino a government analyst Dennis Owino Onyango, testified about the weighing and sampling process he oversaw on 31st October 2021.

    He produced the sampling certificate and sent the samples for analysis under exhibit memo K1733/21. After confirming the samples contained cannabis, he submitted his report.

13. PW 1, Chief Inspector Elizabeth Lumumba, was called to value the seized cannabis, which she assessed at Kshs. 14,220,000. She provided the valuation certificate and the notice of seizure. PW1 clarified that she did not participate in the arrest or the interception of the trailer.

14. PW7 Corporal Clety Kurgat meticulously prepared the records of custody for the seized substances, marked as PEX 21. He also created a notice of intention to tender records into evidence and produced a certified copy of the motor vehicle records. PW7 also produced the keys for the vehicle.

15. He noted that the individuals arrested on that date were the first and second appellants and identified them in court. He testified that they were also present during the search, weighing, and sampling processes, reinforcing the prosecution's case.

16. The chain of custody for the substances recovered in the case against the appellants is well documented through the testimonies of various witnesses. The investigating officer detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the motor vehicle the appellants were arrested in, as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.

17. On whether the substance recovered was narcotic, the government analyst, PW3 testified that his role was to ascertain whether the plant material was a narcotic drug. He analysed the green plant material which weighed 474 kilograms found that the green plant material was cannabis, a narcotic drug listed under the *Narcotic Drugs and Psychotropic Substances (Control) Act*. 1994.

18. In their respective defences, the appellants denied committing the offence. DW1 Hassan Adan Maalim testified that he was assigned the vehicle by the 2nd appellant to deliver cement from Mombasa to Wajir. Upon arrival in Wajir, a broker associated with the 2nd appellant offloaded the cement and took the keys. He stated that he was paid Kshs. 7,000/= by the 2nd appellant. Thereafter he waited for 2 days for a gypsum load in Garissa. The 1st appellant said they were arrested on their way to Nairobi without knowing the reason. He claimed he was unaware of the narcotics in the vehicle.

19. The 2nd appellant testified that he worked at Mombasa Cement. He confirmed transporting cement with the 1st appellant to Wajir on 18th October 2021. He explained that after the brokers offloaded the cement, the vehicle encountered mechanical problems. He left for dowry negotiations in Kitui and returned on 26th October 2021, learning that the vehicle had been repaired. He said he met the 1st

appellant at a petrol station on 30th October 2021 to refuel the vehicle, but they were arrested on their way to Nairobi. The 2nd appellant also claimed to have no knowledge of the illegal items on board.

20. Patrick Muthama recounted attending a dowry function in Kitui with the 2nd appellant, staying together from 20th to 27th October 2021. He described the 2nd appellant as a turnboy on large vehicles and confirmed they were not together on 31st October, the day of the arrest.

21. Alfred Mwinzi recalled last seeing the 2nd appellant on 27th October, after the dowry event and acknowledged knowing about the drug-related charges he was facing. Joan Mutheu, the event's videographer, confirmed seeing the 2nd appellant at the function on 23rd October 2021.

22. The trial court duly considered the defences advanced and found them to be lacking in credibility. From the record, it was established that the 1st appellant was in physical possession of the motor vehicle, as he was driving it at the material time. Consequently, he exercised control over the vehicle. It was therefore unnecessary to engage in an analysis of the various forms of possession, as possession encompasses both the physical holding of an object and exercising dominion or control over it.

23. Even if the bags containing the narcotics were not found directly on the 1st appellant's person, his act of driving the vehicle in which the illicit substances were discovered suffices to demonstrate his control over the same. This control establishes his complicity in the offence of trafficking narcotics.

24. As regards, the 2nd appellant's guilt, he was charged with trafficking of cannabis with the 1st appellant. This brings in the doctrine of common intention as defined under section 21 of the *Penal Code* which provides as follows:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

25. It was the duty of the prosecution in the case against the appellant to prove that he was either in actual possession of the cannabis or in constructive possession of the same. Constructive possession could only be proved if the prosecution adduced evidence of common intention to commit the offence with the driver of the vehicle.

26. The trial magistrate convicted the second appellant on the basis that the appellant claimed to have no prior acquaintance with the first appellant and denied having control over what was loaded onto the motor vehicle. However, the 1st appellant testified that he had been paid by the 2nd appellant to transport the cement. These discrepancies, coupled with the inconsistencies in both appellants' accounts, rendered their defences unconvincing. In the absence of credible evidence, the court inferred that the second appellant acted in concert with the driver in trafficking the cannabis. Consequently, the court dismissed the second appellant's defence as an afterthought.

27. Upon reviewing the evidence adduced at trial, I concur with the decision to reject the second appellant's defence. Although the second appellant was not driving the vehicle, the testimony of prosecution witnesses sufficiently implicated him in the offence of trafficking narcotics.

28. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged against the appellants herein. Their conviction is therefore affirmed.

29. On sentence, the appellants were each sentenced to serve forty (40) years imprisonment. In addition, they were each fined Kshs. 42,660,000 in default to serve 12 months imprisonment running consecutively.

30. In the sentencing proceedings, the trial court considered that the appellants were first offenders, the presentencing reports before imposing the sentence. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.

31. In that regard, I find that the sentence meted out was lawful and in accordance with the trial magistrate's discretion. I am guided by the decision in *Wagude v R* (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag. JA. held that:

> "The Court may interfere with the sentence only if it is shown that it was manifestly excessive...."

32. Although the sentence imposed by the trial court was within the parameters of the law, it is my considered view that it was manifestly excessive and, therefore, ought to be set aside. Accordingly, the appeal on the sentence succeeds. The sentence of forty (40) years imprisonment is hereby substituted with a term of twenty (20) years imprisonment. This adjustment reflects the gravity of the offence, given the substantial quantity (474 kilograms) of the narcotics seized, along with their significant market value. The sheer volume of the drugs indicates a clear intent to distribute, necessitating a stringent sentence to serve as both punishment and a deterrent to others engaging in similar criminal conduct. The additional sentence of payment of a fine of Kshs.42,660,000 in default to serve 12 months imprisonment in default to serve 12 months imprisonment is upheld.

33. In the premises, the sentence is as follows:

    i. The appellants Hassan Adan Maalim and Shadrack Maangi Katua are each sentenced to pay a fine of Kshs. 42,660,000 in default to serve 12 months imprisonment in accordance with section 28(2) of the Penal Code, Cap 63 Laws of Kenya.

    ii. In addition to the sentence in (1) above, the appellants Hassan Adan Maalim and Shadrack Maangi Katua are each sentenced to serve twenty (20) years imprisonment with effect from 6th April 2023 the date of their conviction before the trial court.

    iii. The sentences imposed shall run consecutively.

    Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellants present

Omurokha for the Respondents

Achode Court Assistant