



REPUBLIC OF KENYA



**Mula v Republic (Criminal Appeal E008 of 2024)
[2024] KEHC 14708 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E008 OF 2024
DR KAVEDZA, J
NOVEMBER 26, 2024**

BETWEEN

GODFREY MULA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
on 6th February 2024 by Hon. C.K. Mwaniki (PM) at the Chief
Magistrate's Court at Kibera Criminal Case no. E1584 of 2022)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court for the offence of being in possession of narcotic drugs contrary to section 3(1) as read with 3(2)(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994. The particulars of the offence as per the charge sheet were that on the 7th day of October 2022 Kawangware-46 area of Dagoretti Sub-county within Nairobi County, was found in possession of narcotic drugs with 40 rolls of cannabis sativa with a street value of Kshs.800 concealed in a nylon paper in contravention of the said *Act*. He was sentenced to pay a fine of Kshs. 10,000 in default to serve 5(5) months imprisonment.
2. In the petition of appeal, he challenged the totality of the prosecution's case. The appellant also complained that the trial court failed to consider his defence.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. PW1, Inspector Ekeno Danny, recounted the events of 7th October 2022 during his testimony. Acting on a tip-off, he and a colleague identified a motorcycle, registration number KMGB 362U, being ridden



by the appellant. Upon confirming the identification, they pursued and intercepted the appellant. Following his arrest, a search of the appellant's helmet revealed 40 rolls of a dry plant substance suspected to be cannabis. The appellant was immediately taken into custody. Inspector Ekeno further testified that during the arrest, a commotion ensued as certain individuals attempted to intervene and prevent the appellant's apprehension. Despite the resistance, the officers managed to subdue the situation and complete the arrest successfully.

5. PW2, Police Constable Orina Meraba, testified that he was the investigating officer assigned to the case. As part of his duties, he prepared an exhibit memo detailing the 40 rolls recovered during the arrest and forwarded them to the government chemist for analysis. The subsequent report from the chemist confirmed that the substance in the rolls was cannabis. In court, PW2 presented the exhibit memo and the analyst's report as evidence. During cross-examination, however, PW2 admitted that he did not have knowledge of the specific procedures used to test the substance and acknowledged that he was not an expert in such analyses.
6. In his defence, DW1, the appellant, recounted the events of 7th October 2022, stating that he was outside his home repairing his motorcycle when a grey vehicle arrived. Two men in plain clothes alighted and informed him that he was under arrest, alleging he had damaged their vehicle. However, when questioned, they were unable to point out any specific damage. As the arrest ensued, members of the public gathered, questioning the reason for the appellant's arrest, leading to a tussle. Despite the commotion, the men managed to force him into their vehicle. Inside, he noticed another individual already seated.
7. The appellant further testified that one of the men later drove off on his motorcycle, while he was transported to the police station in the vehicle. Upon arrival, the man who had taken his motorcycle met them at the station and handed a red packet to one of the officers present. The officer then questioned the appellant, asking if he came from a wealthy family. When the appellant replied in the negative, the officer reportedly threatened him, stating that he would face severe trouble he could not escape.
8. DW2, Robert Mula, the appellant's brother; DW3, Jason Kalenda, the appellant's cousin; and DW4, Winifred Wayua Kimanzi, the appellant's neighbor, all corroborated his account. They confirmed that he was at home repairing his motorcycle at the time of arrest and testified to the resistance from members of the public who questioned the arrest, despite which the appellant was taken away by the men in plain clothes.
9. I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is;
 - a). whether the prosecution proved possession of cannabis sativa by the appellant to warrant the arrests
10. Section 3 (1) of the [Act](#) codifies the offence of possession of any narcotic drug which includes cannabis sativa or possession of psychotropic substances. Section 3 (2) (a) provides:

“ Any 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;



11. From the evidence on record, both prosecution and defence evidence, the appellant was at the scene of crime and subsequent arrest. The issue raised was whether the appellant was found in possession of the narcotic drug as alleged by the prosecution witnesses.
12. Possession is defined under Section 4 of the [Penal Code](#) in the following terms:
 - a. “be in possession of” or “have in possession” 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 in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;
 - b. if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed taken to be in the custody and possession of each and all of them”.
13. From the above definition, it follows that possession may be actual or constructive. Actual possession denotes physical custody or control of an item or object. In that case, the person in possession has immediate contact and control over the item.
14. From the evidence presented by PW1, it was alleged that the appellant was found in possession of suspected narcotics concealed in his helmet. However, the prosecution failed to produce the said helmet as evidence before the court, raising questions about the completeness of their case. Furthermore, although the appellant was reportedly arrested by three police officers, only one of them testified during the trial. Consequently, the trial court’s decision to convict the appellant rested solely on the uncorroborated testimony of a single witness.
15. In such circumstances, it is imperative for the court to exercise caution and warn itself against relying solely on uncorroborated evidence. Section 124 of the [Evidence Act](#), Chapter 80 of the Laws of Kenya, underscores the need for corroboration in cases where a single witness's testimony forms the basis of a conviction. In the present case, there was no corroborative evidence to confirm that the appellant was indeed found in possession of the suspected narcotic substance.
16. The trial court justified its conviction by reasoning that ordinary police officers would have no incentive to misrepresent the truth or manipulate facts. It asserted that any claim of fabrication would require corroborative or independent evidence to support it. However, this rationale appears misplaced. The burden of proof squarely lies on the prosecution to substantiate their allegations and prove beyond reasonable doubt that the appellant was in possession of cannabis. It is not the responsibility of the appellant to disprove the allegations made against him. Without sufficient corroboration, the conviction cannot be deemed safe.
17. In *Mukungu vs. Republic* [2002] 2 EA 482, the Court of Appeal citing *Mutonyi v Republic* [1982] KLR 2003, held that:

“An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See *Republic v Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61.”
18. In this case, there was a clear absence of any material evidence corroborating the claim that the appellant was found in possession of narcotic drugs. It is evident, beyond any doubt, that the prosecution’s evidence failed to meet the stringent standard of corroboration required in such matters. The appellant



was ultimately convicted on uncorroborated testimony, which undermines the reliability and safety of the conviction.

19. Given these circumstances, I find that the conviction was unsafe and cannot be sustained.
20. Consequently, the appeal is deemed meritorious and is hereby allowed. The conviction entered by the trial court is quashed, and the sentence imposed upon the appellant is set aside. The appellant is hereby acquitted.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Keverenge for the Appellant

Mburugu for the Respondent

Achode Court Assistant

