



**Kinyai & another v Republic (Criminal Appeal E121 of 2022)
[2023] KEHC 283 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E121 OF 2022
TW CHERERE, J
JANUARY 26, 2023**

BETWEEN

PETER PARTO KINYAI 1ST APPELLANT

BOCHA MOHAMED ISAACK 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Isiolo Criminal
Case Number 133 of 2020 by Hon. E. Ngigi (PM) on 07.09.2022)*

JUDGMENT

Background

1. Peter Parto Kinyai and Bocha Mohamed Isaack (1st and 2nd Appellant respectively) were jointly charged in Isiolo Criminal Case Number 133 of 2020 as follows:

Count 1- Peter Parto Kinyai

Trafficking in narcotic drugs contrary to section 4(a) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) No 4 of 1994 in that on October 22, 2020 at around 16.30 hrs at Sabache area within Samburu County along Isiolo-Moyale Highway was found trafficking in narcotic drugs namely cannabis sativa one bundle in a brown sack approximately 67 kgs worthy Kshs 120,000/- which was not medically prepared

Count 2- Bocha Mohamed Isaack

Trafficking in narcotic drugs contrary to section 4(a) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) No 4 of 1994 in that on October 22, 2020 at around 16.30 hrs at Sabache area within Samburu County along Isiolo-Moyale Highway was found trafficking in narcotic drugs namely



cannabis sativa one bundle in a green sack approximately 7 kgs worthy Kshs 140,000/- which was not medically prepared

The prosecution's case

2. PC Dasir Adan stated that Appellants were arrested on October 22, 2020 and that at the time of arrest, 1st Appellant carrying a green gunny bag and 2nd Appellant a brown gunny bag both of which contains some plant material suspected to bhang. In cross-examination, the witness stated that he did not indicate the recovery of the gunny bags in his first statement but did so in his second. PC Purity Njoroge who was in company of PC Adan stated that 1st Appellant had a green sack and 2nd Appellant a marron sack both containing some plant material. In cross-examination, the witness stated in the first report, she booked that what was recovered from Appellants were bales sealed with yellow cellotape weighing 13 kgs and did not indicate the recovery of the gunny bags or indicate what was recovered from which of the Appellants. 13kgs of some plant material submitted to Government Chemists was analyzed by Nelius Maingi who formed an opinion that the same was cannabis. Appellants were handed over to PC Otieno and charged.

Defence case

3. Both Appellants stated that they had gone to sell cabbages in Marasabit using M/V KCV 690 L Sienta and on their way back decided to buy goats. That they handed over the vehicle to Guyo and they walked to a manyatta to look for goats and it was from there that they were arrested. They denied that any cannabis was recovered from him. Kala Guyo Dida stated that was called by the 2nd Appellant to Archer's Post where he was handed over M/V KCV 690 L Sienta as Appellants took a motor cycle and said they were going to manyatta to buy goats. He later got information that the two had been arrested.
4. The trial magistrate having heard both the prosecution and defence cases found the prosecution case proved and convicted both appellants sentenced each to serve 15 years' imprisonment.

The Appeal

5. The conviction and sentences provoked these appeals. By their joint Amended grounds of appeal filed on November 15, 2022, Appellants raised 7 grounds which I have summarized as follows:
 - i. The prosecution case was not credible
 - ii. The defences were not given due consideration
 - iii. The sentences were harsh

Determination

6. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.
7. The Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 had this to say about the duty of the first appellate court: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When



the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

15. The Court of Appeal appreciated the holding in the foregoing decisions and in *Kiilu & Another v Republic [2005]1 KLR 174*, stated that:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.
8. The jurisdiction of this court in an appeal such as this was well stated in the often cited case of *Okeno v Republic [1972] EA 32* that the court should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.
9. In *Mkendesbwa v Republic [2002] 1 KLR 461*, the Court of Appeal stated that;
- “In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.”
10. With those parameters in mind, I have on the first issue considered whether the evidence by the prosecution witnesses was beyond doubt. It is without doubt that the testimonies by PW1 to PW2 were central to the prosecution case. Not only did they testify that they were arrested Appellants, but they also played a crucial role in the actual recovery of the exhibits in issue thereby interacting throughout with the chain of events.
11. Of interest however to note is that whereas both witnesses stated that they recovered a gunny bag containing some plant material from each of the Appellants, that very crucial piece of information was as conceded by PW1 and PW2 not recorded in the first report. Indeed, PW1 stated that it was in his second statement that he recorded the recovery of the exhibits. The report tendered in court referred to bales sealed with yellow cellotape that were booked at the police station and a doubt arises as to whether the bales are the same allegedly recovered in gunny bags from Appellants which gunny bags as stated herein above were not recorded in the first report.
12. Appellants have in their submission highlighted the inconsistencies in the testimonies of PW1 to PW2, thereby casting aspersions on the credibility of the said witnesses. What this court needs to ask is whether these inconsistencies impeached their credibility.



13. In the case of *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated as follows:

“We begin with the submissions that the prosecution evidence was contradictory. In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.”

14. In this case, learned trial magistrate appreciated the principle of law that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. The learned trial magistrate indeed appreciated that there were discrepancies in the testimonies of the prosecution witness but stated that they were not fundamental. Flowing from the finding by the learned trial magistrate that there were contradictions in the prosecution case, the issue then is whether the Prosecution can be said to have proved beyond reasonable doubt.

15. As was noted in *Twehangane Alfred v Uganda, Crim App No 139 of 2001, [2003] UGCA, 6*:

“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

16. Recovery of exhibits formed the basis on which Appellants were charged and convicted. Any contradictions concerning what was recovered cannot with respect be considered a minor discrepancy. Appellant were facing serious charges and it was the duty of the prosecution to prove its case beyond any reasonable doubt.

17. The evidence by PW1 and PW2 properly evaluated falls in the category of what the Court of Appeal described in *Ndungu Kimanyi v Republic* [1979] KLR 282 that:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

18. The variance between the testimony by PW1 and PW2 and the first report properly evaluated ought to have created an impression in the mind of the court that the witnesses were either being economical with the truth or were untruthful and their evidence ought to have been treated with caution.

19. The contradictions in the prosecution might have been resolved had the arresting officers prepared an inventory at the point of recovery but that did not happen.



20. In the case of *Burunyi & Anor v Uganda* Cr Appeal No 1968 EA 123, Sir Udo Udoma the then CJ held:
- “It is not the duty of the court to stage-manage cases for the prosecution nor is it the duty of the court to endeavor to make a case against an accused where there is none. In a criminal case, the court cannot enter into the arena. The only duty of the court is to hold the scale to see that justice is done according to law on the evidence before it.”
21. From the foregoing, I find that the trial magistrate erred in rejecting the defence and in failing to resolve the contradictions concerning recovery of the exhibits in favour of the Appellants.
22. Concerning sentence, Section 86 of the *Narcotic Drugs & Psychotropic Substances (Control) Act* provides as follows:
- (1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.
 - (2) In this section “proper officer” means the officer authorized by the Minister by notification in the Gazette for the purposes of this section.
23. The question then is what happens where there is no certificate produced to prove the market value of the narcotic drug. The Court of Appeal has had occasion to deal with the provisions of that section in the case of *Kibibi Kalume Katsui v Republic* (2015) eKLR where it expressed itself as follows;
- “The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However, all is not lost, we take note that Pw4 and Pw2 were part of the Anti-Narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks.
24. The same court also in the case of *Priscilla Jemutai Kolongei v Republic* [2005] eKLR held that the provisions of the said section are not mandatory. The court stated that:
- Parliament has the powers to prescribe a fixed punishment or range of punishments applicable to all offenders found guilty of a specified offence. It has done so in Section 4(a) of the Act by giving to the Court several options in sentencing for trafficking narcotic drugs. Section 86 is not a mandatory provision on sentencing but evidential aid, again for the benefit of the Court, in the valuation of goods for penalty.
25. In this case, Appellants are alleged to have been found with 1 stone each valued at Kshs 140,000/- and Kshs 120,000/- respectively. The market value given was Kshs 260,000/-. That would mean that the value per kilo is Kshs 20,000/-. The Investigating officer only stated that he had experience in investigating drug cases but tendered no evidence in support thereof. That in my view explains why the trial magistrate did not impose a fine, the value of the drugs not having been established.



26. Section 4(a) provides the penalty for trafficking in narcotic drugs or psychotropic substance as follows:

“4. Any person who traffics 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.”

27. Section 26 of the [Penal Code](#) gives guidelines on imprisonment

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that—

- (i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment

28. From the foregoing provisions of the law, I would have upheld the conviction and the 15-year sentence had the prosecution case been proved beyond doubt. In the end, I find that the prosecution case cannot be said to have been a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction.

29. Consequently, I find that the appeal has merit. The convictions are quashed and the sentences set aside and it is ordered that Appellants be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU THIS 26TH DAY OF JANUARY 2023.

WAMAE T W CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellants - Present

For the State - Ms Mwaniki (PPC)

