



REPUBLIC OF KENYA



**Bwana v Republic (Criminal Appeal E001 of 2021)
[2022] KEHC 11484 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E001 OF 2021**

**A ALI-ARONI, J
MAY 19, 2022**

BETWEEN

OMAR SAID BWANA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. Mugendi Nyaga
SRM delivered on 18/12/2020 in Wajir Criminal Case No. 148 of 2020)*

JUDGMENT

Background

1. Omar Said Bwana (the appellant herein) was charged, convicted, and sentenced to a fine of Kshs. 1,000,000/= (Kenya shillings One Million) or in default to serve 7 years in jail for the offence of Trafficking in Narcotic Drug contrary to section 4 (a) of the Narcotic [Drugs and Psychotropic Substances Control Act](#) No. 4 of 1994.
2. The particulars of the offence were that on the 18th day of June 2020 at Golden coach bus Office in Wajir East Sub County within Wajir County, jointly with others not before the court, he trafficked in a narcotic drug namely cannabis Sativa (bhang), to wit 10 kgs, with a market value of Kshs. 100,000/=, by sending it in two boxes as a parcel to Garissa in contravention of the provisions of the Act.
3. Being aggrieved by the trial court's decision, the appellant filed this appeal on January 7, 2021 raising seven (7) grounds ostensibly stating that there was no evidence connecting to the two boxes containing the drugs subject matter, he was neither the consigner nor receiver of the said boxes that allegedly contained the narcotic substances.; the prosecution's case was marred with contradictions yet he was convicted and the sentence was excessive.



4. The state objected to the appeal and sought for its dismissal stating that there was evidence connecting the appellant to the substance as he took himself to the complainant's offices seeking to know the whereabouts of the boxes and identifying himself as the owner on 2 occasions. Further he told PW2 an employee of the bus company that he knew the content of the boxes to be cannabis.

Submissions

5. The appeal was canvassed by way of written submissions. In his submissions the Appellant stated that the trial court failed to consider his evidence; as he had been sent by a neighbor known to him to pick the parcel on his behalf. Further the identity card he allegedly gave to PW1 was not presented in court. On the sentence, he decried that the same is too long making his future bleak. He is currently a registered student doing his Kenya Certificate of Secondary Education.
6. The respondent submitted that it mattered not whether the appellant was the sender or the receiver, the fact that the appellant sought to claim the luggage was formidable proof of the offence hence the appeal ought to be dismissed.

Analysis and Determination

7. This being a first appeal it is this court's duty to re-evaluate the evidence and in order to arrive at its own conclusion. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] E A 336) 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. (*Shantilal M Ruwala v R*, [1957] EA 570). 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; it must make its own findings and draw its own 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, see { *Peters v Sunday Post*, [1958] EA 424.”

8. The prosecution case was that on June 15, 2020 a uniformed police officer delivered and requested to register two parcels for delivery with Golden coach bus service to Garissa and paid Kshs 400 for the services. That the aforesaid officer informed Ayub Mohammed, PW1 that his name was Hussein and gave his telephone number as 07255751123 Further he gave the recipient's name as Alex of telephone number 0751921658. The officer was told of the need to open and inspect the content. The officer left in a huff in an unregistered vehicle and told the witness could check the boxes. Upon payment the witness had prepared a receipt and asked his colleague to look at the contents of the parcel. Mohammed Omar PW2 looked at the content of the boxes and found a white shirt checked blue, cosmos unga and dried plant material packed in black nylon paper weighing 10 kgs. They suspect the plant material to be bhang.
9. PW1 told the court that he reported the matter to his superiors and to the DCIO Wajir. On the next day, June 16, 2020, the appellant went to check on whether the boxes had been dispatched. PW1 was called by PW2 and told of the appellant. PW1 asked that the Appellant waits for him. The appellant, however left and came back on June 18, 2020. PW1 informed the court further that he asked the appellant for his identity card which he did not have and he asked the appellant to bring the same. On his return



police officers who had been aptly informed of his presence arrested him. In cross-examination, PW1 stated that when the accused person asked for the luggage, he informed them that the he was the owner, the same had not been sent and that the said boxes were labeled Keringet.

10. PW2 Mohammed Omar corroborated the testimony of PW1. He confirmed receiving payment of Kshs 400/=, issuance of the receipt and checking the contents of the luggage only to find a white polythene bag wrapping something that looked like shrubs. He told the court that on June 18, 2020 the appellant came begging him to release the boxes to him and said he was aware of the content. He returned at 6:30 p.m. and was arrested by the police. At the time the witness had interacted with the appellant three times, there was proper lighting hence he could properly identify the him.

In cross-examination, he was categorical that the accused told him he wanted the boxes that had bhang and were branded Keringet.

11. PW3 Geoffrey Nyagak Anyona a government analyst working with government Chemist for more than 20 years presented the Government analyst report on behalf of James Michael Wairimu who he had worked with for 20 years. It was his finding that the 50 gm of plant material after the examination was found to be cannabis, which is listed under the Narcotics and Psychotropic Substances Act. He further explained that all species of cannabis are prohibited.
12. PW4 PC Vyland Walubusi narrated the course of the investigation. He testified that upon PW1 and PW2 finding out the illegal content of the boxes the two kept the same and waited for someone to claim the same. Further that PW1 and PW2 informed him that they had tried to call the numbers of the sender and the recipient but none went through. On May 18, 2020, the appellant went to check on the boxes and at around 6:00 p.m. they went to the booking office and arrested the appellant after being informed that he was the one asking for the boxes. They interrogated him and he confessed that he knew the contents of the box to be cannabis. The appellant informed them that the owner, whom he called Ahmed Maow of Korondile, had sent him.
13. Upon the close of the prosecution case, the trial court found the appellant had a case to answer and placed him on his defence. The appellant gave sworn testimony as follows; -

One of his friends who resides in Korondile called him vide 0745xxxxxx informing him he had sent two boxes using Golden Coach bus from Wajir to Garissa and requested him to go to the coach offices and confirm what was happening. That he went to the offices and asked about the parcel that had been left there for three (3) days. He was asked to wait; as they checked the stores. Shortly thereafter police officers arrived and arrested him. That after interrogation he realized something was wrong. In cross-examination, he told the court that he went to the golden coach offices two times. The first was on June 15, 2020 and the second on June 18, 2020. On June 18, 2020 when he went back, he was arrested without even seeing the luggage. He knew the person who sent him as a business man in Wajir town. That he gave the police details of the person and his number. However, the police never asked him to take them to him. He confirmed that he went for the parcel but reiterated that he was sent.

14. DW2 Magbul Hussein testified that on June 15, 2020 the accused asked him to drop him at the Golden bus booking office , similarly on the 18th June 202.. He, later on, called him and informed him that he had been arrested.



Analysis and Determination

15. The trial court in its analysis determined as follows;

“.....In this case the accused went to collect the boxes that contained the cannabis. The cannabis was to be delivered from Wajir to Garissa before the attendants at Golden coach intercepted the same. From the above definition, delivery of a narcotic drug is part of trafficking. The accused went to collect the boxes after they were intercepted. Whereas he is not the one who took the boxes to the bus company, his act of going to collect the boxes knowing what they contained made him guilty as the person who took the boxes. In this regard I find that the accused person’s act was part of the delivery of the narcotic drug.....”

16. The main issue in this appeal is whether the prosecution did establish that the Appellant trafficked in the said psychotropic substance. Section 2 of the [Narcotic Drugs And Psychotropic Substances \(Control\)](#) defines trafficking as hereunder;

“trafficking” means 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.....”;

17. The court must state that it is taken aback and finds it odd that the investigating officers never sought to investigate the police officer who delivered the boxes or be interested in the “alleged” sender of the Appellant. Why did they not asked to be taken to him or be interested to know whether he truly existed? The appellant gave them the information, a fact conceded by the investigation officer.

18. Was the appellant herein part of the transaction or a scapegoat? The conduct of the appellant not only places him at the scene but reveals that he was fully aware of the content of the boxes. PW2 was categorical that the appellant told him that he wanted the boxes that had bhang and were branded Keringet.

19. Also notable is that the appellant sought for the two (2) boxes that had the psychotropic substance; he did this not once but on two occasions. PW1 and PW2 set a trap for him when they informed the police. PW2 was categorical that the appellant was fully aware that the substance in the boxes was bhang. The Appellant did not controvert this either by way of cross examination or in his defence.

20. No doubt from the evidence the Appellant was either the owner as he told the witnesses so, or was part of a cartel since he knew the content of the two boxes being transported from Wajir to Garissa. He is certainly not an innocent messenger with no knowledge.

21. This court therefore affirms the conviction of the trial court as the prosecution proved elements of trafficking to the required standard.

22. On sentence, section 4(a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) provides that:

“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; or

(b)”

23. The appellant herein was charged with the offence of trafficked 10 kg bhang with a street value of Kshs. 100,000/=. The trial court imposed a fine of Kshs. 1,000,000/= in default a term sentence of seven (7) years.
24. In *Mohamed Famau Bakari v Republic* [2016] eKLR the Court of Appeal reduced a sentence of Kshs. 1,000,000/= in default life imprisonment to a fine of Kshs.10,000, and in default the appellant to serve three months imprisonment. In the case, the appellant had been found guilty of trafficking in narcotics drugs to wit 7 big rolls of cannabis and 50 tablets of Rohypnol all valued at ksh.3,900/-.
25. In *Mercy Awour v Republic* [2018] eKLR the court reduced a life imprisonment sentence to a term of 10 years imprisonment. The appellant had been found guilty of trafficking 1089 rolls of cannabis Sativa valued at Kshs. 217,800/=
26. Given the circumstances of the case, the quantity of the substance, the fact that the appellant is a first-time offender, and taking due regard to the sentence under section 4 (a) of the Act this court will allow the appeal to the extent of the sentence which appears excessive by substituting the same with a fine of Kenya Shillings three hundred thousand in default three years imprisonment from the date of conviction.

DATED, DELIVERED AND SIGNED IN GARISSA THIS 19TH DAY OF MAY 2022

ALI-ARONI

JUDGE

