



REPUBLIC OF KENYA



**Ngare v Republic (Criminal Appeal 12 of 2020)  
[2022] KEHC 11047 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL 12 OF 2020**

**M MUYA, J  
AUGUST 4, 2022**

**BETWEEN**

**JOHN KARIO NGARE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Original Criminal Case No.1478 of 2018 CMS Court Nyeri – Hon Mutua SPM)*

**JUDGMENT**

1. John Kario Ngare hereinafter referred to as the appellant was convicted and sentenced to serve 5 years imprisonment, and to a fine of Kshs 500,000/= and 12 months imprisonment in default, for the charges of, (1) Trafficking in Narcotic drugs contrary to section 4(a) of *Narcotics drug and Psychotropic substances (control) Act* No.4 of 1994.(2)being in possession of materials used in connection with preparation of cannabis or any other narcotic drug contrary to section 5 (1) (d) of the *Narcotic drugs and psychotropic substances (control) Act* No.4 of 1994.
2. In respect of the 1<sup>st</sup> count the particulars are that on the 19<sup>th</sup> day of December 2018 at around 13.30 hours at Ruringu, Majengo slums within Nyeri sub-county in Nyeri County, was found trafficking in Narcotics by storing a basin full of cannabis Sativa, approximately one (1) Kilogramme valued at Ksh 10,000/= street value which was not in its medicinal preparation form in contravention of the said Act.
3. As for the second count the particulars are that on the 19<sup>th</sup> day of December 2018 at around 13.30 hours at Ruringu, Majengo slums within Nyeri Sub-county, Nyeri County was found in possession of “rizzla” rolling papers, two scissors, and a one hundred shillings note rolling flag, utensils believed to be used in the preparation of cannabis in his house. In this count the appellant was sentenced to a fine of Kshs.250,000/= and in default to serve five years imprisonment.
4. Being dissatisfied with the conviction and sentence meted unto him, the appellant has filed this appeal whose grounds are as follows:-



- (1) That the learned trial magistrate erred in both fact and Law in passing judgment convicting the appellant when the prosecution had not proved the case by discharging the required burden of proof.
- (2) That the learned trial magistrate erred in both Law and fact in overlooking that he was framed by PW3.
- (3) That the learned trial magistrate erred in both Law and fact in overlooking that the communication between the appellant, PW2 and PW3 before the arrest was irregular.
- (4) That the learned trial magistrate erred in Law and in fact in relying on the evidence of the prosecution witnesses which was insufficient and contradictory whereas crucial witnesses were not availed.
- (5) That the learned trial magistrate erred in both fact and Law in imposing consecutive sentences yet the offences were committed in the same transaction.

### **Brief Facts**

5. The prosecution called 4 witnesses to buttress their case. The appellant opted to give sworn evidence and did not call a witness in his defence.
6. This being the first appellant court it's mandated to evaluate and analyse the evidence on record so as to arrive at an independent finding.

Reliance is placed on the often cited case of *R – vs Okano*[1972] EA 32

7. PW2, PW3 and PW4 were at the time attached to the Anti- Narcotics Unit based in Nyeri. The three testified of how on the 19<sup>th</sup> day of December 2018 acting on information received, they proceeded to the house of the appellant at 1.30 p.m. Upon arrival, they found it locked from inside. This was one roomed house. They peeped through the window and saw the accused inside. He initially refused to open but he later on complied. They entered into the room and did a search. Under a bed they recovered a basin which contained some green plant material, they recovered a 'rizzla' paper which is used to roll bhang, it was inside the basin, a pair of scissors also used for preparation, a rolling flag of Kshs.100/= which is used together with the 'rizzla' to roll the bhang. These items were produced in court as exhibit 1-5:

While at the police station inventory was prepared and was signed by the arresting officer and the appellant. It was produced as prosecution exhibit No.6 Also produced as exhibit was an M'pesa transaction report for PC Njagi showing receipt of Kshs 2,000/= from the appellant being intended inducement to drop the charges.

8. The government chemist testified as PW1. She examined the plant material and found that it was cannabis Sativa
9. In his defence the appellant testified that on the 19<sup>th</sup> day of December, 2018 he saw one PC. Maurice Ochieng Peeping into his house. He demanded to know what he wanted and he told him that he had been talking ill about him and he was to face the consequences. After a while three men went to his house and said that they were policemen. They searched his house but recovered nothing. He was taken to Anti Narcotics Unit and placed in cells. Later he was charged with this offence. It is his contention that his brother had left for Qatar and Maurice Ochieng was alleging that he had his debt. It was his defence that the police framed him up in the present charges for which he was convicted and sentenced.
10. In a nutshell, what appears to be the appellants grounds of appeal can be summarized as follows:-



1. Allegations of a frame up
  2. Irregular communication between the appellant and the arresting officers
  3. Contradictory and insufficient evidence
  4. Imposition of consecutive sentences.
1. The ground of a frame up can satisfactorily be merged with that of irregular communication between the appellant and the arresting officers and in particular PW3.  
 During cross-examination by the accused/appellant at page 7 the last but one paragraph, PW2 PC Paul Njagi testified thus:- “You are the one who called me by telephone and told me to meet you and we talk about this case. It is true when you called me I also called you. It is true we have been communicating and I have also sent you money as confirmed by our telephone. The money I was sending you was a refund of the money you had sent me and I told you I was not interested as I can’t interfere with the case.”  
 It is not true when we arrested you, you gave us Kshs 20,000/= but we charged you alleging I was talking to and informing other people.
  12. PW3 PC Felix Omondi Ochieng testified at Page 10. Line 10” I am aware my colleague received Kshs 2000/= which he immediately returned to accused upon discovering he was the one. I have Mpesa transaction report for PC. Njagi’s telephone”
  13. A clear summarization of the above goes to show that indeed there was communication between the appellant and PW2 before and after the arrest. To a large extent, it is the appellant who had communicated with the arresting officers even to the extent of sending money vide Mpesa facility to PW2 for the purposes of influencing the outcome of the case which was already before the court. His Kshs.2000/= was refunded.
  14. For the appellant to have taken the daring step of trying to interfere with the outcome of the case before the court, he must have known that the charges were based on strong grounds and he was not without blame. His allegations of a frame up thaw against his positive attempts to interfere with the outcome of the case, otherwise, why would he give out money if he felt he was wrongly framed.

**On the issue of contradictory and insufficient evidence:-**

15. There is no serious dispute that the green plant material found in a washing basin, was cannabis Sativa. This substance was not in the form of medicinal preparation. There is no much dispute on the fact that apart from the Cannabis Sativa the appellant was found in possession of “rizzla” rolling papers, two scissors, one hundred note rolling flag, which items were for use in the preparation of Cannabis Sativa. The appellant does concede that the three arresting officer PW2 PW3, PW4 and others did visit his house during the day and he saw one of them peeping through the window, and he later allowed them in.
16. The evidence of the three arresting officers, I am satisfied, was consistent and corroborated each other. I find and hold that there was overwhelming evidence against the appellant on the two counts.

**Conclusion**

17. The conviction was sound and proper and it is upheld.  
 On the issue of sentencing the prosecution does concede that the appellant was a first offender and the circumstances of the case did not call for a consecutive sentence.



Section 14 of the *Criminal Procedure Code* provides:-

“Subject to the subsection (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose and those punishments when consisting of imprisonment shall commence, the one after the expiration of the other in the order the court may direct, unless the court directs that the punishment shall run concurrently.”

18. The learned trial magistrate had the discretion to make orders for making consecutive or concurrent sentences but that discretion had to be premised on the circumstances of the case. In the present case, the appellant had been treated as a first offender as there was no record of previous convictions. I am in agreement with the prosecution that the sentences ought to run concurrently. The sentences are hereby interfered and are hereby ordered to run concurrently instead of consecutively. This means that he will serve a term of five years imprisonment

**JUDGMENT DELIVERED DATED AND SIGNED AT NYERI THIS 4<sup>TH</sup> DAY OF AUGUST, 2022.**

**HON. JUSTICE M. MUYA**

**JUDGE**

**In the presence of:**

In person: Applicant

Miss Waweru: Respondent

Court assistant: Kinyua

30 days Right of Appeal.

