



**Musembi v Republic (Criminal Appeal E001 of 2024)
[2025] KEHC 4739 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E001 OF 2024
CM KARIUKI, J
APRIL 3, 2025**

BETWEEN

PETER MUASYA MUSEMBI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. M.I.G. Moranga
(S.P.M) in Kilgoris MCCR No. E1001 of 2021 delivered on 01.03.2023)*

JUDGMENT

1. The trial court convicted the appellant and sentenced him to pay a fine of Kshs. 1,000,000 and serve 10 years imprisonment, in default of payment of the fine of Kshs. 1,000,000 the accused shall serve an extra default sentence of one-year imprisonment for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotics and Psychotropic Substances Control Act. No. 4 of 1994.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide a petition of appeal dated 13.02.2024. The appellant filed grounds of appeal as follows.
 - i. That the prosecution's case was not proved beyond reasonable doubt and relying on uncorroborated evidence.
 - ii. The trial magistrate erred in both law and facts by failing to realize that the main ingredients of the present offence were not proved to the required lawful standards.
 - iii. That the trial magistrate erred in law and fact by basing conviction on inconsistencies, discrepancies, and glaring gaps.
 - iv. That the learned trial magistrate erred in both law and facts by failing to analyze that the entire evidence was manufactured, manipulated, and framed to meet the predetermined goal of fixing the appellant.



Brief facts

3. The appellant was charged with the offence of trafficking narcotic drugs contrary to section 4(a) of the Narcotic and Psychotropic Substances Control [*Act no. 4 of 1994*](#).
4. The particulars were that on 07/12/2021 along Kehancha- Lolgorian road in Transmara South Sub County within narok county, the appellant was found transporting a narcotic drug namely cannabis sativa(bhang) to wit 390 kgs valued at approximately kshs. 3,9000,000 in a motor vehicle registration number KDA 358W in contravention of the said act.
5. The appellant was initially jointly charged with Irene Mutile Matheka, however, the 2nd accused was turned into a prosecution witness, and a case against her was withdrawn under section 87(a) of the [*Criminal Procedure Code*](#) on 28.10.2022.
6. The appellant was tried and convicted. The appellant was sentenced to pay a fine of Kshs. 1,000,000 and serve 10 years imprisonment, in default of payment of the fine of Kshs. 1,000,000 the accused to serve an extra default sentence of one year imprisonment.

Directions of the court.

7. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

8. The appellant submitted that he had no idea that he was ferrying any narcotics and was not found in possession of the said narcotics. The appellant relied on section 4(a) of the [*Penal Code*](#), Calvin Ogallo Otieno v Republic [2022] eKLR, Peter Mwangi Kariuki v Republic [2015] eKLR
9. The appellant submitted that the trial magistrate did not take into consideration of his mitigation. The appellant relied on Muruatetu & Another V Republic; Katiba Institute & 5 Others (Amicus Curiae) (Petition 15 & 16 Of 2015(Consolidated) [2017] KESC 2(KLR) (114 December) (2017) (Judgment)
10. The appellant in his mitigation states that he is age 48 years and a sole breadwinner to his wife and 3 children. He therefore prays for leniency and that the sentence be quashed and set aside.

The respondent's submissions.

11. The respondent submitted that the appellant was trafficking the narcotics by way of conveying it in the suit vehicle. Therefore, contrary to the appellant's assertion in his grounds of appeal, the prosecution proved the requisite elements of the offense, and the evidence was consistent and corroborated. The respondent relied on sections 4(a), and 2 of the Narcotic and Psychotropic Substances Act, Gabriel Ojiambo Nambesi V Republic [2007] eKLR, the testimony of PW1, PW2, PW3, PW4, and PW6, and Calvin Ogallo Otieno V Republic [2022] eKLR
12. The respondent submitted that the identification of the appellant was proper as he was identified by PW6, and the arrest occurred during the day. The respondent relied on the testimony of PW6 and Anjononi and Others Vs Republic [1980] KLR, and Daniel Muthomi Marigu & 4 Others Vs Republic [2021] eKLR.
13. The respondent submitted that the appellant's defense was unbelievable and lacked credibility. Thus, the trial court cannot be faulted for dismissing it.



14. The respondent submitted that the sentence falls within the permitted lawful maximum limits. The respondent urged this court not to interfere with the sentence but in any event to enhance it. The respondent relied on section 4(a) of the Narcotic and Psychotropic Substances Act.

Analysis And Determination.

Court's duty

15. First, an appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32
16. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are.
- i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

Whether the prosecution proved its case beyond a reasonable doubt

17. 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;”

18. 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..”

19. 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 clearly 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.”

20. In this particular case, the prosecution contended that the appellant was involved in the trafficking of a narcotic substance. According to the evidence presented, the appellant was apprehended at Loliondo Center as part of an operation guided by intelligence. Witnesses PW1, and PW3 informed the court



that they had received intelligence indicating that a motor vehicle registration number KDA 358W, white in colour, Toyota Noah was spotted along Kehancha -Lolgorian road and was suspected of transporting cannabis sativa. PW1 with other officers stationed themselves at Loliondo area. The said vehicle approached them, they tried to stop it, but the driver made a U-turn and sped towards the direction they were traveling from prompting a police chase which ended up in an arrest at Loliondo Center. The vehicle was inspected, and they found it to be carrying 12 sacks of green leafy substance suspected to be bhang.

21. PW4, an investigating officer testified that he forwarded samples of each of the 12 sacks to the government chemist for analysis. The report confirmed that the samples tested positive for cannabis sativa. He produced the exhibit memo forwarding the samples to the government chemist as P Exh 4(a) and the government analyst report as P Exh 4(b). He produced photos of the subject vehicle as P Exh 1(a) and (b), a certificate of photographic print as P Exh 6, and 12 sacks of cannabis sativa as P Exh 7-16.
22. In his defense, the appellant gave unsworn testimony and testified that he was a hired driver. He was handed over the vehicle and told to go to Sirare. He was told he would be received at Sirare and guided further there. He arrived at Sirare met the contact and gave him the vehicle at around 8 p.m. And he was to give him the car the next day at 11 a.m. He left with his lady friend and were later arrested at Kehancha but he did not know what he was carrying until he opened the boot that is when he realized it was bhang.
23. The trial court found the defence did not shake the prosecution's evidence. The prosecution's case, corroborated by multiple witnesses, proved the offence beyond reasonable doubt. This court rejects the appellant's defence and upholds the prosecution's evidence.
24. 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. The conviction of the appellant is therefore affirmed.

On sentence.

25. The appellant was sentenced to pay a fine of Kshs. 1,000,000 and serve 10 years imprisonment, in default of payment of the fine of Kshs. 1,000,000 the accused to serve an extra default sentence of one year imprisonment.
26. During the sentencing proceedings, the court considered the appellant's mitigation, the pre-sentence report, and the fact that he was a first offender.
27. The sentence meted was therefore legal and I see no reason to interfere. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed in its entirety.

Conclusion and orders

- i. The appeal on conviction and sentence is dismissed.
- ii. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS3RDDAY OF ...APRIL., 2025.**

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**HON. CHARLES KARIUKI
JUDGE**

