



REPUBLIC OF KENYA



**Abdullahi v Republic (Criminal Appeal E018 of 2024)  
[2025] KEHC 5955 (KLR) (Crim) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5955 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL APPEAL E018 OF 2024  
SC CHIRCHIR, J  
MAY 12, 2025**

**BETWEEN**

**ABDULLAHI MOHAMED ABDULLAHI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the judgment of hon. L.Mutai (CM) delivered on 23rd November 2022 in Isiolo chief Magistrate's court criminal case No. E301 of 2021)*

**JUDGMENT**

1. The Appellant was charged alongside one other Person, with the offence of trafficking in Narcotic drugs contrary to section 4 (a) of the Narcotics Drugs and Psychotropic Substance Control [Act No. 4 of 1994](#).
2. The particulars of the charge are that on 1/4/2021 at Merti Junction along Moyale -Isiolo highway, within Samburu County ,were found trafficking fifteen point two seven (15.27) Kgs of Cannabis Sativa (bang) using motor vehicle registration number KCQ 339 make Toyota Harrier with a street value of Kshs. 381,750 (three hundred and eighty-one thousand seven hundred and fifty shillings) which was not medically prepared.
3. The Appellant denied the charges and the case went to full trial. In the end, the court acquitted his co-accused, and convicted the Appellant . He was sentenced to 8 years in prison and a fine of Kshs 1,000,000. In default of the fine, he was to serve an additional 2 years.
4. The Appellants was aggrieved by the judgment and petitioned for appeal. The grounds of Appeal as amended and filed on 21/9/2023 are as follows;



1. That the learned trial Magistrate erred in both matters of law and fact by failing to note there were inconsistencies and contradictions on evidence adduced by prosecution witnesses.
  2. That the learned trial magistrate erred in law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt.
  3. That the learned trial magistrate erred in both law and fact by rejecting the appellant's defence without giving cogent reasons.
  4. That the trial magistrate erred in both matters of law and also a fact where he failed to make findings that the client who hired the said motor vehicle from the car hire was not the accused person herein.
  5. That the trial court magistrate erred in both matters of law and also a fact where he failed to consider the time that was spent in custody while undergoing the trial as part of my sentence pursuant to section 333 (2) of the *Criminal Procedure Code* (CPC).
5. The Appeal was canvassed by way of written submissions.

### **Appellant's submissions**

6. It is the Appellant's submissions that the prosecution's evidence was tainted with contradictions and inconveniences; that the charge was not proved beyond reasonable doubt; that his defence was rejected without any logical basis.
7. On sentencing, it is submitted that the trial court failed to take into consideration the period the Applicant had spent in custody prior to conviction.

### **Respondent's submissions**

8. It is the respondent's submissions that the contradictions between the testimony of PW1 and Pw2 were minor and did not affect the substance of the prosecution's case.
9. While relying on the decision of the high court in *Timamai vs Republic* ( Criminal Appeal E002/2023), it is submitted that the prosecution proved the existence of all the ingredients of the offence.
10. On the Appellant's defence , it is submitted that having opted for unsworn testimony , and hence denying the prosecution a chance at cross- examination, the Appellant's defence was of less probative value.
11. In regard to the provisions of section 333(2) of the criminal procedure code, the respondent concedes.

### **Analysis and Determination**

12. An appeal to this court from the Magistrate's court is by way of retrial. Consequently, it is under the duty to review the evidence, evaluate it and arrive at its own findings. However, allowance must be made for the fact that unlike the appellate court, the trial court had the benefit of hearing and seeing the witnesses first hand (see *Oneko vs Republic* (1972) EA 132 ).
13. I have considered the evidence, the Memorandum of Appeal, the lower court record and the Appellant's submissions. In my view the following issues arise for determination;
  - a). Whether the prosecution's case was tainted with contradictions and inconsistencies.



- b). Whether the prosecution's case was proved beyond reasonable doubt.
- c). whether there was compliance with the proviso to section 333(2) of the criminal procedure code.

**a. Whether the prosecution's case was marred with contradictions and inconsistencies**

- 14. The Appellant has submitted that there were contradictions between the testimony of PW1 and PW2 on what time/day the crime was committed. I have noted the contradiction. PW1 talked of 31/3/2021 at 3.00 am while PW2 stated 1/4/2021 at 11 pm.

The incident is reported to have taken place at night, and according to the two witnesses it was then either on the night of 31st march or 1st April. The two days follow each other and to confuse days which were following each other is not odd. The contradiction is not substantive so as to affect the prosecution's case, and there is no indication that either witness was out to deliberately mislead the court.

- 15. In the case of Richard Munene v Republic [2018] eKLR the court of Appeal had this to say about contradictions and inconsistencies: "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
- 16. This complain is therefore without merit, and I dismiss it.

**b). Whether the offence was proved beyond reasonable doubt.**

- 17. The Appellant was charged with trafficking in Narcotic Drugs Contrary to Section 4 (a) of the Narcotics Drugs and Psychotropic and Substance Act (The Act). Section 2 of the Act defines "Trafficking" to mean "Importation, Exportation, Manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery, distribution by any person of 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 of the thereof....."
- 18. Further the Court of Appeal in Gabriel Ojiambo Nambezi Vs Republic (2007) eKLR, stated as follows; "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 trial prove by evidence the conduct of an accused person which constitutes trafficking".
- 19. The accusation against the Appellant is that he was the driver of the motor vehicle registration No. KCQ 339, which was carrying drugs, inside a concealed compartment in the dashboard. The vehicle was moving from the direction of Moyale heading to the general direction of Isiolo.
- 20. The Appellant was not the owner of the subject motor vehicle but he was in possession of it. Lucy Wangui Mungai (PW3) informed the court that she had hired out the vehicle to the Appellant and one other person. A car lease agreement was signed. They told her they wanted to use the vehicle to pick up a mother to one of them from Moyale. She later handed the vehicle to the Appellant at Tosha Petrol Station at Ruiru. She told the court that the vehicle was registered to his brother Jackson Njeru. The car hire agreement was produced.



21. Thus, apart from the fact that the Appellant was found driving the vehicle, PW3 did confirm that he is the person she surrendered the vehicle to. The next time PW3 located the vehicle was by use of a tracking system. The vehicle was in Isiolo police station having been confiscated by the police. I am satisfied, based on the handing over of the vehicle to the Appellant and the fact that he was driving the vehicle when he was stopped by PW1 and PW2 that the Appellant was in possession of the motor vehicle at the time.
22. The carrying of the drugs in a vehicle, would fit the term “Conveyance” within the context of Section 2 of the Act. In this regard I find support in the decision of the court in Mohammed Farrau Bakari Vs Republic (2006) in which while considering the term “Conveyance” the court held “The term “Conveyance” is defined to mean” a conveyance of any description used for carriage of person/goods and includes any air craft, vehicle or vessel.”
23. PW1 and PW2 told the court that they stopped motor vehicle registration number KCQ 339P at Merti junction along the Moyale -Isiolo highway. On searching it they found 14 pales of what looked like cannabis sativa, inside a concealed dash board. The motor vehicle was being driven by the Appellant. There was another person in the vehicle (2nd accused), who was later acquitted by the trial court. The vehicle and the drugs were photographed and the photographs produced ( PEx1-10). The Government Analyst (PW4) who tested the substance formed the opinion that the substance was cannabis sativa.
24. I have considered the Appellant’s defence. He made an unsworn statement in which he denied the offence while stating that he was not driving the motor vehicle. However, his denial did not shake the evidence of PW1 and PW2 who arrested the Appellant while “on the wheel” of the subject motor vehicle. Their evidence was further corroborated by the testimony of PW3 who told the court that she personally handed the vehicle to him at a specific location.
25. I am satisfied that the prosecution proved the offence of trafficking beyond reasonable doubt, and the Appellant was rightly convicted.
26. On the sentence, the Appellant has argued that the trial court failed to consider the period he spent in custody prior to conviction.

I have perused the record and noted that the Appellant was first arraigned in court on 06/4/2021 and released on bond on 5/7/2021. Thus, he spent about 2 months in custody. Pursuant to the proviso to section 333 (2) of the *Criminal Procedure Code*, the trial court is obligated to consider the period spent in custody by an accused person. The sentence by the trial Magistrate is silent on whether the 2 months were considered. The Appellant’s complain in this regard is therefore valid.

27. In conclusion; -
  - a). The conviction of the Appellant by the trial court is hereby upheld, and Appeal dismissed.
  - b). The sentence is hereby varied to the extent that the stated sentence is hereby reduced by a period of 60 days.

**DATED, SIGNED AND DELIVERED AT ISIOLO ,THIS 12TH DAY OF MAY 2025.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Kashane Gollo- Court Assistant

Abdullahi Mohammed- Appellant



Mr. Ngetich – for the Respondent.

