Oyugi v Republic (Criminal Appeal E126 of 2024)
[2025] KEHC 8269 (KLR) (10 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E126 OF 2024

AC BETT, J

JUNE 10, 2025

BETWEEN

VICTOR OYUGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon V.O. Amboko (SRM) in Kakamega CMCCR. Case No. 455 of 2022 delivered on 30th October 2024)

JUDGMENT

Background

1. The Appellant was charged with the offence of trafficking narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control (Amendment) *Act No. 4 of 2022*. The particulars of the offence were that on the 1st day of April 2022 at Shibuli area along Kakamega Mumias Road in Kakamega County, the Accused trafficked by transporting narcotic drugs namely cannabis sativa (bhang) to wit fifty five (55) big rolls with a street value of Kshs. 16,500 using a motor vehicle registration number KAS 240E make Toyota Corolla white in color in contravention of the said Act.

2. The Appellant denied the charges and after a hearing in which the prosecution called six (6) witnesses, he was convicted of the said offence and sentenced to pay a fine of Kshs. 100,000 and in default to serve imprisonment for a period of three (3) years.

3. The Appellant was aggrieved by the conviction and sentence and lodged this appeal in which he set out the following grounds of appeal;

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" 1. That, the trial court erroneously judged me where crucial witnesses (the public who raised an alarm of the said abandoned vehicle claimed to be ferrying drugs) were not called to testify.

2. That, the learned trial magistrate grossly erred in law and facts by judging me without considering the contradictions in the whole proceedings.

3. That, the trial court grossly erred in law and facts by rejecting my plausible defend without proper evaluation.

More grounds to be adduced upon received (sic) proceedings in full."

Prosecution's Case

4. The prosecution's case was that on the material date, one PC Peter Kobia who was performing his general duties at Kakamega went on patrol at Shibuli area following a call from members of the public that there were eight (8) armed mobs within the area whose intent was to commit robbery. In the course of their patrol, along ACK Mumias Road at Carol's bar, there was a motor vehicle registration number KAS 240S white saloon parked along the road. The Appellant was sleeping inside the car. PC Kobia who was with his colleague PC Wilson Toroitich asked the Appellant to open the door but did not receive a response. They proceeded to open the door which was not locked, and the Appellant who appeared hostile used abusive language on them. On searching the car, they found a navy-blue bag on the co-driver seat. Inside the bag they found 55 rolls of cannabis sativa wrapped in khaki paper. He counted 55 rolls but did not open the khaki paper. Since the vehicle could not move as it was damaged, it was pushed by members of the public to Shibuli police station. The Appellant produced a letter of appointment when asked for identification. The vehicle was photographed at the police station.

5. Corporal Harun Ndera testified that when he received a call from PC, Peter Kobia, he proceeded to the scene where he was informed of the incident. The Appellant was rude upon interrogation and a search of the car yielded a certificate of appointment bearing the names Victor Oyugi. The certificate was from the Administration police and the Appellant confirmed that it was his. He then informed the OCS Kakamega Police Station who instructed him to book the suspect together with the exhibits.

6. The case was investigated by PC Clement Kiprono from the DCI Kakamega Central, a narcotics officer who requested PC Emmanuel Olando of Crime Scene appointed by the Director of Prosecutions vide Gazette Notice No. 3/2/2023 to visit and process a scene where some dry plant materials were discovered inside a saloon car, Toyota Corolla white in color. PC Olando visited the scene on 3/4/2022 and documented the scene by taking photographs which he produced as PExh3 (a)-(e). The photographs showed the car which was parked at Shibuli Police Station, the damaged front part of the car, where the plant material was found in the motor vehicle packed in a dark bluish bag, a close up view of the plant material with the bag opened and finally, the scene where the motor vehicle had been found parked initially.

7. PW5 was PC Milford Toroitich. His evidence was that on the material date he was on patrol with PC Peter Kobia within Mumias Road when he heard screams stating that there were thieves. The thieves wanted to break into Carol's bar but did not succeed and ran away. PW5 recounted that they saw a car along the road and asked members of the public whose it was and since they did not know the owner, they suspected that it was involved in an accident because the front of the car, motor vehicle registration No. KAS 240E, was damaged. The driver was sleeping inside and they woke him up only to notice that he was drunk. They conducted a search and found at the co-driver's seat under the seat, a dark blue bag which contained rolls which were tied in a polythene bag and which when opened, were found to be cannabis sativa. Since the owner of the vehicle did not respond to their questions,

they opted to take him to the police station. Members of the public helped to push the vehicle to the police station. The rolls were fifty five (55) in number.

8. The investigating officer also forwarded an exhibit memo to Richard Kimutai Langat (PW6) a gazetted Government Analyst working at the Government Chemist Kisumu which the Analyst received on 4/4/2022. The memo form forwarded a blue bag marked Kakamega DCI Central with the Appellant labelled as Victor Oyugi. It contained 55 rolls of plant material which the witness weighed and found to be 5kgs. He analyzed the material using chemicals and found all the rolls to be cannabis sativa which is a narcotic drug. He had marked the bag KI98/2022. He produced the Government Analyst Report (PExh5) and confirmed that the blue bag and the rolls of bhang were in court.

9. PC Kiprono the investigating officer said that during the investigations, he realized that the Appellant was a police officer from Shianda Police Station in Mumias East. He testified that he conducted investigations and after documenting the same to the Government Analyst at Kisumu and after receiving a report confirming that the exhibit was cannabis sativa, he prepared the file and the Appellant was later charged. PC Kiprono produced the 55 rolls of bhang and the bag as exhibits in court and stated that the officers at Shibuli Police Post had prepared an inventory which the Appellant who was drunk and unruly had refused to sign.

Defence Case

10. In his defence, the Appellant in an unsworn statement said that on 31/3/2022 in the evening, he drove his car to Kakamega after duty as he intended to do some shopping and visit friends. He did the shopping then visited his friends in a bar at Kurdi area in Kakamega. He took alcohol till 9.00 pm and got drunk. He drove his vehicle till Shibuli area and parked it on the left side of the road as he was too drunk to drive. He made sure he locked the car door and went to sleep. As he slept, two police officers who were armed and in uniform knocked the car door. He opened the car and they handcuffed him once he alighted. They asked him if he was one of the thieves as a theft had occurred, he denied. They pushed him back to the car and took him to the police station where he was taken into the office. Thirty (30) minutes later, they came back with a bag which they stated they had found in the car. They told the Appellant that the bag was his baggage and despite his protestation started counting bhang while claiming that they had found it in his car. The Appellant denied the offence and insisted that he was framed.

Submissions

11. The Appellant submitted that there were material contradictions in the evidence given by the two witnesses who were together at the time of the incident. According to him, PW1 said that when he opened the car door, he found a travel bag on the co-driver's seat. On the other hand, PW5 said that the bag was under the seat. He submitted that the evidence of PW1 and PW5 is full of contradictions and inconsistencies and was fabricated to pin him.

12. The Respondent did not file any submissions.

Analysis and Determination

13. This is a first appeal and the duty of the court is as enunciated in the case of Okeno v Republic [1972] EA 32 which is to analyze and re-evaluate the evidence adduced at the court afresh so as to draw its own independent conclusion while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses as they gave evidence.

14. 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."

15. It is not in dispute that the Appellant was found asleep in his car was arrested by police officers from Kakamega Police Station on 1/4/2022 at 1.00hrs. What is in dispute is whether at the time of the arrest, the Appellant had in his car a blue travel bag containing 55 rolls of cannabis sativa.

16. It cannot be gainsaid that in a criminal case, it is incumbent on the prosecution to prove its case against the Appellant beyond reasonable doubt. In the case of Moses Nato Raphael v Republic [2015] eKLR the Court of Appeal cited the case of Woolmington v DPP [1935] A.C 462 where the court: -

> " The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This Principle is well captured in the time honored English case of Woolmington v. DPP (1935) A. C 462 where the court stated:-
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> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject [to the qualification involving the defence of insanity and to any statutory exception].If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

17. As to what amounts to reasonable doubt, the Court of Appeal in the case of Tony Njogu Nyanjui v Republic [2023] KEC 1122(KLR) cited Lord Denning in the case of Miller v Ministry of Pensions [1947] 2 AII ER 372, where he said:-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. if the evidence is so strong against a man as to leave only a remote possibility in his favour with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

18. In this case the prosecution needed to prove that at the time they arrested the Appellant, he was conveying in his car, the cannabis sativa that was produced in court.

19. The prosecution led evidence which they maintained, proved the charges. However, the Appellant has faulted the evidence as being fraught with contradictions and inconsistencies. He has listed the instances of the contradictions and the inconsistencies.

20. Not every inconsistency or contradiction in the prosecution's evidence is fatal to a conviction. It must be demonstrated that the inconsistency and contradiction is so substantial as to go to the root of the

charges. In Erick Onyango Odeng v. Republic [2014] eKLR, the Court of Appeal, citing with approval the case of Twehangane Alfred v. Uganda [2003] UGCA6, stated as follows:-

> "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."

21. In MTG v. Republic [2022] KEHC 189 (KLR), Mativo J. considered the issue of inconsistencies in evidence and stated:-

> "15. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question to be addressed is whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in David Ojeabuo v Federal Republic of Nigeria that:-
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> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."
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> 16. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from."

22. I have analyzed the prosecution's evidence and established that indeed, there are certain contradictions and inconsistencies in the prosecution's case. The Appellant took issue with the evidence as to who handcuffed him as whereas PW1 stated that he was handcuffed by In-charge, the In-charge (PW2) testified that he found the Appellant was already handcuffed. The evidence of PW5 was that he and PW1 handcuffed the Appellant and the trial court found their evidence consistent. On re-evaluation, I find that the apparent difference evidence as who handcuffed the Appellant is a discrepancy rather

than a contradiction. The evidence of PW2, the In-charge corroborated that of PW5 that he and PC Kobia handcuffed the Appellant.

23. As to whether the Appellant produced the letter of appointment to PW1 and PW5 or whether it was recovered upon a search as testified by PW2, the same cannot be termed as material. In the course of giving evidence, witnesses may not necessarily recall the sequence of events in the same way.

24. The evidence of PW1 and PW5 placed the cannabis sativa in the co-driver's seat in the car that the Appellant was found in. That car was motor vehicle registration No. KAS 240E Toyota Corolla. They called PW2 who rushed to the scene and found the bag on the co-driver's seat that had rolls of bhang in Khaki paper. The evidence of PW2 clarified any discrepancy that was in the evidence of PW1 and PW5.

25. On the alleged inconsistency in the evidence of PW3 with the facts, I find that there was no inconsistency at all. PW3 testified that he was called upon to take photographs and reconstruct the scene. His evidence was that he reconstructed the scene. In my understanding, reconstruction would entail retrieving the suspicious baggage that had been found in the car but now in custody of the investigating officer being released to the witness to enable him to as far as is practicable, recreate the same scenario as obtained during the discovery of the drugs. PW1 the investigating officer confirmed the reconstruction of the scene.

26. I have examined the photographs produced by PW3 as well as his evidence in relation to the documentation of the scene. The evidence was well articulated, objective, and tendered in a professional and impartial manner. The photographs fortify the evidence of PW1, PW2 and PW5. It can therefore not be faulted.

27. In regard to the submissions that PW2 counted the rolls before the trial court and found 54 rolls, I note that during cross-examination of PW2, the witness counted the rolls and the court observed that there were 54 rolls plus bhang residue inside the bag. The Government Analyst who testified as PW6 said that he received 55 rolls of dry plant material, tested from PW7, tested all of them, and established that all of them were cannabis. PW7 testified that he was the one who labelled the bhang V1 to V55 and forwarded the same to PW6 for analysis. The exhibit memo corroborated PW7's evidence that he forwarded the 55 rolls. In light of the evidence, the fact that the bhang produced in court was one roll less could be due to the loosening of one of the rolls during handling thereby resulting to the residue that was evident to the trial court.

28. The Appellant submitted that PW1 testified that the vehicle which was parked on the side the road was motor vehicle registration number KAS 240S yet he had never owned or driven motor vehicle registration number KAS 240S. I have perused the evidence adduced by the prosecution witnesses as well as the photographs taken of the subject motor vehicle and I am of the view that PW1 made a mistake in recalling the registration number of the vehicle which was resolved by all the other evidence that conclusively established that the Appellant was caught in motor vehicle registration No. KAS 240E. In any event, it is common knowledge that people often get confused with dates and registration numbers and the failure by PW1 to properly identify the car is attributable to lapse in memory.

29. The Appellant further contended that the prosecution failed to produce the occurrence book number, the investigation diary and the search certificate. The Appellant further argued that there were contradictions as to who between PW1, PW5 and the investigating officer prepared the inventory which was produced in court.

30. The pertinent issue is whether the failure to produce the occurrence book number, the investigation diary and the search certificate and the failure to establish who prepared the inventory were fatal to the prosecution's case. In my view, making of entries in an occurrence book, preparation of search

certificate or inventory are procedural steps that are taken during the course of investigations and it is not imperative that they are being produced in court in order to secure a conviction. In the case of Leonard Odhiambo Ouma & Another v Republic [2011] eKLR the Court of Appeal held as follows:-

> "...Failure to compile an inventory contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial. We find no substance in this ground as well..."

31. In any event, the witnesses were clear that they found the 55 rolls of cannabis in the Appellant vehicle, seized it, forwarded it for analysis where it was confirmed to be cannabis after documenting it by way of photographing by a gazetted scene -of-crime officer, and produced all the recovered rolls in court. In Stephen Kimani Robe &others v Republic [2013] eKLR, the court held that:-

> "The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."

32. The Appellant did not demonstrate that the failure to produce the occurrence book and search certificate or to confirm conclusively who prepared the inventory prejudiced his case.

33. The Appellant faulted the prosecution for failure to undertake forensic evidence of wit the lifting of fingerprints on the bag to determine the real owner and the failure to adduce the evidence of members of the public who were allegedly at the scene. With respect of the forensic examination of the bag, there was sufficient evidence that it was found in the Appellant's car. The Appellant was alone in the car at the time. The forensic examination would have only been necessary if the car had more than one occupant.

34. In regard to the witnesses, it is well settled that the prosecution is not obligated to call all possible witnesses in a case. In the case of Julius Kalewa Mutunga v Republic [2006] eKLR the Court of Appeal held:-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

35. The prosecution only needed to call such witnesses as were necessary to establish truth as was held in Bukenya &others v Uganda [1972] E.A 549. It is only where the evidence adduced is barely adequate that the court may infer that the witnesses that were not called would have most likely given evidence that was adverse to the prosecution's case. In the present scenario, there was sufficient evidence that the Appellant was caught in possession of 55 rolls of cannabis in his vehicle. His unsworn statement was a mere denial and an allegation that he was framed. His defence did not displace the prosecution's case which was overwhelming.

36. Having reviewed the prosecution's and the defence case and re-evaluated the evidence in totality, I find that the case against the Appellant was proved beyond reasonable doubt and I therefore uphold the conviction.

37. In regard to the sentence, I note that the Appellant was a first offender, was remorseful and has heavy family responsibilities. The trial court considered the Appellant's mitigation as well as the pre-sentence

report in meting out its sentence. In Caroline Anna Majabu v Republic [2014] eKLR, the Court of Appeal stated that: -

> "While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders."

38. Regardless of the above holding of the Court of appeal, it was noted by the trial court that the Accused abused his position. He deserves a suitable penalty.

39. The street value of the cannabis was said to be Kshs. 16,500. A fine of three times the street value would be Kshs 50,000.

40. I therefore set aside the sentence of the lower court and substitute it with a fine of Kshs. 50,000/= and in default, one (1) year imprisonment to run from the date the Appellant was sentenced which was 31st October 2024.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

The Appellant

Ms. Chala for the Respondent

Court Assistant: Polycap