



**Boru v Republic (Criminal Appeal E003 of 2024)
[2025] KEHC 12929 (KLR) (Crim) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E003 OF 2024
SC CHIRCHIR, J
SEPTEMBER 18, 2025**

BETWEEN

ABDIKADIR JALDESA BORU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon. L.Mutai (CM) delivered on 30th May 2024 in Criminal case No. E598 of 2021 at the chief Magistrate's court at Isiolo)

JUDGMENT

1. The Appellant was charged with the offence of Trafficking in Narcotic Drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act Number 4 of 1994 (The Act). The particulars of the charge are that on 20th day of July, 2021 at Merti Junction, Archers post, along Marsabit – Isiolo Highway, within Samburu county, was found trafficking eight point nine zero (8.90) kilograms of cannabis sativa (bhang) with street value of Kshs. 160,000= (one hundred and sixty thousand in motor vehicle registration number KCH 807H make Nissan Tiida which was not medically prepared.
2. He was convicted of the charge and imposed a fine of Kshs. 800,000 or 5 years imprisonment in default of the fine. He was aggrieved by the outcome and consequently filed the present appeal.

Petition of Appeal

3. He has set out the following grounds.
 1. That the charge was not proved beyond reasonable doubt.
 2. That the evidence was not cogent or adequate to form a basis of trial.



3. That he was not accorded a fair hearing in accordance with Article 50 of the constitution.
 4. That the trial court relied on incontinence and shallow evidence.
 5. That his defence was disregarded.
 6. That the trial magistrate failed to comply with section 333(2)
 7. That his mitigation as well as a the circumstances of the offence was not considered.
 8. That the street value of the drugs was not established .
4. The appeal proceeded by way of written submissions.

Appellant's submissions

5. It is the appellant's first submissions that there was no evidence on the value of the drugs; that indeed there was no valuation done evidenced by the fact that no certificate of valuation was tendered in evidence. He further submits that the ascertainment of the value of the drugs was necessary for purposes of the sentencing; that failure to carry out valuation was an infringement of section 86 of the Act.
6. The appellant also submits that he was not given a chance to mitigate and therefore there was no compliance with sections 216 and 329 of the criminal procedure code (CPC) . That in the circumstances the court did not consider the circumstances of the crime and his mitigation.
7. It is finally submitted that in sentencing the Appellant the trial court failed to comply with section 333(2) of the Criminal Procedure Code CPC. He states that he spent close to two (2) weeks in custody between his arrest on 20-07-21 until 2.8.21 and later returned to custody from 7.4.24 until he was convicted on 31/5/2024.
8. I need point out that I have seen another set of submission by S. Ogeto Ongori & Company Advocates dated 17.3.25 but the date of filing is not indicated. I have not seen a Notice of appointment of the said advocates, and the firm was not representing the Appellant in the lower court. The filing of the submissions by the said firm of Advocates was therefore irregular and the submissions in question are hereby expunged from record.
9. The Respondent did not file any submissions.

Analysis and determination

10. The role of this court as the 1st appellant court is well settled. It is to review the evidence, evaluate and come up with its own findings. The Appellate court must however take into consideration the fact that the trial court had the advantage of hearing and seeing the witnesses first – hand.
11. Upon consideration of the record of the trial court, the grounds of appeal and appellant's submissions I have identified the following issues for determination:
 - a. Whether the prosecution's case was proved beyond reasonable doubts.
 - b. Whether the value of the drugs was ascertained and whether the said value was material to the prosecution's case.



- c. Whether the appellant's right to fair trial was infringed.
- d. Whether the appellant was given a chance to mitigate and whether the sentence was excessive in any event.
- e. Whether section 333(2) of the CPC was complied with.

Whether the prosecution's case was proved

12. The appellant was found in possession of the drugs. This was in accordance with the testimony of the PW3, PW4, police officers working at multi -agency team, and were stationed at Sabacha Area along Moyale – Isiolo Highway. They stopped Motor vehicle registration number KCH 807H Nissan Tiida, and the only occupant of the vehicle was the driver who was the appellant herein. They searched the vehicle and found that there were materials concealed inside two of the vehicles doors. They called the scene of crime personnel, who arrived and dismantled the doors. They removed the substance which was later identified as narcotic drugs.
13. On whether the substance was prohibited substance ,the government analyst (PW6) testified that he tested the material handed over to him and established that it was cannabis. Under Schedule 1 of the Act, cannabis is classified as a narcotic drug. The substance was weighed and a certificate of weighing was produced 7(a) showing that the drug weighed 8.90 kg.
14. The next question is whether the Appellant Intended to Traffic the drug.PW3 and PW4 testified that they stopped the motor vehicle on Moyale –Isiolo Highway. The appellant told them that he was headed to Nairobi form Moyale. The drugs were sealed inside the vehicles doors' compartments which had to be broken for the drugs to be removed. The circumstances of being in transit and the manner in which the drugs were concealed shows that it was meant for trafficking and not for any other purpose.
15. I have noted that the appellant did not sign either the sampling certificate, inventory or weighing certificate. However within the inventory lists are his personal items like the driving licence and identity card. Am therefore satisfied with the authenticity of the said documents notwithstanding the lack of signature by the Appellant.
16. Further the Appellant told the court that he was given the motor vehicle in Marsabit but did not provide the name of the person who handed over the vehicle to him. Further he denounced the car hire agreement which showed that he had hired the vehicle from PW1, without giving any explanation as to how his signature ended up in the agreement. The Appellant came out as being less candid in his defence. His defence was simply implausible.
17. I am satisfied that in view of the foregoing the prosecution proved its case beyond reasonable doubts.

Whether the value of the drugs was ascertained

18. Section 86 of the Act requires the production of a valuation certificate, where the fine to be imposed is to be determined by the market value of the drug. However the requirement of section 4(a) is the weight of the drug, not the value. That is to say where the weight of the drug is over 100 grams then a person is convicted and is liable to a maximum of Kenya shillings 50 million or market value of the drug , whichever is higher. The trial court did not peg the sentence on the value of the drug. The magistrate simply meted out a sentence less than prescribed under the Act, when the weight of the drug is above 100 grams. The appellants complainant would have been valid if the fine was in excess of Kshs. 50 million. The weight of the drug was however ascertained to be 8.95 kgs. This ground of Appeal is also without merit.



Whether the appellant right to fair trial was infringed

19. It is the appellant case that his mitigation was not taken. A perusal of the record shows that this ground of appeal is valid. It is only the prosecution who informed the court that the appellant was a first offender. Otherwise the record is silent on whether the appellant was given a chance to address the court on mitigation. Mitigation is part and parcel of the trial. And consequently an accused right to fair hearing is equally protected during this stage of the hearing (Ref: Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR)
20. The appellant sentencing is at the discretion of the trial court and an appellate court can only interfere if inter alia the sentencing is wrong in principle. Failure to give a chance to the appellant to mitigate was wrong in the principle and this court has a reason to interfere with it. Consequently taking into account that failure this court will review the sentence to a fine of Kshs. 600,000/= or 4 years imprisonment in default.

Whether section 333 was complied with

21. The above stated section of CPC places an obligation on the trial court to factor in the period spent by a convict in custody prior to conviction. It is apparent on the face of the record that no such consideration was made.
22. In conclusion the appeal herein , partially succeeds and I hereby proceed to make orders as follows:
 - a). The conviction of the Appellant is hereby upheld.
 - b). The sentence by the trial court is hereby set aside and substituted with a fine of Kshs. 600,000/= and 4 years imprisonment in default.
 - c). The term of imprisonment on (b) above is hereby discounted by 44 days being the sum of the days the Appellant was in custody.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 18TH DAY OF SEPTEMBER 2025 .

S.CHIRCHIR.

JUDGE.

In the presence of:

Roba Katelo – court Assistant

The Appellant

Mr. B.Ngetich -for the Respondent

