



**Herkena v Republic (Criminal Appeal E005 of 2024)
[2025] KEHC 12899 (KLR) (Crim) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E005 OF 2024
SC CHIRCHIR, J
SEPTEMBER 18, 2025**

BETWEEN

ALINOOR MOHAMED HERKENA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment of Hon. L.Mutai (CM) delivered on of 28th March 2024 in Isiolo chief Magistrate’s court criminal case No. E322 of 2022)

JUDGMENT

1. The Appellant herein was charged ,with four others, for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 (The Act.) The particulars of the offence are that on 25.06.2022 at Sabache area along Isiolo – Moyale Highway, within Samburu County, were found trafficking in Narcotic drug namely cannabis sativa to wit 73.6 kilograms, with street value of Kshs. 2,208,000/= in motor vehicle registration number KCB 666S in contravention of the said Act.
2. The charges against the other four were withdrawn before the trial began. The appellant was later tried and convicted of the offence and sentenced to a prison term of 20 years.

Petition of Appeal

3. The Appellant has brought the present appeal ,challenging both the conviction and sentence . He has pleaded that the case was not proved beyond reasonable doubt; that he was not accorded a fair hearing in terms of Article 50 of *the Constitution*; he faults the trial court for relying on inconsistent and shallow evidence; that his age and circumstances of the offence and mitigation were not considered. He further states that his defence was not considered and that, the sentence was excessive.



4. The appeal proceeded by way of written submissions.

Appellant's submissions.

5. The appellant submits that the standard of proof as set out in the case of Philip Muiruri Ndaruga -vrs- Republic (citation not provided) ,was not met. He states that contrary to the provisions of Section 86 of the Act, the value of the drugs was not ascertained. He submits that PW4, the owner of the vehicle was the actual culprit. He further states that he was an innocent victim, who was set up by PW4 on a mission about which he knew nothing ;and that the prosecution failed to delve into the actual circumstances of the case.
6. It is further submitted that the prosecution's evidence was inconsistent and shallow. He cites the inconsistency of PW4's testimony on how much the car hire charges were; whether or not he approved the modification made of the vehicle and whether he had hired out the vehicle to the Appellant or whether the Appellant was his employee. It is submitted that the above contradictions caused prejudice to the appellant.
7. On the sentence, he submits that he was a young man of 20 years, and was first offender and that the sentence was excessive in the circumstances.

Respondent's submissions

8. It is the respondents submissions that the offence was duly proved. In this regard ,the respondent has relied on the provisions of Section 4(a) of the Act and the findings of the Justice K. W. Waweru in the case of Timamai -Vs- Republic (Criminal Appeal Number E. 002 of 2023) on the elements that make up the offence . On the issue of transportation of the drugs, It is submitted that the testimony of PW1, PW2, PW3 and PW4 satisfactorily proved that the appellant was transporting drugs.
9. On whether the substance found on the appellant was drugs, the appellant submits that the Government Analyst (PW7) tested the substance and established that it was cannabis sativa. On quantity, It is stated that the Investigations Officer produced a certificate of weighing, indicating that the cannabis weighed 73.6 kilograms.
10. In respect to whether Section 86 of the Act was complied with, it is submitted that the section is only applicable during sentencing and only if the sentence imposed, is a fine.
11. The respondent admits that there was some contradictions between the testimony of PW1 and PW2 , concerning the date of his arrest but further submit that the inconsistency was minor, and did not materially affect the prosecution's case.
12. On the sentence imposed, it is the respondents submissions that the sentence of 20 years was lenient when considered against the prescribed sentence under Section 4 (a) (ii) of the Act.

Analysis and determination

13. This is a first appeal and it is trite law that the first appellate court is under the duty to review the evidence, do its own analysis and arrive at its own conclusion, while taking into consideration the fact that the trial court had the advantage of hearing and seeing the witnesses. (see :Okeno vs Republic (1972)E.A 32)
14. I have considered the grounds of appeal, the trial record and the parties' submissions and I have identified the following issues for determination :



- a. Whether the prosecution's case was marred by contradictions and inconsistencies.
- b. Whether the prosecution's case was proved beyond reasonable doubt.
- c. Whether the appellant's mitigation was considered and;
- d. whether the sentence was excessive.

contradictions and inconsistencies

15. The appellant has highlighted a number of inconsistencies. He has stated for instance that whereas PW4 had earlier told the court that he hired out the vehicle for between Kshs. 100,000 to kshs. 120,000/=, on being recalled, he stated it was hired for Kshs. 70,000 - 100,000/=. He further states that the same witness contradicted himself on whether he had agreed to the modification of the vehicle. He further states that whereas, PW 4 stated that he had hired out the vehicle, the investigation officer told the court that the appellant was PW4's employees.
16. The Law on the contradiction and inconsistencies is well settled; they become material only if they affect the substance of the prosecution's case or reflect a deliberate attempt by a witness to lie. (Ref: Erick Onyango Ondeng v Republic [2012] KEHC 3600 (KLR))
17. The question of whether the vehicle was hired out at a particular price or the other, does not affect the substance of the case, namely that the Appellant was found driving a vehicle in which drugs were found. In the same vein, it matters not whether the Appellant was a hirer of the vehicle, or an employee of PW4.
18. The appellant, submit that he was a victim of circumstances and seem to suggest that PW4 was the mastermind. However, even if the PW4 had been charged it would not have lessened his culpability. This line of defence is therefore misplaced.
19. The contradictions and inconsistencies did not dent the prosecution's case, neither does it appear that any of the witnesses was out to deliberately mislead the court.

whether the Appellant's defence was considered

20. In his testimony the appellant, he admitted to have been the one driving the vehicle on the material day ,but states that he was not aware about the existence of the drugs in the vehicle; That the drugs belonged to PW4, who gave him the vehicle. I have looked at the judgment of the trial court and observed that the magistrate adequately interrogated the appellant's defence. The trial magistrate dismissed the defence on the basis that the appellant failed to call any of the 4 passengers he alleged to have been carrying to corroborate his testimony. She found the defence implausible. I have no reason to differ with her finding because unlike this court she had the advantage of hearing the witness firsthand .

Whether the prosecution's case was proved

21. In terms of Section 2 of the Act, trafficking in narcotics involve "importation , exportation, manufacture, buying, sale, giving supplying, storing, administering ,conveyancing, delivery or distribution" of Narcotic or Psychotropic substance.
22. The appellant admitted that on the material, day he was driving motor vehicle registration number KCB 666S from Marsabit towards Meru. According to PW1 and PW2 on the same day they stopped the subject motor vehicle at Sabache Area , along Moyale- Isiolo highway and searched it . A substance which later turned out to be cannabis sativa was recovered in a compartment located at the rear of



the vehicle. Thus there is evidence that the appellant was conveying the said substance from Marsabit enroute to Meru.

23. On whether the substance was a prohibited substance, PW7 told the court that she tested the substance using the appropriate chemical methods, and established that the material was cannabis. Cannabis is categorized as Narcotic drug, which is a prohibited substance. Further, PW2 did the sampling and weighing and produced the respective certificates (PEXB 2 and 3 respectively). The later certificate show that the drugs weighed 73.6 kgs . On the question of intention, the fact that the Appellant was driving from one county to another and the fact of concealing the drugs in a sealed compartment in the vehicle , testify about his intention, and that was to traffick the drug.
24. Thus all the ingredients which the prosecution must prove, as per the decision in Timama vs Republic(supra) are present in this case. I am therefore satisfied that the prosecution's case was proved beyond reasonable doubt.
25. The appellant has also argued that section 86 of the Act was not complied with. That is to say the value of the drug was not ascertained. This section however only becomes relevant if the court decides to impose a fine. This is because the amount of the fine to be imposed is dependant upon the value of the drug , the subject of trafficking. However in this case no fine was imposed and thus the section became irrelevant.

Sentence

26. Section 4(a) (ii) of the Act ,Prescribes a fine of not less that Kshs. 50 million, or 3 times the value of the narcotics , whichever is greater, or a prison term of 50 years or both fine and imprisonment. It is evident that the Act prescribes /severe punishment for the offence. Thus considered against the prescribed sentence, I am in agreement with the prosecution that the sentence of 20 years was therefore lenient.
27. On mitigation despite the appellant submission that his mitigation was not considered is not true. The record shows that the accused did submit through his Advocate and the court considered his mitigation before passing the sentence
28. In the end , it is my finding that the appeal has no merit. It is hereby dismissed.

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

S CHIRCHIR

JUDGE

In the presence of:

Roba Court Assistant

Appellant- present

Mr. B. Ngetich for the Respondent.

