



**Kerrow v Republic (Criminal Appeal E059 of 2022)
[2024] KEHC 1197 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E059 OF 2022
JN ONYIEGO, J
FEBRUARY 9, 2024**

BETWEEN

KARU IBRAHIM KERROW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Wasike Senior Resident Magistrate, in Mandera SRM'S Court Criminal Case No. E203 of 2021 delivered on 28.07.2022)

JUDGMENT

1. The appellant was convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the *Narcotics and Psychotropic Substances (Control) Act* No.4 of 1994 and sentenced to a fine of Kes. 1000,000/- and in addition to serve 6 years' imprisonment. Particulars of the offence were that on 10.05.2021 at Banisa Town in Banisa Sub County within Mandera County was found trafficking narcotic drugs to wit fifteen (15) Kg cannabis sativa with a street value of Kes. 150,000/- which was not medically prepared.
2. The grounds of appeal are that:
 1. The learned trial magistrate failed to appreciate the need to analyze the parties evidence hence reaching a wrong determination.
 2. The learned trial magistrate's finding was influenced by the finding in Mandera MCCR/E/ NO. 203 of 2021.
 3. The learned trial Magistrate erred in law and fact by convicting the appellant after the prosecution had failed to prove their case beyond reasonable doubt.
 4. The learned trial magistrate considered extraneous facts in reaching an erroneous determination.



5. The sentence meted out by the trial court was not only excessive but also harsh.

Submissions

3. The appeal was canvassed by way of written submissions. The appellant while relying on his submissions dated 02.08.2022 contended that prosecution did not prove its case to the required standard and therefore, his conviction and thereafter sentence was not safe. That the sentence meted out in the circumstances herein was not only harsh but also excessive. He urged this court to allow the appeal, quash conviction and set aside the sentence.
4. Mr. Kihara, the prosecution counsel on the other hand submitted while relying on his submissions dated 23.10.2023 that the evidence adduced by the prosecution witnesses was enough to convict the appellant with the current offence as all the ingredients were established. On sentence, it was contended that the sentence invoked by the trial magistrate was not only legal but also appropriate. Learned counsel basically supported the holding of the court. He thus urged this court to find that the appeal lacks merit and thus ought to be dismissed.

Analysis and Determination

5. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify. [See *Okeno v Republic* (1972) EA 32].
6. Briefly, PW1, Issack Makabila testified that on 10.05.2021, he was on patrol within Banisa Town when he got information that a non-native suspicious person, the appellant herein was spotted carrying a box. That together with APC Nurrow(pw2), they followed the appellant to a rented house where he had entered. That he arrested and took him to Banisa Police station where upon opening the box, they found suspected cannabis sativa weighing roughly 15 kgs.
7. PW2, APC Nurrow Hassan Ibrahim stated that on 10.05.2021 while on patrol with PW1 within Banisa Town, they got information that a male suspicious person was spotted carrying a blue metallic box. Together with PW1, they followed him to a rented room where they arrested him. That upon searching the box, they found 3 sacks with suspected cannabis sativa which they took possession of.
8. PW3, Sylvester Mauka testified that he was the investigating officer in the matter and that while at the police station, he saw PW1 and PW2 bring along the appellant who was carrying a blue metallic box. That members of the public were furious and shouting towards the appellant. It was his evidence that when the blue metallic box was opened, three sacks of plant material which he produced as Pex 2 a,b,c were found . He stated that he sent samples of the exhibit to the government chemist via a memo dated 23.05.2021 which he produced as Pex3. That the results received from the government chemist established that the samples submitted was cannabis sativa.
9. Via a ruling delivered on 25.10.2021, the trial court found that a prima facie case had been established against the appellant thus placing him on his defence.
10. DW1, Karu Ibrahim Kerrow in his sworn defence denied committing the offence herein. He termed the charges as a frame up. On cross examination, he stated that he was travelling from Moyale to Banisa when he was arrested. That he was arrested in a passenger vehicle and not in a rented house as was claimed.



11. DW2, Issack Sheikh Khalio stated that the appellant was arrested when they were on their way to Rhamu from Banisa. That he had nothing on him save for a paper bag. On cross examination, he stated that the appellant was arrested on 08.04.2021.
12. The appellant was charged with the offence of trafficking narcotic drugs. It was incumbent upon the prosecution to prove that the appellant was found in possession and trafficking of narcotic drugs which was not in medicinal preparation. The term “trafficking” is defined in section 2 of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) to mean –

“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.”
13. Was the material plant substance classified as narcotic drug. According to the government chemist report(pex.no.4), the plant material allegedly recovered from the appellant and submitted for analysis was classified as cannabis sativa which is a narcotic drug. The appellant did not challenge that aspect. Accordingly, it is my holding that the said plant was cannabis sativa which was not in medicinal preparation.
14. The next question is whether the said drug was found in the possession of the appellant. The only evidence relied upon by the prosecution is the testimony of pw1 and pw2 both police officers who claimed that through their own intelligence received information from members of the public that they had seen a suspicious and strange character within Banissa town carrying a metallic box.
15. The two officers who arrested the appellant and allegedly recovered the narcotic drug did not know the appellant before. In my view, they had no reason to frame up the appellant. During cross examination of pw1, the appellant did not put any questions to suggest that he was arrested while in a passenger vehicle as he purported in his defence. I have no doubt that pw1 and pw2 were independent witnesses hence there is nothing to challenge their testimony.
16. Dw2 said that he was with the appellant when he was arrested on 8th April 2021. However, the charge sheet talks of 10th May 2021 as the date of arrest and plea taken on 11th May 2021. It then follows that Dw2 is testifying over events that are of a different day or he was simply hired hence a liar. His evidence cannot be trusted.
17. In that regard, I entirely agree with the learned magistrate that prosecution proved its case beyond reasonable doubt that the appellant was found in possession the subject drug substance.
18. Was the cannabis sativa for purposes of trafficking? Considering the quantity involved measuring 15 kg and the manner in which it was packed and found, it could not have been for personal consumption but destined for sale or distribution. To that extent, the transaction can rightly be classified as trafficking. The appellant merely denied being found in possession of bhang He did not sway prosecution evidence or at all.
19. On the ground that the trial magistrate failed to analyze the parties’ evidence hence reaching a wrong determination, the same is not correct as the trial court noted that the appellant’s defence did not cast a shadow of doubt on the prosecution’s case and thus was rightly dismissed.
20. Concerning the allegation that the trial court’s determination was influenced by extraneous evidence, it remains unknown the extraneous evidence that the trial magistrate allegedly considered in reaching the impugned judgment. I say so for the reason that the appellant did not submit on how the finding



in Manderu MCCR/E/NO. 203 of 2021 influenced the trial magistrate's determination and what the relationship the said suit had with the suit herein. It is trite that he who alleges must always prove. [See section 107 of the Evidence Act].

21. On the question of sentence, the law is clear that sentence is a matter of discretion by the trial court and that the appellate court can only interfere if satisfied that the same is excessive or arrived at after considering irrelevant factors or upon applying wrong legal principles of the law. See Shedrack Kipkoech Kogo v R (2018) e KLR.
22. 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; or...
23. The appellant was sentenced to pay 1,000,000 in default to serve 6 years' imprisonment. Nothing has been demonstrated to show that the sentence by the trial court was illegal or severe in the given circumstances. Considering the seriousness of the offence in question, it is my considered view that the court properly exercised its discretion.
24. In view of the above finding, it is my holding that the conviction and sentence meted out by the trial magistrate was not only safe but also legal. Accordingly, the appeal is hereby dismissed.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH FEBRUARY 2024

J. N. ONYIEGO

JUDGE

