



REPUBLIC OF KENYA



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**Oloo v Republic (Criminal Appeal E012 of 2022)
[2024] KEHC 2373 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E012 OF 2022
JN ONYIEGO, J
FEBRUARY 9, 2024**

BETWEEN

MOHAMED NOOR OLOO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment and sentence in Wajir Criminal
Case No.E182 of 2021__ dated 28.02.22 (Hon. Mugendi Nyaga (SRM))*

JUDGMENT

1. The appellant herein was tried and convicted of the offence of trafficking in narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994. [hereinafter the Act].
2. The particulars of the charge were that on 4.04.2021 at Athibool Location in Wajir West Sub County within Wajir County, jointly trafficked in a narcotic drug namely cannabis sativa (bhang) to wit 700 Kgs with a market value of Kes. 21,000,000 by transporting it in a motor vehicle registration number KCK 252C Mitsubishi FH in contravention of the provision of the said Act.
3. Upon his conviction, the appellant was sentenced to pay a fine of Kes. 63,000,000 million in default to serve 50 years' imprisonment.
4. Aggrieved by his conviction and sentence, the appellant via a petition of appeal dated 20.11.2023 proffered the present appeal on the grounds that:
 - i. That the learned trial magistrate convicted him when the prosecution did not prove its case to the required standards.
 - ii. That the learned trial magistrate meted out a harsh and excessive sentence as opposed to the circumstances of the case.



Submissions of the appellant

5. The appellant in advancing his appeal relied on his submissions dated 20.11.2023 urging that the prosecution did not prove its case beyond reasonable doubt. That the prosecution did not determine whether the appellant knowingly or unknowingly engaged in the commission of the offence herein. He contended that being a hired casual worker, he was not aware of what was in the lorry as ordinarily, the lorry was used to transport cement.
6. He blamed his predicament on Mr. Mwangi whom he argued was in full control of the said motor vehicle. He relied on the cases of *Gathara v R* [2005] 2 KLR and *Amer and Nine Others v R* [2000] KLR where it was stressed that the legal burden to prove an allegation squarely lies on the prosecution. He further contended that having not been represented during the trial was prejudicial to his case. That he was not informed of his rights to be represented by an advocate as provided for in article 50 of the *Constitution*. He relied on the case of *Karisa Chengo and 12 Others v R* Criminal No. 44,45 & 76 of 2016 to stress the importance of informing an accused person of his rights to representation.
7. The trial magistrate was faulted for having failed to analyze and further consider the evidence of the appellant to his detriment. That he had a strong alibi and yet the prosecution through the police did not investigate the same to determine whether the same was viable. He relied on the case of *Wang'ombe v R* [1980] KLR 149 where it was held that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer.
8. He decried the fact that the case was not properly investigated thus leading to a finding that was prejudicial to him. On sentence, he contended that the same was not only harsh but also inappropriate in the circumstances herein as the trial magistrate used his discretion inappropriately. That despite the fact that he had been in custody for a period close to two and a half years, he was still sentenced to pay a fine of Kes. 63 million and in default to serve fifty years' imprisonment.
9. He argued that the sentence was harsh as currently, he was aged 44 years and that would mean that by the time if the same ever happens, that he served to the end of the sentence meted out, then his part of usefulness as a person shall have been wasted away. He relied on the cases of *Moses Banda Daniel v R* [2016] eKLR and *Robert Mutungi Muumbi v R* [2015] eKLR wherein it was stressed that in as much as the sentence is at the discretion of the trial court, the same must depend on the facts of each case. He urged this court to quash his conviction and thereafter set aside his sentence.

Submissions of the respondent

10. The learned prosecutor, Mr. Kihara on the other hand relied on his submissions dated 24.04.2023 that the prosecution proved its case to the required standards. That all the essential elements of the offence were established. He contended that the court's finding on conviction could thus not be faulted as the same was supported by the evidence on record. On sentence, he urged this court to uphold the sentence by the trial court as the same was appropriate. He stated that the appeal herein was devoid of merit thus the same ought to be dismissed.
11. This being a first appeal to this court based on both facts and the law, this court is under obligation to re-consider, re-evaluate and re-assess afresh the evidence tendered before the trial court so as to arrive at an independent determination bearing in mind that it did not have the advantage of seeing nor listening to witnesses testify to be able to assess their general demeanour. See *Kiilu & Another v Republic*, [2005] eKLR.



12. Briefly, PW1, No. 221790 Ssgt. Mohamed Abdi Salat told the court that on 04.04.2021 at around 6.00 a.m., he received a call from one member of the public informing him of a big suspicious lorry heading towards Habaswein. That together with two officers from the station, they laid ambush on the road. He further stated that while there, they saw a motor vehicle of registration number KCK 252 C Mitsubishi Canter approach and so they intercepted and took it to Hadado Police Station whereby he called his seniors the OCS Hadado Police station, OCPD Wajir West Sub County and multiagency Team who swung to action.
13. That the general compartment of the lorry had no luggage but they suspected the roof of the lorry which appeared modified and so they directed the driver to open the bolts. He stated that in the modified compartment, they noticed 93 bales of dried plants.
14. PW2, No. 106216 PC Kelvin Ochola recalled that on the material day, he was at the station when PW1 shared with him some information he had received from an informer. That a suspicious motor vehicle had been seen in the area and so, together with PW1 and PC Kipsang proceeded to Lolkuta. That upon reaching there, they saw a motor vehicle registration number KCK 252 C Mitsubishi Canter approach. That upon stopping the vehicle, there were two occupants being the driver and a passenger. It was his testimony that PW1 thus directed the driver to open the vehicle but in its cabin, there was nothing. The same prompted him to direct the driver to drive the said motor vehicle to the police station where a multi-agency team joined them. That while there, the OCPD noted that the vehicle had an extension which was sealed by red tapes. He told the court that when the compartment was forced open, 93 bales of dried plant were found inside. The said exhibits were subsequently handed over to the DCI Wajir as he recorded his statement in relation to the matter.
15. PW3, Nelius Njeri Mwangi, a government chemist testified that she received exhibits accompanied by an exhibit memo. form no. CR531/56/2021 from Cpl Julius Lochomoi. That the exhibits were in khaki envelopes marked A1 to A192 DCI Wajir East. That each envelope had approximately 10gram of dry plant material and upon carrying out analysis, she established that the plant material was cannabis sativa as listed under the Act. She produced the exhibit memo and the report as exhibits.
16. PW4, 106425 PC Timothy Kipsang testified that on 04.04.2021 at around 6. 00 a.m., PW1 received a tip off from an informer telling him that a suspicious motor vehicle had been spotted and the same was suspected to be carrying suspected goods. That together with his colleagues, they were directed to head to Lolkuta where they intercepted the said motor vehicle. That upon searching the same, they found nothing. Upon further scrutiny, they discovered an extension on top of the said lorry and upon checking the same, they recovered 93 bales of suspected dry plants.
17. PW5, No. 236631 Chief Inspector Musyimi Kelo, the investigating officer testified that on the material day, the OCS Hadado called him informing him of a suspicious looking motor vehicle registration number KCK 252 C. That the same was ferrying suspected plant material believed to be bhang. That on arrival at the scene, they found the said motor vehicle and upon inspecting it, they found loads of dry plant material that were concealed at ceiling of the roof of the M/vehicle. He testified that there was a red tape that ran around the modified compartment and it was his view that the same was intended to conceal the modification. An inventory was prepared of which the appellant signed as other investigations were carried out.
18. That the bhang was weighed at 342.5 kgs and thereafter, a weighing certificate was prepared which was equally signed by the appellant. He stated that he conducted a search at the NTSA and found that the motor vehicle in question belonged to one Moses Marsa Mutat of ID No. ***** and mobile no. 07*****. Upon concluding the investigations, he charged the appellant with the offence herein.



19. Of importance to note is the fact that the prosecution before closing their case sought leave to amend the charge sheet as it was discovered that 64 more bales were found in a compartment hidden on the body of the very vehicle. The same precipitated the new charges to be read afresh to the accused persons which the appellant pleaded not guilty.
20. The prosecution closed its case and the appellant was placed on his defence upon the court finding that a prima facie case had been established by the prosecution.
21. DW1, Mohamed Noor Oloo Omboyo testified that he was the driver of the M/vehicle in question and that on the fateful day, he had been assigned to deliver cement to Bute. That Upon completing the assignment, he was to drive back to Nairobi. He went further to state that upon arrival at Bute, together with his turn boy, they went to sleep as a young man engaged in the offloading of the cement. That the same was as per the directions of the owner of the vehicle. He stated that 2.00 a.m., together with his turn boy, they left Bute. He went further to state that at Lolkuta, they found a road block and shortly after, police arrived. He further stated that they were informed that their vehicle looked suspicious and therefore, he was directed to drive to the police station. That he was forced to open the roof of the said vehicle and to his shock, there were bales of bhang inside. He thus signed the notice of seizure as was directed by the investigating officer. He denied being involved in the offence herein and blamed the owner of the motor vehicle for his woes.
22. DW2, Abraham Ibrahim Hassan, a turn boy stated that previously, he had worked with DW1 and that at times, after delivering goods, the offloading was always done by other people. He stated that in this case, they left Nairobi on 02.04.2021 and arrived at Bute on 03.04.2021. It was his evidence that upon arrival, DW1 told him that someone would offload the goods from the vehicle. On the fateful day and in the company of DW1, they left Bute en route to Nairobi aboard the motor vehicle registration number KCK 252C.
23. That on the way, they were stopped and the motor vehicle was searched but nothing was found in it. He stated that the driver was directed to drive the motor vehicle to Hadado Police Station and thereafter, their phones and Identity cards were confiscated as they were booked in the cells. After some time, DW1 was called out of the cell for some time while he was called out on 04.04.2021 when he was directed to sign a certain document. On cross examination, he stated that he was employed by DW1 as he did not know the owner of the motor vehicle. That he was simply a turn boy whose work was to ensure that the vehicle functioned well. He confirmed the presence of the red tape on top of the motor vehicle but his explanation was that he all along thought that the same was a decoration. He denied having knowledge and further, being involved in trafficking the bhang in question.
24. DW3, Moses Malsa Mutula testified that he was a business man and that he managed vehicles owned by his friends. He stated that in the case herein, he was the owner of the vehicle but had previously hired it to one John Mwangi who had required the motor vehicle for a period of three months. He stated that together with John Mwangi, they entered an agreement as John took possession of the said motor vehicle. That the said motor vehicle was to be driven by a driver of his choice and that is when he forwarded the appellant herein as the driver and DW2 as a turn boy. On cross examination, he stated that once the motor vehicle was hired out, it was the responsibility of the driver to know where the vehicle was kept and generally, take care of it.
25. Guided by the above principles relating to the duty of the first appellate court, I have considered the grounds of appeal, the evidence on record, the written and oral submissions made by the parties and all the authorities cited. Having done so, I find that two key issues crystallize for my determination which are:



- i. Whether the prosecution proved the guilt of the appellant as charged beyond any reasonable doubt.
 - ii. Whether the trial court considered all relevant factors in sentencing the appellant and whether the sentence imposed on him was harsh and excessive in the circumstances of the case.
26. The appellant was charged with trafficking narcotics amounting to 700kg with a street value of about Kes 63m. 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..”
27. In Gabriel Ojiambo Nambesi vs Republic, [2007] eKLR, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs 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 the trial prove by evidence the conduct of an accused person which constitutes trafficking.”
28. In this case, the prosecution alleged that the appellant trafficked in cannabis sativa (bhang) by transporting it in a motor vehicle registration number KCK 252C Mitsubishi FH. In Mohamed Famau Bakari [2016] eKLR, the Court of Appeal considered the definition of the term “conveyance” as stated in Section 2 of the Act and stated as follows:
- “The term ‘conveyance’ is defined to mean; “... a conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel”. As defined above and used throughout in the Act, “conveyance” is not the action or process of transportation but the means of transport.”
29. In the instant case, the prosecution’s case was that via an intelligence shared by an informer to PW1, some dry leaves were recovered from the MV, was on 12.04.2021 scientifically analysed by PW3 and found to be cannabis which is listed as a narcotic drug under the Act.
30. The appellant argued that for the offence herein to be satisfactorily proven, the prosecution ought to establish to the required standard that he had actual knowledge of the existence of the narcotic drugs. That he did not have the knowledge of the existence of bhang in the said mv. It was his position that he was possibly set upon by his employer who had specifically directed him to let other people in his absence offload the luggage he had delivered.
31. From the evidence of both the prosecution and the defence, there is no dispute that the subject plant material was cannabis sativa(Bhang). Equally, there is no dispute that the said narcotics was intercepted while on transit aboard the motor vehicle in question. It is also admitted that it was not authorized hence illegally in possession of whoever was transporting the same. The key question is whether the appellant was in the know of the existence of the said narcotics and whether the sentence meted out was commensurate to the offence committed.



32. According to the appellant, he was set by his employer and that he was not aware of the existence of the cannabis concealed at the roof of the mv.
33. In my considered view, the analogy is misplaced and I say so for the reason that DW3, the owner of the vehicle testified that in as much as he was the owner of the vehicle, once the said vehicle was under the control of the driver, it was upon the driver to know where the vehicle was kept and generally, take care of it.
34. Equally, DW2 also testified that it was DW1 who always had the possession of the vehicle when they were carrying out an assignment and that he would not have known anything in relation to the impounded drugs. Apparently, the evidence of DW2 and DW3 was not challenged at all,
35. In the same breadth, it is important to note that even during the cross examination of the prosecution witnesses, the court record showed that none of the prosecution witnesses was cross examined by the appellant on the issue whether he had no knowledge of what was in the said vehicle or that probably, the drugs were planted in his vehicle. The claim only featured in the appellant's defence.
36. In my view, the evidence on record was consistent and the same pointed to the fact that the appellant was found to be trafficking the said narcotic drugs hidden on the compartments on the top of the roof and body of the said vehicle. In as much as the appellant contended that he was not the owner of the vehicle and that someone else was responsible for offloading the goods that were in the lorry, no evidence was placed before the court to support such allegation.
37. Even if we were to believe the appellant for a moment which is not, that some people offloaded the luggage he had ferried to Bute in his absence and therefore concealed cannabis in the ceiling (roof) of the MV, how come he did not notice that there was something a miss with the mv roof the same having been fixed with a cello tape all round which according to DW2 appeared like a decoration? I do not believe the explanation given by the appellant. It was my conviction that the appellant was fully aware of the trafficking aspect of cannabis herein and that the same was illegal.
38. In view of the foregoing, I find that the appellant's statement in defence lacked credibility and did not dislodge the cogent evidence otherwise adduced by the prosecution.
39. Given the foregoing, I am of the considered view that that the appellant was properly convicted. His appeal against conviction therefore fails.
40. On the appeal against sentence, the appellant's complaint was that the trial court passed a sentence that was harsh and excessive in the circumstances.
41. The Court of Appeal in *Robert Mutungi Muumbi vs Republic*, [2015] eKLR, cited with approval its decision in *Bernard Kimani Gacheru vs Republic*, [2002] eKLR held thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”



42. Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* prescribes the penalty for the offence of trafficking in narcotic drugs, which is a fine of KShs. 1 million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, imprisonment for life.
43. This court appreciates the fact that sentencing is at the discretion of the trial court except that, the discretion must be exercised judiciously. The trial court must be guided by the evidence and sound legal principles. The Supreme Court in the case of *Francis Karioko Muruatetu & Another vs Republic*, Petition Number 15 of 2015, while considering the provisions of section 329 of the *Criminal Procedure Code* gave guidance on sentencing as follows:
- “The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”
44. In the present case, the trial magistrate noted that the appellant was a first offender and further, that his family depended on him. On the claim that he was not accorded legal representation, each accused person has the right to appoint an advocate of his own choice.
45. In sentencing, he ordered the appellant to pay a fine of Kes. 63,000,000 million in default to serve 50 years’ imprisonment. The learned trial magistrate apparently did not rely on the jurisprudence developed by the Court of Appeal to the effect that the penalty prescribed under Section 4 (a) of the *Act* was not mandatory; that the word “liable” meant that the trial court retained discretion to impose an appropriate sentence subject to the maximum punishment provided by the law taking into account the quantity and value of the drugs. In the same breadth, the trial court did not consider the mitigation by the appellant as noted on the record.
46. My reading of the ruling on sentencing reveals that the learned trial magistrate meted out the sentence while recognizing the fact that the offence of trafficking in narcotic drugs had devastating effects and that the same was a menace in our society.
47. Of importance to note too, is the emerging jurisprudence in relation to sentences prescribing long and/or life imprisonment. I say so for the reason that the appellant urged that he is currently aged 44 years and that by the time if at all he completes serving the said sentence, his life shall have wasted away.
48. The Court of Appeal in the case of *Evans Nyamari Ayako v Republic*, Criminal Appeal No. 22 of 2018, interpreted life imprisonment to mean thirty years’ imprisonment.
49. In view of the above finding, I am inclined to replace the sentence of a fine of 63,000,000/- and in default 50 years with that of a fine of Kes. 10,000,000/- in default 10 years’ imprisonment. In doing so, I have considered the entire period the appellant spent in remand custody which is 6-4-21 up to 28-2-22. The upshot of it all is that the appeal against conviction is dismissed and that against sentence partially succeeds.

ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2024

J. N. ONYIEGO

JUDGE

