



**Hassan v Republic (Criminal Appeal 11 of 2023)
[2024] KEHC 4331 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 11 OF 2023
DR KAVEDZA, J
APRIL 11, 2024**

BETWEEN

SHUKRI ALI HASSAN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered By Hon. L. Onyina (C.M)
at JKIA Chief Magistrate's Court Criminal case no. 21 of 2020 Republic vs Shukri Ali Hassan)*

JUDGMENT

1. The appellant with another not before this court was charged with 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. After a full trial, he was convicted and sentenced to serve 15 years imprisonment, in addition to paying a fine of Kshs 9,000,000/= in default to serve an additional 1-year imprisonment. Being dissatisfied, he filed an appeal challenging his conviction and sentence.
2. In his appeal, the appellant raised six (6) grounds challenging the totality of the prosecution's evidence against which he was convicted. He urged the court to allow his appeal.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
4. The prosecution called eight (8) witnesses in support of their case. PW1 Corporal Joseph Mbugua, attached to the Special Service Unit, testified that on March 15, 2020, while patrolling with his team along Thika Superhighway, they received intelligence about a suspected vehicle, KBG 787 E, potentially carrying illegal goods from Wajir. They set up an ambush at the Thika-Eastern bypass junction and intercepted the vehicle at Kamakis around 2:30 pm. They found two occupants, the



- driver and co-driver, and escorted the vehicle to the DCI headquarters. PW1 personally drove the vehicle to the DCI headquarters, where they searched the motor vehicle. They discovered a special compartment sealed with black polythene and tape, containing 31 yellow-wrapped sacks of dry green plant material, identified as bhang. Mbugua signed the search certificate and inventory, confirming the findings. Officers from the anti-narcotics unit, special service unit, and scenes of crime personnel were present during the search. The occupants claimed the vehicle was empty and they were coming from Wajir, but bhang was found during the search.
5. PW2, Denis Owino Onyango, a government analyst, testified that he witnessed the weighing of 31 bales of dry plant material, totalling 103 kilograms, at the DCI headquarters. The weighing was conducted by Inspector Albashir Olow in the presence of the appellant and his co-accused, police officers, and others. On March 19, 2020, he received the plant material accompanied by a request to ascertain its narcotic nature. On March 20, 2020, he analyzed the material, confirming it as cannabis using Duquenois-Lavin and First Blue (B) Salt tests. He issued a report, signed on March 20, 2020, which was presented as prosecution exhibit 8, bearing his government seal and markings. He concluded the plant material to be cannabis.
 6. PW3, Sergeant Isaac Sang, detailed his team's interception of a suspected vehicle, a Toyota Hilux Double Cabin, with registration KBG 787E, allegedly carrying illicit goods. Acting on information, they laid an ambush on Thika Superhighway, intercepting the vehicle near Kamakis. They found two occupants, Aliow Shalow Isaak and Shukri Ali Hassan, whom they ordered to proceed to DCI headquarters. There, they discovered a modified compartment with 31 bales suspected of containing narcotics. The suspects claimed the vehicle was empty. The team conducted a search, recovering the bales and conducting a weighing supervised by Inspector Albashir Olow. The suspects' identities were verified, and notices of seizure were issued.
 7. PW4, Inspector Albashir Olow, corroborated PW3's account, describing the search process, recovery of suspected cannabis, and issuance of seizure notices. Both witnesses identified the seized items, emphasizing procedural adherence and proper documentation. They confirmed the preservation of evidence for forensic analysis.
 8. PW5, Corporal Derrick Kiprono, of the Crime Scene Investigations unit at DCI headquarters, documented the process of weighing suspected narcotic substances intercepted by the Special Service Unit in a Toyota Hilux Double Cabin, registration KBG 787E. He took detailed photographs and prepared the necessary certificates and reports, including prosecution exhibits.
 9. PW6, Corporal Sheila Kipsoi, an investigator at the anti-narcotics unit, joined PW5 and Inspector Albashir Olow at DCI headquarters on March 15, 2020. They intercepted the suspected vehicle, finding two occupants, Aliow Shalow Isaak and Shukri Ali Hassan. Both witnesses testified to the recovery of identity cards and other documents from the suspects, as well as the discovery of 31 bales of suspected cannabis hidden in the vehicle's compartment. They conducted searches, prepared documentation, and oversaw the weighing process, corroborating Inspector Albashir Olow's account. PW6 also initiated correspondence with the National Transport and Safety Authority regarding the vehicle's registration details. Additionally, she prepared exhibits for seized items and forwarded recovered phones to the cybercrime unit.
 10. PW7, Chief Inspector Philip Langat, is assigned to the Kasarani DCI as head of the anti-narcotics unit and a gazetted valuer. He received a call from Corporal Sheila Kipsoi on March 15, 2020, about the arrest of two suspects with 103 kilograms of cannabis. Based on documents provided, including a government chemist report and a weighing certificate, he valued the cannabis at Ksh. 3,090,000 and produced a Certificate of Valuation as prosecution exhibit 19.



11. PW8, Inspector Joseph Kulum, has served at the DCI's Cyber Crime unit for eleven years as a certified computer forensic investigator. On November 13, 2020, he received two mobile phones accompanied by an exhibit memo from Corporal Sheila Kipsoi. He used the Celebrate forensic tool to extract data from the phones. Exhibit SAH contained photos of the appellant and an identification card, while exhibit ASI included an image of the motor vehicle KBG 787E. He prepared a report and a CD with the findings, along with a certificate under section 106B of the *Evidence Act*, presenting the exhibits and documents in court as exhibits 20(a), 20(b), 21, 23, and 24.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave sworn evidence and called one witness. He told the court that he boarded the motor vehicle at Kora Kalei, where travellers stop for meals. He didn't know the driver's name but paid Ksh. 1000 for a ride to Nairobi to visit his cousin. He insisted he didn't know the vehicle carried bhang, as he didn't detect any odor during the journey there were several police roadblocks. At those roadblocks, officers didn't find anything suspicious. When arrested at a roadblock along the Eastern bypass, he didn't understand why. Upon reaching the DCI headquarters, he learned about the bhang in the vehicle. He denied being involved in the trafficking of narcotic drugs.
13. His cousin, Ibrahim Abdul Hassan, DW2 confirmed Shukri's intention to visit him in Nairobi before heading to Tana River. Ibrahim was surprised by the arrest, as the appellant had never been involved in drugs. However, he told the court that he was not clear about the appellant's travel details from Takava, Mandera.
14. This court has re-evaluated the evidence adduced before the trial court, the appellant's grounds of appeal, as well as the rival parties' submissions. Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act provides as follows;

“Any person who traffics 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;”
15. 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...”
16. In *Gabriel Ojiambo Nambesi v 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. The court stated thus:

“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.”

17. In this particular case, the prosecution contended that the appellant and his co-accused were involved in the trafficking of a narcotic substance. According to the evidence presented, the appellant was apprehended in the company of another at Kamakis, Along Eastern Bypass as part of an operation guided by intelligence. On 15th March 2020, they were stopped suspected to be carrying narcotic substances in the motor vehicle registration number KBG 787E where the appellant was an occupant.
18. A search was conducted on the said motor vehicle at the DCI. The search confirmed the presence of 31 yellow-wrapped sacks of dry green plant material in a hidden compartment which was suspected to be narcotic in nature. The appellant and his co-accused cooperated during the search and seizure. An inventory of the recovered items was prepared by PW1. The suspected packages weighed 103 Kilograms, witnessed by the appellant, his co-accused, PW3, PW4, PW5 and PW 6. PW 7 provided a valuation of Kshs3,090,000 for the 103 Kilograms narcotic, based on the charge sheet, weighing certificate, and government analyst's report.
19. The chain of custody for the substances recovered in the case against the appellant and his co-accused is well documented through the testimonies of various witnesses. The investigating officer detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the motor vehicle the appellant was arrested in, as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
20. On whether the substance recovered was narcotic, the government analyst, PW 2 testified that his role was to ascertain whether the plant material was a narcotic drug. He analysed the green plant material which weighed 103 Kilograms and found that the green plant material was cannabis, a narcotic drug listed under the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*. The report dated 20th March 2020 was produced as a prosecution exhibit.
21. In his defense, the appellant refuted any involvement in the trafficking of the narcotic drugs and contended that the prosecution witnesses failed to establish a connection between him and the narcotics. He maintained that he was a fare-paying passenger in the said motor vehicle and was not aware that there were any illegal substances thereon. The prosecution witnesses maintained that the appellant was arrested while trafficking the said narcotic substances from Wajir to Nairobi. During his arrest, his mobile phone, make infinix (exhibit 20) was confiscated and exploited by the forensic analyst (PW8). Photos of the appellant standing/posing in front of the motor vehicle along the highway were recovered from the phone. Consequently, the linkages to the narcotic drugs is through the aforementioned photograph of the appellant standing in front of the motor vehicle along the highway, as well as, his presence in the motor vehicle from which the narcotic drugs were recovered. The motor vehicle was being driven by his co-accused (Allow Shallow Issak).
22. It is common ground that the police officers arrested the appellant following intelligence information. A search was conducted in the motor vehicle and narcotic drugs were recovered. However, there was no direct evidence from an eye witness linking the appellant to the exhibit. Furthermore, the absence of the first accused in the proceedings, having jumped bail, and yet he was the driver of the motor vehicle, seems to lend credence to the appellant's assertion that he was a mere passenger. The question for determination is whether the prosecution has established evidence that links the appellant to the offence. The evidence available before court is circumstantial in nature.



23. Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. It is trite that such evidence can sustain a conviction wherein it meets the threshold surmised by the Court of Appeal in *Musili Tulo v R* [2014] eKLR, as follows:
- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
 - ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else.

Further, in the case of Abanga alia *Onyango v Republic*, Court of Appeal, 32 of 1990, stated that;

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests i.e. the circumstances under which inference of guilt is sought to be drawn must cogently and should be of a definite tendency unerringly pointing towards the guilt of the accused the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

24. The question that arises is whether the evidence presented in this case satisfies the aforementioned criteria. I am aware that merely having a picture of oneself standing next to a motor vehicle involved in the trafficking of narcotics does not in itself create a presumption of guilt. Furthermore, receiving transportation from an individual involved in the alleged offense would not establish a sufficient connection between the appellant and the offence of trafficking narcotic drugs.
25. However, the appellant was arrested in company of another in the motor vehicle transporting narcotics. The prosecution evidence was that both accused persons were found in possession of narcotic drugs. The appellant had the burden to rebut the evidence on joint enterprise, that is to say, the onus was upon him to disprove possession of narcotics as stated under section 111 of the *Evidence Act*.

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exception from or qualification to, the operation of the law creating the offence with which he is charged and the burden proving any fact especially within the knowledge of such person is upon him. Provided that such burden shall be discerned to be discharged if the evidence given by the provision, whether in cross-examination or otherwise, that since circumstances of facts exists”.

26. The appellant maintained that he only boarded the motor vehicle on 15th March 2020, the material day of his arrest and had no knowledge whatsoever of the narcotic drugs. However, the appellant’s credibility is dented in that, PW 8 produced a report showing phone records extracted from the appellant’s infinix phone recovered upon his arrest. At page 140, row 1, of exhibit 23 is an image of the appellant standing next to motor vehicle registration number KBG 787E, from which the narcotic drugs were recovered. Furthermore, the evidence on record shows that he was the owner of the said phone from which the image (exhibit 23) was extracted by the forensic analyst. The said image shows the appellant standing next to the motor vehicle from which the narcotic drugs were recovered on 15th March 2020, when the appellant and his co-accused were apprehended.



27. On cross-examination, the appellant denied any knowledge of the photograph extracted from his phone. To my mind, this was the turning point in favour of the prosecution's case. The appellant merely denied knowledge of the image in his phone. He failed to offer any explanation as to how his image was captured along the superhighway, standing next to the motor vehicle in which the narcotic drugs were recovered. Importantly, the metadata extracted from exhibit 23, shows the make of the phone as infinix, the date the image was taken as 14th March 2020 and the time, at 8.45pm.
28. The metadata having captured the make of the phone, clearly speaks to the integrity of the forensic process. Had the image been planted(photoshopped), the make of the phone could have been destroyed in the process.
29. The electronic evidence recovered from the appellant's phone therefore corroborates the physical or tangible evidence of the motor vehicle and the phone produced by the investigating officer. It is my view, that the appellant failed to rebut the otherwise credible evidence linking him to the constructive possession of the narcotic drugs.
30. The learned trial magistrate drew an inference that the appellant knew the existence of the cannabis and participated in its transportation. I agree with the finding of the trial court. Indeed, the appellant had constructive knowledge since he had no explanation to impeach the prosecution evidence.
31. On the ingredients of knowledge, Devlin J, once said in the case of *Roper v Taylor's Central Garages* [1951] 2 TLR 284 that:-

“There are I think three degrees of knowledge which it may be relevant to consider in cases of this kind. The first is actual knowledge which the justices may find because they infer it from the nature of the act done for no man can prove another man's state of mind, and they may find it even when the defendant gives evidence to the contrary.

They may say we do not believe him, we think that that was his state of mind. They may feel that the evidence falls short of that, and if they do they have then to consider what may be described as knowledge of the second degree, whether the defendant was as it has been called, shutting his eyes to an obvious means of knowledge. Various expressions have been used to describe that state of mind.

The respondent deliberately refrains from making inquiries, the result of which he might not care to have.”

The third kind of knowledge is what is generally known in law as constructive knowledge, it is what is encompassed by the words “Ought to have known, in the phrase knew or ought to have known.....” It does not mean actual knowledge at all. It means that the defendant had in effect the means of knowledge.”
32. This court is quite satisfied from the record that there is no contrary evidence advanced by the appellant to qualify the definition of the term possession under section 4 of the *Penal Code*. It is sufficient that the prosecution established that the person who had possession, had the of knowledge of the existence of the exhibit and, was in fact in possession and or control.
33. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.



34. On the sentence, the appellant was sentenced to pay a fine of Kshs 9,00,000, in default to serve 1-year imprisonment. In addition, he was sentenced to fifteen years imprisonment. The appellant argued that the sentence was harsh and excessive.
35. From the record, the said narcotic drugs were duly weighed and found to be the value of a substance (cannabis) weighing 103 kilograms grams with a market value of Ksh 3,090,000. In sentencing, the trial court considered the market value before imposing the fine in addition to the prison sentence. The trial court also considered his mitigation and that he was a first offender. The sentence meted out was therefore within the law.
36. The upshot of the above is that the appeal against conviction and sentence is dismissed for lacking in merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11TH DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present on the platform

Ms. Paclea for the Respondent

Nelson Court Assistant

