



**Macharia & another v Republic (Criminal Appeal 4 & 21 of 2023  
(Consolidated)) [2024] KEHC 4710 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4710 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 4 & 21 OF 2023 (CONSOLIDATED)**

**DR KAVEDZA, J**

**MAY 7, 2024**

**BETWEEN**

**SAMUEL KIMANI MACHARIA ..... 1<sup>ST</sup> APPELLANT**

**PETER MWANGI KURIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by Hon. L.O Onyina (C.M) on 21<sup>st</sup> February 2023 at JKIA Chief Magistrate's Court Criminal case no. E009 of 2020 Republic vs Samuel Kimani Machari and Peter Mwangi Kuria)*

**JUDGMENT**

1. The appellants herein were charged and after a full trial convicted for the offence of trafficking in narcotic drugs contrary to section 4 (a) of the [Narcotics and Psychotropic Substances \(Control\) Act, 1994](#). They were each sentenced to serve 25 years imprisonment. In addition, they were fined Kshs. 20,790,000 in default to serve 12 months imprisonment.
2. Being aggrieved, the appellants challenged their conviction and sentence on appeal. In their respective petitions of appeal, they challenged the totality of the prosecutions evidence against which they were convicted. In addition, the court failed to take their defences into account. They also argued that their sentences were harsh and excessive.
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 10 witnesses in support of their case. PW1 Corporal George Murunga, a police officer stationed at the Directorate of Criminal Investigations (DCI) headquarters, within the Transnational Organized Crime Unit, received instructions on the morning of August 30, 2020, from his superior, Chief Inspector Marunga. The instructions pertained to intelligence regarding a vehicle, registration number KCD 808N, suspected of transporting narcotics along the Nairobi-Namanga Highway. Accompanied by colleagues Police Constable Stephen Kakai, Police Constable Mabishi, and Police Constable Milicent, they set out in two police vehicles to locate and apprehend the suspected vehicle.
5. They established a temporary roadblock near the Isinya Weighbridge and spotted the suspected vehicle around 8:00 PM. Despite attempting to block it, the vehicle evaded them. After a chase of approximately three hundred meters, they successfully blocked the vehicle and instructed its two occupants to disembark. Upon inspecting the vehicle, they discovered eight sacks of dry plant material, suspected to be narcotics, in both the cabin and the rear of the pickup.
6. The decision was made to escort the vehicle and its occupants to Isinya Police Station for further processing. There, they identified the driver as Samuel Kimani Macharia and the co-driver as Peter Mwangi Kuria. Police Constable Kakai (PW2) prepared an inventory of the seized items, including the plant material, mobile phones, driving license, and personal items found in possession of the suspects. Following their booking at Isinya Police Station, they were escorted to DCI headquarters, where officers from the anti-narcotics unit were involved in jointly preparing an inventory of all recovered items. These included those found in the vehicle as well as those in possession of the suspects.
7. PW3, Mr. Stephen Gitau Muchuku, testified that he manages Carlos Auto Motor Spares, a business that rents out vehicles. He testified that on August 18, 2020, Samuel Kimani Macharia rented a Toyota Hilux Double Cabin (registration number KCD 808N) for a month, paying a Ksh. 20,000 deposit. A week later, Mr. Muchuku learned that the rented vehicle and its hirer had been arrested for transporting marijuana. He notified his superiors and a lawyer, who confirmed the incident. He provided the Car Hire Agreement, Samuel Macharia's ID card, and the vehicle's logbook as evidence.
8. Inspector Ishmael Oruko, PW4, from the Directorate of Criminal Investigations Anti-Narcotics Unit in Nairobi, received a directive on August 30, 2020, to take over a case at DCI headquarters. Accompanied by his team, including Police Constable Michael Awiti and Corporal Ngeno, they arrived and were briefed by Corporal George Murunga (PW1). Murunga handed over a vehicle, registration KCD 808N, along with two individuals suspected of narcotics involvement, Samwel Kimani Macharia and Peter Mwangi Kuria.
9. Inside the vehicle were eight sacks containing suspected narcotics, discovered during a search supervised by Inspector Oruko. Police Constable Awiti prepared the necessary documentation, including a search certificate and inventory. They also seized mobile phones, a driver's license, and personal items. The sacks were marked, photographed, and stored in the police armory.
10. On September 1, 2020, Inspector Oruko appointed Corporal Caroline Karemba as the investigating officer. He oversaw a weighing and sampling procedure, conducted in the presence of suspects and witnesses, including government analyst PW7. The sacks' total weight was recorded as 231 kilograms, with samples extracted for analysis, documented in certificates signed by all involved.
11. Chief Inspector Elizabeth Lumumba, PW6, is a police officer designated as a proper officer under section 86 of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, as per Gazette Notice No. 9805 dated September 20, 2017. On September 1, 2020, Corporal Karemba contacted her, requesting a valuation for 231 kilograms of cannabis. Lumumba provided a valuation of Ksh. 6,930,000. She



- prepared and signed a Certificate of Valuation, indicating the value of the 231 kilograms of cannabis as Ksh. 6,930,000. In her testimony, Lumumba explained her valuation process and presented the Certificate of Valuation
12. Government Analyst PW7 received the exhibit memo and analyzed the dry green plant material using the Duquinois Levin Test and the First Blue B-Salt Test. The analysis confirmed the material as cannabis, a narcotic drug listed under the First Schedule of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994. He prepared the Report of the Government Analyst which he signed and sealed on September 9, 2020.
  13. PW8, Corporal Derricks Kiprono, belonging to the Crime Scene Investigation Unit was present during the search, weighing, and sampling exercises. He documented these procedures by taking a series of photographs, which he elaborated on during his testimony. This served as a visual record and supported the various stages of the investigation.
  14. PW9, Chief Inspector George Aringo, received two mobile phone exhibits on September 11, 2020. He analysed them to retrieve communication data, producing a report on August 10, 2021, which revealed messages from one phone. Meanwhile, the investigating officer, PW10, received a disc containing photographs from Sergeant George Marunga. PW1 forwarded it for processing, resulting in photographic prints and enlargements supervised by PW8. PW10 also prepared various documents, including a Notice of Intention to Tender Records in Evidence and a Record of Custody of Seized Substances. Additionally, she obtained an Occurrence Book extract and produced an inventory of recovered items from the vehicle.
  15. After the close of the prosecutions case, the appellants were found to have a case to answer and were put on their respective defences. The first appellant gave sworn evidence and testified that he was a farmer and recounted the events of August 30, 2020. At the time he was called to collect Lucerne for his cattle. Initially intending to use a lorry, he opted for a smaller vehicle to inspect the Lucerne's quality upon arrival in Isinya. A dispute arose when the person who called him insisted on the lorry. He claimed that upon their return with the Lucerne, police arrived, and he was forcibly taken to DCI headquarters without being given a chance to enter his pickup.
  16. He emphasized his long-standing relationship with the second accused person, Peter Mwangi, and detailed their agreement regarding the sale of his land in Muranga, providing legal documents and medical records to support his claims. Despite his explanations, he admitted to not clearing the pickup hire and acknowledged its return to the owner.
  17. The second appellant in his testimony, reiterated his limited knowledge of the first appellant and denied any involvement with narcotics transportation. He recounted a land deal initiated by the first appellant due to medical issues, providing documentation as evidence. On the day of the incident, he claimed to have been called by the first appellant who needed financial assistance for medical reasons. They arranged to meet at Isinya petrol station, where the first appellant was supposed to pick him up.
  18. Upon arrival, armed individuals intervened, forcing them to lie down and confiscate their belongings before taking them to DCI headquarters and later to Muthaiga police station. The second appellant maintained innocence regarding the pickup and its contents, emphasizing that the first appellant contacted him solely regarding land matters. He denied any significant relationship with the first appellant and reiterated his innocence in the narcotics case.



19. This court has re-evaluated the evidence adduced before the trial court, the appellants' grounds of appeal, as well as the written submissions on record. 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;”

20. 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...”

21. 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.”

22. In this particular case, the prosecution contended that the appellants were involved in the trafficking of a narcotic substance. According to the evidence presented, the appellants were apprehended along Nairobi Kajiado road at the Isinya weighbridge. That this was part of an operation guided by intelligence. On 30<sup>th</sup> August 2020, they were stopped because they were suspected to be carrying narcotic substances in the motor vehicle registration number KCD 808N where the first appellant was the driver and the second appellant was an occupant.

23. A search was conducted on the said motor vehicle at the DCI. The search confirmed the presence of eight sacks of dry plant material which was suspected to be narcotic in nature. The appellants cooperated during the search and seizure. An inventory of the recovered items was prepared by PW2 PC Stephen Kakai together with his two colleagues who did not give evidence in this case. The suspected packages weighed 231 Kilograms, witnessed by the appellants, PW 4 and PW7. PW6 prepared and signed a Certificate of Valuation indicating the value of the 231 Kg of cannabis as Ksh. 6,930,000 based on the charge sheet, weighing certificate, and government analyst's report.

24. The chain of custody for the substances recovered in the case against the appellants 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.
25. On whether the substance recovered was narcotic, the government analyst, PW 7 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.
  26. In their defense, the first appellant claimed they had no knowledge of the narcotics found in the vehicle they were driving. They insisted that the plant-like substance discovered was what they believed to be Lucerne for their cattle, and they had no intention of using the vehicle for transporting narcotics. However, the prosecution presented evidence to refute this claim. Witness PW 3 testified that the first appellant had rented the Toyota Hilux Double Cabin with registration number KCD 808N from him for Kshs. 20,000. This was supported by documentary evidence of agreement.
  27. The plant-like substance recovered was confirmed to be cannabis. In light of this evidence, the court concluded that since eight bags of cannabis were found in the first appellant's physical possession, it was not necessary to analyse the various forms of possession. Possession encompasses both physically having something and having control over it. Even if the bags had not been directly found with the first appellant, since they were driving the vehicle where the drugs were discovered, they had control over it. This confirms his involvement in the offense of trafficking narcotics.
  28. As regards, the 2<sup>nd</sup> appellant's guilt, he was charged with trafficking of cannabis with the 1<sup>st</sup> appellant. This brings in the doctrine of common intention as defined under section 21 of the *Penal Code* which provides as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
  29. It was the duty of the prosecution in the case against the appellant to prove that he was either in actual possession of the bhang or in constructive possession of the same. Constructive possession could only be proved if the prosecution adduced evidence of common intention to commit the offence with the driver of the vehicle.
  30. The trial magistrate rendered a convicted the second appellant on the grounds that the appellant stated to have no prior acquaintance with the first appellant. Furthermore, the second appellant was apprehended purportedly on his way to a site inspection concerning a land transaction, yet cannabis was discovered within the vehicle he was in: four sacks situated on the rear seat and an additional four sacks located in the rear section of the double cabin. The conspicuous smell of cannabis implied cognizance of the transported goods. It is implausible that the second appellant remained unaware of the potent and pungent smell. Moreover, subsequent to the apprehension, the appellant had the opportunity to inform law enforcement of the suspected presence of narcotic substances, specifically cannabis, yet he claimed to have no knowledge thereof.
  31. These factors, combined with the inconsistency in the second appellant's version of events, rendered his defence unbelievable. Without credible evidence, the court presumed that the second appellant acted in concert with the driver of the vehicle in trafficking the cannabis. Therefore, the court dismissed the second appellant's defence as an afterthought.



32. Upon reviewing the evidence presented in the trial court, I concur with the decision to dismiss the second appellant's defence. Despite not being the driver of the vehicle, the prosecution witnesses implicated him in the offense of trafficking narcotics.
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 against the appellants herein. Their conviction is therefore affirmed.
34. On the sentence, the appellants were each sentenced to pay a fine of Kshs. 20,790,000 in default to serve 1-year imprisonment. In addition, they were each sentenced to serve twenty-five (25) years imprisonment. The appellants 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 231 kilograms grams with a market value of Ksh. 6, 930,000. In sentencing, the trial court considered the market value before imposing the fine in addition to the prison sentence. The trial court also considered their mitigation and that they were first offenders. The sentence meted out was therefore within the law. However, the sentence of 25 years in my view was harsh and excessive considering the ages of the appellants who are 59 and 66 years respectively.
36. Therefore, the appeal on sentence succeeds. The sentence of 25 years imprisonment imposed on the appellants is hereby substituted with a sentence of ten (10) years imprisonment. The additional sentence of payment of a fine of Ksh. 20,790,000 in default to serve 12 months imprisonment is upheld. In the end, the substituted sentence shall be as follows:
- i. Samuel Macharia Kimani and Peter Mwangi Kuria are each sentenced to pay a fine of Kshs. 20,790,000 in default to serve 12 months imprisonment.
  - ii. In addition, the two appellants are each sentenced to serve ten (10) years imprisonment. The sentences shall be computed from the date of their conviction and shall run consecutively, being default sentences.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF MAY 2024\***

**D. KAVEDZA**

**JUDGE**

In the presence of:

G. Kamau for the 1<sup>st</sup> Appellant

Omari for the 2<sup>nd</sup> Appellant

Mutuma for the Respondent

Joy Court Assistant

