



**Mwangi v Republic (Criminal Appeal 91 of 2023)
[2024] KEHC 4308 (KLR) (Crim) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 91 OF 2023
CM KARIUKI, J
MAY 2, 2024**

BETWEEN

SILAS KIBET MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgement of Hon. H. O Barasa, SPM delivered on 27th October 2022 at the SPM's Court at Engineer Cr. Case No. E. 1063 of 2022)

JUDGMENT

1. The Appellant herein was charged with the offense of trafficking narcotics drugs contrary to Section 4 as read with Section 4 (a) (ii) of the Narcotic and Psychotropic Substances (Control) Amendment Act, 2022. Particulars being that on the 1st day of June 2022 at around 1101 hours at Manunga Village, Kwa White Trading Centre at Naivasha East Sub-County within Nakuru County, the Appellant was found trafficking narcotic drugs namely bhang weighing 115,500 grams with a street value of Kshs. 3,465,000/- which was not in the form of medicinal preparation.
2. After the trial, the Appellant was found guilty as charged and was later sentenced to 25 years imprisonment.
3. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the following 5 grounds of appeal set out in the petition of appeal dated 21st November 2022:-
 - i. That the learned trial magistrate erred in law and fact by convicting the Appellant but failed to note that the ingredients of the offense were not conclusively proved.
 - ii. That the learned trial magistrate erred in law and fact by convicting the Appellant yet failed to find that his defense was cogent and believable.



- iii. That the learned trial magistrate erred in law and in fact when he convicted the Appellant yet failed to find that the prosecution did not discharge the burden of proof.
- iv. That the learned trial magistrate erred in law and fact by awarding the Appellant a sentence that is not only excessive but also harsh in the circumstances of the offense.
4. Reasons wherefore the Appellant prayed for the appeal to be allowed, the sentence be set aside the Appellant be set at liberty, and the sentence be reviewed.
5. Appellant's Submissions
6. The Appellant submitted that his conviction was not proved beyond doubt as required by law. There was a bone of contention on the number of sacks that were recovered from the Appellant's place. That PW1's evidence was contrary to the number of sacks recovered similar to PW2 and PW5. It was stated that the sample taken to the government chemist revealed that it contained a mixture of tobacco and cannabis sativa contrary to what the Appellant was charged with therefore the substance taken to the government and presented to the court as cannabis sativa was not the substance that was confiscated from the Appellant's place and he humbly prays that this court find that he was convicted on uncorroborated evidence.
7. The Appellant stated that the learned trial magistrate ruled that the prosecution did not prove that the offence of drug trafficking as charged by the Appellant but instead of acquitting the Appellant, he went ahead to convict him on the offence of being in possession of cannabis which he was never charged with. That the charge sheet was never amended and the Appellant was accorded the chance to plead to the charges.
8. He contended that he was denied a fair hearing contrary to Article 50 of *the Constitution* and he was also denied the chance to cross-examine the witness on the same and be allowed to prepare and challenge the evidence produced on the same.
9. Lastly, the Appellant asserted that the sentence awarded was excessive and harsh within the circumstances. That the learned trial magistrate did not consider the fact that he was a first offender, a father of four children; one of them being disabled and prayed that the time he remained in remand custody be considered. He stated that the sentence did not meet the requirements of sentencing in Article 50(2)(p)(q) of *the Constitution* and the judicial sentencing guidelines. He prayed that in case this appeal fails on conviction; the court should consider reviewing the sentence with a much lesser sentence and consider the time spent in custody in line with Section 333 (2) of the Criminal Procedure Code.

The parties were directed to canvass appeal via submissions but only Respondents Submissions are on record as appellant submissions were Not available at the time of drafting this judgement.

10. Analysis and Determination
11. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which was succinctly captured by the Court of Appeal in *Kiilu & Another v. Republic* [2005] eKLR, as follows:-

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its conclusion.



It is not the function of the first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court's findings and conclusion; it must make its findings and draw its conclusion. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

12. Having considered the grounds of appeal, the evidence on record, and the Appellant's written submissions, I find that the key issues for my determination are:-
13. Whether the prosecution proved the guilt of the Appellant as charged beyond any reasonable doubt.
14. 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.
15. A thorough appraisal of the trial court's judgment clearly shows that the learned trial magistrate reproduced and considered all the evidence adduced in support of the prosecution and defense case. PW1, the Senior Chief Koinange Location testified that on 1st June 2022 at around 1.30 am, he was called by one Wainana Kamau who reported that his sheep had been stolen. He was then called and informed that a suspect had been arrested with the stolen sheep and he had disclosed that he was to deliver the sheep to the Appellant in exchange for bhang and a payment of Kshs. 1,200/-
16. The suspect led members of the public to the Appellant's place where five sacks of plant material suspected to be bhang were recovered in his store. They also found an ordinary motorcycle and motorbike in the store which they suspected were used to transport the plant material. They then called police officers from Njabini Police Station who arrived at the scene and arrested the Appellant and the suspect.
17. PW2 testifies that he was informed that a thief who was in possession of stolen sheep had been arrested and that he had extorted the public to the Appellant's homestead. He rushed there and found over 200 people who wanted to lynch them so he called the area chief who came to the scene and thereafter called the police. He stated that they found five sacks of bhang from the accused's person's store. The store was labeled 'Fish Eagles' and also a motorcycle and motorbike. He asserted that the Appellant had been a resident of the area for over 30 years and he knew him very well and knew for a fact that the said homestead and store belonged to him.
18. PW3, the Area Chief, Naivasha East Location testified that she was called by one Joseph on the material day and informed that they had found bhang in the Appellant's home. She then went to the scene alongside elders and found many people outside the Appellant's house. The Appellant and another suspect had also been tied and made to sit down plus the sheep were at the scene. She was then appraised of the issue and was shown the recovered bhang before the police were called to arrest them. She informed the court that the Appellant was well known to her and that sometime back they arrested him with bhang and charged him accordingly.
19. PW4 on his part corroborated the testimonies above and reiterated that they found five sacks of bhang at the Appellant's store.
20. PW5, a police officer attached to Njabini Police Station testified that they received reports from the area chief on the material day of a bhang peddler who had been arrested at Kwa White. Together with the OCS, and other police officers, they proceeded to the scene where they found over 200 members of the public. They arrested two individuals. One of them was found with stolen sheep and he was the one who led the public to the Appellant where they recovered the bhang. They were shown the store where the five sacks of bhang were stored and they photographed the store labeled 'fish eagle' together



with the house where the Appellant was found sleeping. They then prepared an inventory of all the recovered items and escorted the Appellant to the police station.

21. PW6, a government analyst based in Nairobi testified that on 2nd June 2022, some plant material in five envelopes were submitted to them for purposes of analysis. They weighed 1,195 grams and were duly accompanied by an exhibit memo form. Upon analyzing the plant material, he found that the same contained a mixture of tobacco and cannabis and prepared a report dated 6th June 2022 to that effect.
22. In his defense, the Appellant gave unsworn testimony stating that on 31st May 2022 at around 2.00 am, he heard his door being banged and when he woke up he found two people who ordered him to come out and sit down. He was informed that someone who had been found with stolen sheep had led them to his place. They then informed him that there was something in the adjacent room and he was shocked to see what was found in the room. he was then arrested alongside the recovered material.
23. Section 4 of the Narcotic and Psychotropic Substances (Control) Amendment Act, 2022 states that:-
24.
 4. Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—
25. In respect of any narcotic drug or psychotropic substance—
26. Where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings imprisonment for a term of thirty years, or both such fine and imprisonment;
27. Where the person is in possession of more than 100 grams, to a fine of not less than fifty million shillings or three times the market value of the narcotic drug or psychotropic substance whichever is greater, or to imprisonment for a term of fifty years, or both such fine and imprisonment.
28. The learned magistrate asserted that there was no doubt that the plant material that was produced in court was indeed cannabis. Further, PW6 testified that the same was a mixture of cannabis which is listed in the First Schedule of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, and tobacco which is not in the Act.
29. I also concur that the substance was indeed recovered from the Appellant’s homestead namely his store as evidenced by the prosecution and proved by the testimony of PW1, PW2, PW4, and PW5. The recovered plant material was said to weigh 115,500 grams.
30. Consequently, the trial magistrate grappled with the issue of whether the Appellant was trafficking the said substance. 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..”
31. 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 offense 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 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.”

32. The prosecution was seized with one motorcycle and a motorbike which were found alongside the five sacks of the plant material which were alleged to be used in trafficking the substance. The trial magistrate ascertained that it would be speculative to find that the Appellant was using the motorcycle and motorbike to transport the recovered plant material, an assertion I agree with as the same does not meet the parameters set out in the aforementioned Section 2 of the Act.
33. In my view, I wholly agree with the trial magistrate that whereas the definition of trafficking is broad enough to include the aspect of storage, in this case, the evidence tendered before the court safely points to the offence of possession as opposed to trafficking narcotic drugs.
34. In *Jean Wanjala Songoi & Patrick Manyola v Republic* [2014] eKLR where it was held that:-

“...Possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, the aspect of the offence was not established beyond reasonable doubt against the Appellants.”
35. Additionally, in *Peter Mwangi Kariuki v Republic* [2015] eKLR, it was stated that:-

In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to know two things, namely, that the accused knew the item was in his custody and secondly, he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it.
36. Accordingly, after my independent appraisal of the evidence on record, it is my view that the fact of possession was indisputably proven by the prosecution. In the case of *Hussein-Vs-R* [1980] KLR 139, the Court of Appeal made it clear that being in possession does not mean that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that possessor must have such access to and physical control over the thing that he is in possession to deal with it as an owner could to the exclusion of strangers.
37. The plant material which was in five sacks was found in the Appellant’s homestead specifically in his store and the substance was later identified by PW6 as a mixture of cannabis and tobacco. The recovered material was found to be weighing 115,500 grams. I did not find any material contradictions in the evidence of PW1, PW2, PW3, PW4, PW5, and PW6 who were involved in the interception, arrest of the Appellant as well as recovery and testing of the substance later confirmed to contain cannabis. There was also no question that the homestead and store belonged to the Appellant and I agree with the trial magistrate that the only logical conclusion was that the Appellant was the owner of the recovered plant material and was therefore in actual possession of the same.
38. Moreover, I have weighed the Appellant’s defense in its totality and I conclude that the defense was not credible, was unworthy of belief, and did not displace the prosecution’s evidence in any way. Moreover, I disregard the Appellant’s notion that the trial magistrate did not consider his defense.



39. The Appellant stated that the learned trial magistrate ruled that the prosecution did not prove that the offence of drug trafficking as charged by the Appellant but instead of acquitting the Appellant, he went ahead to convict him on the offence of being in possession of cannabis which he was never charged with. That the charge sheet was never amended and the Appellant was accorded the chance to plead to the charges. He contended that he was denied a fair hearing contrary to Article 50 of *the Constitution* and he was also denied the chance to cross-examine the witness on the same and be allowed to prepare and challenge the evidence produced on the same.
40. However, it is my considered finding that the Appellant was denied his constitutional right in any way. The trial court considered the evidence for the charge against him and rightly and appropriately convicted him for the offence of possession instead of trafficking given the evidence available. It is the duty of the trial court to fully analyze the facts and weigh the same to establish if the case against the accused is proved beyond reasonable doubt, which duty was carefully undertaken in the present case. I find that there was no evidence of any contravention of the Appellant's constitutional right to a fair trial or any omission on the trial court's part which could have caused the Appellant any prejudice.
41. In the upshot, I agree with the trial magistrate's conclusion that the prosecution proved beyond any reasonable doubt that the accused herein was in possession of cannabis, a narcotic drug, and upheld the guilty conviction.
42. On sentencing, the Appellant asserted that the sentence awarded was excessive and harsh within the circumstances. That the learned trial magistrate did not consider the fact that he was a first offender, a father of four children; one of them being disabled and prayed that the time he remained in remand custody be considered. He stated that the sentence did not meet the requirements of sentencing in Article 50(2)(p)(q) of *the Constitution* and the judicial sentencing guidelines.
43. However, after perusing the sentencing ruling, I find that the learned trial magistrate considered all the relevant factors including the Appellant's mitigation, the quantity and the value of the drugs the Appellant was found in possession of, the nature and circumstances of the offense herein and the penalty stipulated by the law. She asserted that the Appellant was found with 115,500 grams of the cannabis whose street value was put at Kshs. 3,465,000/-.
44. Taking into account the severity of the offense and the grave and devastating effects that the drug menace continues to have on our society, especially on the youth and the penalty stipulated under the law and at the same time balancing the same with the Appellant's mitigation and the fact that he is a first offender, I find that the sentence meted out on the Appellant was harsh and excessive in the circumstances of the case.
45. I find reason to interfere with the same. Further, the appellant was not given an option for a fine. In the circumstances, I make the orders;
- (i) I sentence the appellant to pay a fine of Kshs. 10,000,000/- in default he shall serve a sentence of 15 years' imprisonment.
 - (ii) Moreover, in accordance with the provisions of Section 333 (2) of the Criminal Procedure Code, the period that the Appellant spent in custody shall be taken into account in computing the Appellant's sentence.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 2ND DAY OF MAY 2024

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C KARIUKI



JUDGE

