



**Elema v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 8309 (KLR) (1 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E005 OF 2023**

LW GITARI, J

JULY 1, 2024

BETWEEN

ALI SORA ELEMA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appeal arises from the decision in the Chief Magistrate’s Court at Isiolo Criminal Case No.90A of 2020.
2. In the case the appellant was charged with together with one Adano Hallow Ibrahim with the offence of trafficking in Narcotic Drugs contrary to Section 4((9) of the Narcotic Drugs and Psychotropic substances Control Act No.4/1994. It was alleged that on 2/7/2020 at Milima Wamba along Marsabit Isiolo road, within Samburu County they were found trafficking twenty one point zero two (21.02) Kilogrammes of Cannabis Sativa (bhang) using motor vehicle registration number KBV 836 Make Toyota Succeed with a street value of Kshs.525,500/- which was not medically prepared.
3. The appellant and his co-accused denied the charges and a plea of not guilty was entered. A full trial followed after which the appellant was found guilty as charged and was accordingly convicted. He was ordered to pay a fine of Kshs.1,576,500/- and addition to serve a sentence of imprisonment for thirty five (35) years. His co-accused was however found not guilty and was acquitted under Section 215 of the Criminal Procedure Code.
4. The appellant was dissatisfied with both the conviction and sentence and filed this appeal which is anchored on the following grounds:-
 1. That the learned trial magistrate erred in both matters of law and fact by failing to note that PW1, PW4, PW6 andPW7 gave contradictory and paradoxical evidence.



2. That the learned trial magistrate flouted in matters of fact and law by relying on the testimony of DW1 and DW3 to convict the appellant herein without analyzing their evidence.
 3. That the trial magistrate was so biased by convicting the appellant to serve 35 years imprisonment by stating that the appellant bribed his way at the customs without any prove from the prosecution.
 4. That the trial magistrate flouted in matters of fact and law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.
 5. That the trial magistrate flouted in matters of fact and law by failing to note that the appellant brought the receipts from the customs to prove his innocence.
 6. That the trial magistrate flouted in matters of fact and law by failing to note that the KEY witnesses were not called from the customs.
 7. That the learned trial magistrate erred in both matters of law and fact by failing to note that the sentence is harsh and excessive.
 8. That the learned trial magistrate erred in both matters of law and fact by rejecting the appellant defence without giving cogent reasons.
5. He prays that the appeal be allowed, the conviction be quashed and the sentence be set aside. That he be set at liberty by this court.

The Prosecution's Case:

6. PW1 P.C Godfrey Muthamia attached to Multi-Agency Security Team. On 20/7/2020 PW1 was at Wamba Junction where they had erected a road block. A motor vehicle make Pro-box registration number KBS 229Q Silver in colour was stopped at the road block. The vehicle was being driven by Hussein Maalim Ali. There was also a vehicle registration number KBV 836 H which was being driven by Adono Ali and it had a co-driver Ali Sora Elema. A search was conducted in the two motor vehicles and it was revealed that the vehicles were carrying cartons of Mango Biscuits. In the motor vehicle KBS five cartons contained Bhang. In KBV there were 50 cartons of Mango Biscuits and inside five (5) of them there was bhang concealed in the cartons. Inside the vehicle KBV there were four tins of first milk powder which contained bhang and a tin of Star milk powder also had bhang. Two tins from Nura milk powder had bhang. In motor vehicle KBS one carton of Nura milk powder container of twenty five kilogrammes also contained bhang. In the motor vehicle KBV, there were four big rolls of plant material wrapped in a polythene bag. The two motor vehicles were arrested and detained at Isiolo Police Station together with the two drivers and one occupant. A certificate of the inventory was prepared at the police station. The drugs were weighed. The vehicles had also carried cartons of biscuits containing biscuits. KBV 836 Y had carried 90 cartons containing biscuits. In the vehicle KBS 229 Q there were fifty (50) cartons of biscuits containing plant material out of which five (5) had plant material suspected to be bhang. There was also one Euro Milk Containing plant material weighing at ten (10) kilogrammes. Ibrahim Khalid Intaro (PW2) testified that he is a taxi driver and on 19/7/2019 his motor vehicle KBS 229 Q was hired by Elema. That he is the owner of the said motor vehicle and he produced his original log book. He had employed Hussein Maalim who was the 3rd accused in this case as his driver.
7. On 20/7/2019, the 3rd accused called him and reported that his vehicle had been detained. The driver had informed him that he was hired to transport biscuits to Isiolo by the appellant Ali Sora Elema.



- The vehicle was arrested for carrying Bhang. He went to Isiolo Police Station and reported and also recorded a statement.
8. Sallo Wario (PW3) testified that on 20/7/2019 her motor vehicle was hired by Ali Sora. Her driver was Adano who was the 1st accused in the case. The appellant when hiring the vehicle stated that he was to transport some luggage to Isiolo. Later she learnt that the motor vehicle was arrested at Isiolo for carrying bhang. Her motor vehicle was KBV 836 H which was bought by her husband (deceased) and he had entered an agreement with the seller on 4/11/2019. The vehicle was driven by her son (1st accused).
 9. Nicholas Yano (PW3) is a police officer who was attached to the Department of Criminal Investigations (D.C.I) Anti-Narcotic Unit Isiolo County. He was instructed to investigate the matter. The two vehicles were intercepted at Wamba Junction by a multi-agency investigations team. The vehicle were searched and narcotic drugs were recovered. The vehicles were detained at Isiolo police Station. Motor vehicle KBV 836 was transporting bhang concealed in cartons of biscuits. The vehicle was being driven by Adano Allo Ibrahim and a co-driver Ali Sora Elema.
 10. The 2nd vehicle KBS 229 Q was also carrying in milk cartons. The driver was Maalim Ali. The vehicles were photographed and the photographs were produced as exhibit 14 a- L.
 11. Emmy Otieno (PW5) was a government Analyst at the Government Chemist. She testified that the plant material was examined and found to be cannabis sativa. She testified on behalf of her work-mate James Wairimu who could not attend court as he was on other official duties at Bungoma. She was conversant with his handwriting. According to her on 12/8/2020 the exhibits were taken to the chemist buy P.C Yano. They were in envelops marked 1- A19 bearing the names of Adano Ibrahim and Ali Sora Elema. The envelopes were containing plant material which were examined and found to be cannabis sativa which is listed under Narcotic Drugs and Psychotropic substance (Control Act). She produced exhibit memo form and the report as exhibit 17 a &b and the plant material as exhibit 18. The exhibits according to the witnesses were accompanied by a certificate of weighing and a certificate of sampling which was produced as exhibit 19 and 20.
 12. Michal Kimwere Ngeno (PW2) is a scenes of crime officer attached at the District Criminal Investigations Officer Isiolo. She testified that she was requested to take photographs of the motor vehicle KBV 836 H and KBS 229Q which had been arrested by multi-Agency officers at Wamba Junction. She took photographs of the motor vehicles and the respective luggages which were in the said motor vehicles. The photographs 5&6 shows five cartons and one tin containing substance suspected to be cannabis. They were recovered in motor vehicle KBS 229 Q. The others were one tin and two boxes showing green plant material suspected to be cannabis. They were recovered from motor vehicle KBV 836 H. She produced the photographs and certificate as exhibit 15a and 16.
 13. Dasir Adan (PW7) is a police officer who was performing duties with other officers- multi-Agency team and Wamba along Isiolo-Moyale road when they stopped the two motor vehicles and ordered the occupants to alight. They inspected the vehicles and found that they were carrying biscuits. On inspection motor vehicle KBV 836 was carrying six boxes and six tins of suspected cannabis. The motor vehicle KBS 229Q was carrying five cartons and one tin containing cannabis. The cartons and the tine were blanded as biscuits to conceal the drugs. Motor vehicle KBV 836 H was being driven by Hussein Maalim Ali. They arrested the vehicles, the occupants and the exhibits to Isiolo Police Station.
 14. Police Constable Kananu Betty (PW8) is from Isiolo Police Station and on the material day he was with other police officers performing duties along Isiolo-Moyale Road at Wamba Junction. She corroborated the testimony of PW4 &PW7 on how they conducted a search in the two motor vehicles and recovered what was suspected to be cannabis. She testified that the vehicle KBS 229Q was driven



by 3rd accused while KBV 836 had a driver and a passenger. The driver was Adono Ibrahim and the appellant was the co-driver.

15. Police Constable Nicholas Yano (PW4) was the investigating officer. He gave evidence on how the vehicles were stopped at the road block and on investigations, they were found to be carrying narcotic drugs. He testified that the vehicles were carrying cartons of biscuits while in some cannabis drugs were carried in the cartons disguised as biscuits and others as milk. He recovered a slip from KRA issued at Moyale border No.2020MOY3033YW indicating the name of the client as Ali Sora who is the appellant. It was produced as exhibit 21. He then prepared a weighing certificate which the appellant and the driver of KBV 836H. The weight of the drugs was 21.2 kilogrammes with a street value of Ksh.525,000/-. Those recovered from motor vehicle KBS 229 Q weighed 10.36 Kilogrammes with a street value of Ksh.259,000/- The driver of the said motor vehicle signed a weighing certificate. He was the 3rd accused in the matter. He then wrote to the registrar of motor vehicles and he received a letter showing the owners of the motor vehicles who he summoned and recorded their statements. The witnesses established that the items belonged to the appellant who had been issued with a receipt by KRA for the goods but was not authorized to carry drugs The co-accused were then charged.

Defence Case:

16. The appellant gave his defence on Oath. He denied he charges. He stated that he hired the vehicle driven by 1st accused on 20/7/2020 at around 11.00 am and then went to Ethiopia for a consignment. He bought one hundred and fifty (150) cartons of biscuits then left for the customs office. The officers searched the vehicle and confirmed that it was carrying the said one hundred and fifty cartons of biscuits. He parted ways with 1st accused and agreed to meet at Burika Petrol Station as he went to meet 3rd accused's motor vehicle KBS. He went and bought twenty five (25) cartons of milk. He called first accused and he said he was ahead of them. Later he found him at Gutiya with the boot of the vehicle open and there was a motor cycle nearby. The 1st accused alleged that he had opened the boot to tighten the biscuits consignment. He got in the vehicle driven by 1st accused and distributed the biscuits and the milk at Marsabit and Laisamis then proceeded to Manle where they arrived at 12.00 midnight and spent the night. He sold the remaining five cartons of milk. I told 2rd accused to go back but he decided to go to Isiolo to look for customers rather than go back with an empty vehicle. The vehicle KBV 836 H had ten cartons of biscuits. At Mlima Wamba, they were intercepted by the Multi-Agency Team who searched the motor vehicle and recovered bhang. They also recovered bhang in the second motor vehicle. He was surprised as he had finished with the vehicle of 2nd accused.
17. In cross-examination the appellant admitted that he is the one who had hired the two vehicles from 1st and 3rd accused on 19/7/2020. That he is the one who knew what each vehicle carried and he is the one who paid for consignment.
18. The trial magistrate found the appellant guilty and sentenced him to pay a fine of Kshs.1,576,500/- being the estimated street value of the drugs and ordered him to serve a prison sentence of thirty five years.
19. The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution did not tender any iota of evidence to link him to the offence in question. He further contends that the prosecution did not prove the key ingredients of the offence he was charged with. He relies on the



Court of Appeal decision in the case of Gabriel Ojiambo Nambesi –v- Republic (2007) eKLR. Where it was stated that;

“It is evidence from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drug or psychotropic substances. In our view for a charge sheet to disclose the offence of trafficking, the particulars of the charge must specify must clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at trial prove by evidence the conduct of an accused person which constitutes trafficking.....”

20. The appellant submits that the prosecution did not establish the conduct of the appellant which constitutes trafficking. It is also his contention that there was no proof that the drug recovered belonged to him.
21. The appellant submits that the street value of the drug was prejudicial to him a no professional standard method was used and yet the value was used to determine the sentence imposed. He relies on the case of Kolongei –v- Republic (2005) 1KLR 7, He further submits that mensrea was not established.
22. The appellant submits that there was incomplete disclosure of evidence and a violation of Article 50(2) (b) (k) of *the Constitution*.

He contends that a motor vehicle KBS 534Y was mentioned by PW1 but no evidence was tendered as to who the owner of the vehicle was and the investigating officer failed to disclose its whereabouts. That no evidence was adduced as to why it was brought to court if it was not connected with the present offence.

Failure to procure an Essential Witness:

23. The appellant contends that the prosecution failed to call the owner of motor vehicle KBS 534Y whose vehicle was shown to court carrying ninety (90) Boxes of biscuits. The appellants cites the case of Bukenya-v- Uganda 1972 E.A 584.
He has urged the court to re-evaluate the evidence and resolve the doubt in his favour.
24. The appellant has also urged the court to find that the prosecution case was marred with contradictions and inconsistencies which should be resolved in his favour as the discrepancies inconsistencies are fundamental.
25. The appellants faults the court for reliance on the ‘ones not encompassed as evidence.’ The appellants submits that the findings by the trial magistrate that he bribed his way is not supported by any evidence on record. That the finding by the trial magistrate about ninety cartons inside motor vehicle KBS 534Y is not supported by evidence. he Urges the court to find that reliance by the trial court on the theories while convicting infringed his rights to fair trial. He relies on the case of Oketh Okale-v- Republic (1965) E.A 555 where the Court of Appeal while addressing the issue of unwarranted conclusions by the trial Judge held that – “a trial Judge cannot create their own theories not canvassed in evidence.”
26. Finally the appellant submits that the trial magistrate erred by rejecting his defence and meted out a harsh and excessive sentence without properly analyzing the issues raised in his defence based on this submissions. The appellant prays that the appeal be allowed.

Respondents submissions:

27. The respondents submits that this court is mandated to re-evaluate the evidence before the trial court afresh and come up with its own independent finding while bearing in mind that it has not seen nor



heard the witnesses and make due allowance for this. Reliance was held on Gabriel Kamau Njoroge-v Republic (1982-88) 1 KLR 1134. The respondent address grounds 1, 3, 4, 5, & 6 which challenges the prosecution evidence summarily and ground 2&8 together on the appellants defence and sentence. It is the contention by the prosecution that the witnesses PW1, PW7 and PW8 gave well corroborated evidence as they were the officers who were present at the scene when the recoveries were made from motor vehicles KBV836H Toyota Succeed and KBS 229Q make Toyota Succeed. He submits that the evidence proved that the appellant was trafficking in Narcotic drugs by transportation and conveying. He relies on the case of Gabriel Ojiambo Namesi –v-Republic (2007) eKLR, Court of Appeal and Mohammed Famau Bakari –v- Republic (2016) where the Court of Appeal considered what the ingredients of the offence of trafficking and the definition of the term conveyance respectively. He submits that conveying is one of the ways by which narcotic drugs may be trafficked. That they proved that the appellant was the owner of the drugs which were disguised as biscuits to conceal them and he was the owner of the luggage which was being transported in motor vehicle KBV 836 H. That it was proved that the appellant had hired the motor vehicle at the time the drugs were recovered and he had knowledge of the existence of the drugs in the motor vehicle.

28. On the alleged contradictions and inconsistencies, the respondent submits that there were no material discrepancies in their case. He refers the court to the Court of Appeal decision in Phillip Nzaka Watu –v- Republic (2016) eKLR.
29. On the issue raised by the appellant that his defence was not considered, he submits that the trial magistrate considered the defence and gave reasons for rejecting it.
30. Finally on the sentence, the prosecution submits that the sentence pronounced as the appellant was legal and proper while relying on the case of Benard Kimani Gacheru-v- republic (2002) eKLR, he submits that sentencing is the exercise of discretion by the trial court and an appellate court will not interfere with the sentence unless it is shown that it is manifestly excessive, that the court overlooked some material factors or acted on wrong principles. The respondent prays that the appeal be dismissed.
31. I have considered this appeal, the evidence tendered before the trial court and the submissions by the parties.
32. This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is Okeno-v- Republic (1972) E.A 32 where this duty was discussed. This was buttressed in the case of Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated:-

“ 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 to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
33. It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses.”



Issues for determination:

34. Based on grounds of appeal which were expounded in the appellant's submissions the issues which arise for determination are:
1. Whether the charge against the appellant was proved beyond any reasonable doubts.
 2. Whether the sentence imposed on the appellant was harsh.

Analysis and determination:

35. The appellant was charged with trafficking in Narcotic Drugs contrary to Section 4a of the Narcotic Drugs and psychotropic substances (Control) Act No. 4 of 1994 to be referred as the Act. Section 4(1) of the 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 a 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.”

36. The term “trafficking” is defined under Section 2 of the Act as follows:

“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.”

37. In the case of Gabriel Ojiambo Nambesi –v- Republic (supra) which has been cited by both parties herein, the Court of Appeal addressed itself on the above definition and what is required to prove the offence of Trafficking in Narcotic Drugs. The court stated-

“It is evident from the definition of the word 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 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.”

38. In this case the prosecution alleged that the appellant was trafficking the drugs using a motor vehicle registration number KBV 836 H make Toyota Succeeds as disclosed in the particulars of the charge. In Mohamed Famau Bakari-v- Republic (supra) the court considered the term conveyance as defined under Section 2 of the Act and stated as follows:-

“The term ‘conveyance’ is defined to mean “ a conveyance of any description used for 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 transports.”



39. The Court of Appeal in the case of Gabriel Ojiambo Nambesi –v- Republic (supra) emphasized that upon the accused being charged with the offence of trafficking the state has a duty at the trial, to prove by evidence the conduct of that accused person which constitutes trafficking.
40. Guided by this holding the question is whether the prosecution availed evidence to prove that the accused was trafficking in Narcotic Drugs. The chronology of the evidence is that on 20/7/2020 the appellant hired the motor vehicle registration number KBV 836 H from its owner Sallo Wario (PW3) alleging that he wanted to transport some luggage to Isiolo. The vehicle was driven by her driver Adano Hallow Ibrahim who was the first accused trial court. The vehicle was driven to Ethiopia and was loaded with cartons biscuits. The appellant had also hired the motor vehicle KBS 229Q from its owner Ibrahim Kalid (PW2) to transport biscuits to Isiolo. The vehicle was driven by his driver Hussein Maalimu who was the 3rd accused. The appellant had a clearance from Kenya Revenue Authority to transport the goods. The vehicle was loaded with cartons of milk within Moyale town. The appellant and the driver left Moyale for Isiolo. However the motor vehicles were stopped at Mlima Wamba and police officers, who included PW1 P.C Godfrey Muthamia, Police Constable Dasir Adan (PW7) and Police Constable Kahamu Betty (PW8) inspected the luggage. From the motor vehicle KBV 836 H police recovered assorted Mango and Cappuccino Biscuits and out of five cartons of biscuits they recovered what was suspected to be cannabis. More suspected cannabis was recovered from a tin of star milk powder, others from two tins of Nura milk powder and five rolls of plant material wrapped in polythene papers. These were produced in court as exhibits 1-7. An inventory of the recovered items was prepared which the applicant signed. The applicant was arrested and detained at Isiolo Police station. The inventory was produced as exhibit 23. The items listed are
1. 50 cartons Assorted Mango and Capucino Biscuits.
 2. 5 cartons of mango biscuits containing cannabis sativa plant material.
 3. 4 tins of first milk powder containing cannabis sativa plant material.
 4. One tin star milk powder containing cannabis sativa plant material.
 5. One tin kaafi milk powder containing cannabis sativa plant material.
 6. One tin of Nuka milk powder containing cannabis sativa plant material.
 7. Two tins of Euro milk powder containing cannabis sativa plant material
 8. 5 rolls of cannabis sativa material wrapped in polythene bags.
41. This was the certificate of inventory of the items recovered from motor vehicle KBV 836H make probox Silver in color chasis number NCP5/20/2387 on 20th day of July 2020 at Wamba junction road block at around 0930hrs by multi agency team commended by Adan Dasira. The appellant signed as Ali Sora Elema I.D No.26017593 as well as the police officers and the driver Adano Hallow Ibrahim.
42. The drugs were weighed and found to be 21.2 (twenty-one point two) kilogrammes. The appellant was present when drugs were weighed and he signed a certificate exhibit 20. The recorded dugs were examined at the Government Chemist and found to be cannabis which is included in the Narcotic Drugs and Psychotropic Substance (Control) Act. The memo form and the government analyst report was produced as exhibit 17 a & b.
43. The prosecution produced a receipt which was recovered from the said vehicle which was a Kenya Revenue Authority (KRA) bearing the name of the appellant to prove that he was the owner of the biscuits, exhibit 21. The plant materials were also produced as exhibits 1 – 7. The prosecution also



produced evidence showing that the vehicle KBV 836H was owned by the husband of PW3 – who had custody of the vehicle and was being driven by her driver at the time of this incident.

44. The vehicles and the exhibits were photographed and the photos were produced in court; see exhibits 16.
45. The culmination of this is that in his defence the appellant admitted that he is the one who hired the said motor vehicle KBV 836H and he went to Ethiopia for the consignment. He bought 150 cartons which were later found in the said motor vehicle. He further stated that he is the one who knew what was in the consignment and he is the one who paid for the consignment at customs offices as per the KRA Registration receipt which was produced in court as exhibit.
46. For the offence of Trafficking in Narcotic Drugs to be proved, the prosecution must establish to the required standard which in criminal cases is that of beyond any reasonable doubts, that the person accused of the offence had actual possession or had knowledge of the existence of the drugs in the means of conveyance in question. The contention by the appellant is that the prosecution did not establish any of the dealing with the drugs which constitutes trafficking.
47. I find that the prosecution has proved that the appellant was the owner of the consignment which was in motor vehicle KBV 836H which he had hired to transport it to Isiolo. It is from this consignment that drugs were recovered. The motor vehicle KBV 836H was the conveyance used to transport the drugs. The appellant was in the motor vehicle seated next to the driver as a co-driver. The appellant had knowledge of the existence of the drugs. In view of the evidence of PW1 who told the court that the reason they suspected the motor vehicle is that it is not common for goods like the ones which the appellant was transporting to come from that direction towards the direction of Isiolo. This means that the sole reason for transporting the goods was to disguise the narcotic drugs. The appellant had hired the motor vehicle and was carried in it. These evidence is sufficient prove that the appellant is the one who was trafficking in narcotic drugs.
48. There is prove beyond any reasonable doubts that he was transporting the drugs using the motor vehicle as the conveyance.
49. The weight of the drugs was determined in the presence of the appellant as testified by PW4. The investigating officer in the presence of the appellant and he signed the certificate exhibit 20. The appellant does not deny that the drugs were weighed in his presence nor does he deny he signed the certificate.
50. The value of the drugs is supposed to be determined as the first part of the sentence is based on the value of the drugs.
51. The issue of the market and street value was discussed by the court of Appeal in the case of Priscilla Jemutai Kolongei –vs- Republic (2005) eKLR where the court stated that street and market value has no fundamental difference. The value given is not estimated but what is being sought is a willing seller would accept from a willing buyer. It went on to state that there is no express provision on the basis to be used to calculate the value on the prohibited drugs other than that given under Section 86 of the Act. The Section provides:
 - (1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.
 - (2) In this section “proper officer” means the officer authorized by the Minister by notification in the Gazette for the purposes of this section.”



52. The court stated:

The certificate remains prima facie evidence which may be challenged by other evidence in the absence of which it is the only evidence to be relied on in addition to other evidence on record.”

53. That is to say that where the certificate is produced and no other evidence to prove the value, the certificate shall be relied on to prove the value. In this case the certificate of weighing was produced as exhibit 20 showing that the weight was 21.2 kilogrammes and a street value of Kshs. 525,000/-

54. No prejudice was suffered sentence under Section 4a of the Act is based on the market value which as submitted by the appellant is the price which an item ought to be reasonably expected to fetch on a sale in the open market. The state gave a value of the drugs which was not challenged. The trial magistrate followed the law and therefore the appellant was not prejudiced.

55. The appellant has stated that there was none disclosure of evidence on motor vehicle KBS 534Y. I find that there was no motor vehicle KBS 534Y which was involved. The vehicle in the second count was KBS 229Q. KBS 534Y was only mentioned once. It is my view that it is most probable that KBS 534Y was a typing error which normally happens when writing or when being typed. Such an error must be ignored as it does not cast doubts in the prosecution case as inventories were recorded and appellant signed. There is nothing to show that they were planted in the motor vehicle KBS 229Q.

56. On the issue of failure to call essential witness, Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

57. I find that it is the prosecution who has discretion to call witnesses who are necessary to support their case. As I have stated the prosecution did not fail to call crucial witnesses as KBS 534Y did not feature anywhere as a vehicle which was involved in the said criminal activity.

58. The prosecution presented adequate evidence in support of their case. The prosecution produced the certificate of the inventory of recovered items from motor vehicles KBV 836H and KBS 229Q as exhibit 23 & 24. No other vehicle was mentioned. The prosecution produced photographs of the motor vehicles loaded with the exhibits and again the vehicles are KBS 229Q and KBV 836H. They were produced as exhibits – 15. The prosecution produced all the evidence that it had and the allegation of the violations of the rights of the appellant to fair trial is a sham.

59. On the issue of contradictions and inconsistencies, it is trite law that minor contradictions are ignored by the court but on the other hand contradictions and inconsistencies in the evidence which are material and tend to show that the witnesses are not truthful may lead the court to reject that evidence. In *Philip Nyaga Watu vs. Republic* (2016) eKLR, Court of Appeal, it was held that:-

However it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing said to them in outset detail. Some discrepancies must be expected because human recollection is infallible and no two people perceive the same phenomena exactly the same way-----whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extend of discrepancies and inconsistencies in question”



60. See also the case of Twehangane Alfred vs. Republic Uganda Criminal Appeal No.139/2001 (2003) UGCA-6. The court stated that minor contradiction will be ignored unless the court thinks they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.
61. The appellant has pointed out discrepancies on the dates of 19/7/2019 and 20/7/2021. This in my view are minor discrepancies which this court must ignore as there is evidence by witnesses who have adduced evidence to prove the dates in question. The date of 20/7/2019 must have been a genuine mistake as a typing error in view of the overwhelming evidence adduced to prove the dates of the incident. I agree with the respondent that there were no material discrepancies in the evidence and no prejudice was suffered by the appellant.
62. On the issue of theories not encompassed by evidence, it is trite that the determination of issues must be based on the law and evidence. A trial court is not expected to create its own theories which were not canvassed in evidence. The finding by the trial magistrate was motivated by the fact that the appellant had a receipt issued by customs and yet the vehicle was carrying drugs. The 3rd accused had adduced evidence that they passed through all road blocks after the appellant left the vehicle, talked to police officers at those road blocks and they were allowed to proceed.
63. However, the issue of corruption did not arise in the evidence and it was therefore wrong for the trial magistrate to come up with his own theories which were not canvassed in the evidence. No prejudice was suffered by the appellant arising from that comment.
64. The appellant contends that the defence was rejected without properly analyzing it by the learned trial magistrate. I have perused the judgment by the learned trial magistrate and find that he properly analyzed the defence of the appellant and rightly concluded that criminal liability, (Mensrea and actus reus) was proved. The ground is without merits.
65. The appellant has stated the sentence was harsh and excessive. The court of Appeal in Robert Mutungi Muumbi vs. Republic (2015) eKLR while quoting with approval the decision in Benard Kimani Gacheru vs. Republic (2002) eKLR stated that:-

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.”

66. The penalty provided under Section 4(a) of the Act (Supra) prescribes a penalty of a fine of Kshs.1,000,000/- or three times the value of the narcotic drugs or psychotropic Substance whichever is greater and in addition to imprisonment for life. The court can only interfere with the discretion of the learned magistrate if the sentence is excessive in the circumstances of the case or that the court overlooked some material factor or took into account some wrong material or acted on wrong principles.
67. In this case. The learned trial magistrate stated as follows in his on the sentence:-

“I have considered the nature of the offence and the manner in which it was committed. I do note the submissions by the prosecution and the mitigation by the accused. The court



takes judicial nature of the negative effect of the drug and substance abuse was occasioned in the society. Many young people have lost sense of their lives, families have broken down, crime is on the rise and the society is crying. The 2nd accused person concealed the identity of the drugs to enable him move from Ethiopia deed into the Kenya territory pretending to be carrying out genuine biscuits of supply of milk and biscuits. He went into risking the lives of the 1st and 3rd accused persons who believed that they were carrying biscuits and milk. The 2nd accused person is underserving of any mercy given the scheme he had laid down in order to succeed in his illegal business.

68. Consequently, the 2nd accused shall pay a fine of Ksh.1,576,500/- being the estimated street value of the cannabis received from the 2nd accused.
69. In addition, the 2nd accused shall serve a prison sentence of 35 years. Right of Appeal in 14 days.”
70. The learned trial magistrate considered relevant factors and passed the lawful sentence provided under the law. The learned trial magistrate did not take into account the period that the appellant had spent in remand while awaiting trial as mandatorily required under Section 333(2) of the Criminal Procedure Code. The appellant was in prison from 5/3/2020 when his bond was cancelled up to 4/1/2022 when the sentence was passed a period of two (2) years ten (10) months and five (5) days. The sentence imposed by the trial magistrate should therefore be reduced by that period of two years, eight months and five days.

Conclusion

71. Based on the above analysis and for the reasons I have given, I find that his appeal is without merits. I order that the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF JULY 2024.

L.W. GITARI

JUDGE

