Sora v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 11477 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E012 OF 2023

JN NJAGI, J

SEPTEMBER 18, 2024

BETWEEN

JAFFER KANU ISSACK SORA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Marsabit Principal Magistrate`s Court Criminal Case No.366 of 2019 by Hon.C.Wekesa, SPM, delivered on 10/5/2023)

JUDGMENT

1. The Appellant herein was convicted in absentia for the offence of trafficking in narcotic drugs contrary to section 4(a) of *Narcotic Drugs and Psychotropic substances Control Act* No.4 of 1994. The particulars of the offence are that 19th day of June 2019 at Marsabit Central Sub-County within Marsabit County jointly with others not before court were found trafficking Narcotic drugs namely cannabis sativa (bhang) to wit 89 bales of five kilograms each totaling 445 kilograms of street value of Kshs 11,125,000/= by transporting in a Toyota Prado TX registration number KCF 007Q hauling trailer registration number ZB 9366, in contravention to the said Act.

2. The accused was sentenced to pay a fine of Ksh.33,375,000/= in default to serve imprisonment for a period of 5 years and in addition of the said fine to serve imprisonment for a period of ten years. The appellant was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal are that:

    1. That the trial court erred in fact and in law in failing to consider that the accused was condemned unheard contrary to Article 50 of the *Constitution* Of Kenya.

    2. That the trial court erred in fact and in law in failing to consider the Appellant had a right to be present during trial as provided for under Article 50 (2)(f) of the Constitution of Kenya 2010.

3. That the Honorable court erred in fact and in law in failing to consider that the Appellant is a first-time offender.

4. That the Trial Court erred in fact and in law in failing to consider that the charge of trafficking narcotic drugs Contrary to section 4(a) of the *Narcotic &Psychotropic Substance Control Act* No. 4 of 1994 cannot be maintained in the circumstance.

5. That the trial court erred in fact and law in failing to order the 1st Appellant to be availed in Court instead proceeded to hear and determine the case without the Appellant.

6. That the trial court erred in law in conducting proceedings that violated the rights of the Appellant as per the provisions of the Constitution hence null and void.

7. That the trial court erred in fact and in law in convicting the Appellant based on evidence that was full of contradictions and without analyzing the evidence.

8. That the trial court erred in law and in fact in failing to consider the fact that no evidence was adduced by the Appellant in his defence for failure of the court to provide security to the Appellant to enable him to be present in Court as he feared for his life.

9. That the trial court erred in fact and in law in failing to consider that the prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt as Appellant Right to defend himself was not protected by the court.

10 That the sentence given was harsh in the circumstances.

Case for the prosecution

3. The appellant was jointly charged with two other accused persons. The prosecution called seven witnesses in the case. After the first two witnesses had testified, the appellant jumped bail and escaped to the United Kingdom. A year later after the appellant jumped bail, the trial court ordered the case to proceed in the absence of the appellant. The case proceeded in his absence. The appellant`s co-accused were acquitted of the charge and the appellant was convicted.

4. It was the evidence of PC King`ori Mwaniki PW1 and PC Wycliffe Machogo PW2, police officers stationed at Marsabit police station, that on the 19/6/2019 they were manning a road block at KBC barrier outside the outskirts of Marsabit town along Marsabit Moyale highway. That a police vehicle registration number GK 105 attached to Turbi police station approached the barrier from Moyale direction. It was being followed from behind by a motor vehicle registration No. KCF 007Q Toyota Land Cruiser that was hauling a trailer No. ZB 9366. The two vehicles stopped at the barrier. PC Mwaniki PW1 went to inspect the Prado while PC Machogo PW2 went to check on the GK Vehicle. PC Mwaniki found the Prado being driven by the appellant. There were two passengers in his vehicle. He requested the appellant to allow him inspect the motor vehicle. The appellant declined and said that he was a presidential candidate and could not be subjected to a search. PC Machogo saw his colleague arguing with the appellant and went to inquire as to what was happening. He heard the appellant saying that he is above search as he is a presidential aspirant. He declined to have the motor vehicle searched. The police officers requested the police officers in the Turbi police station motor vehicle to escort the appellant to Marsabit police station. The appellant complied and followed the police vehicle to Marsabit police station. PW1 and PW2 briefed the OCS on what had happened but still the appellant declined to have the motor vehicle searched. The appellant`s passengers escaped in the course of the commotion. It was the evidence of the two witnesses that it took the intervention of the DCIO and the OCPD for the appellant to open the motor vehicle and allowed it to be searched. Nothing was

found in the motor vehicle. The trailer was found completely sealed with bolts. They opened the bolts. Inside the trailer the police officers found 89 bales of green plant material that they suspected to be bhang. They weighed the green plant material and an inventory was prepared. The appellant was placed in the cells. The appellant`s passengers were later arrested and the three of them were jointly charged.

5. It was the evidence of Sgt Naibei Robert PW5 of Marsabit police station that he was on the material day at the police station when he was informed by PC Machogo PW2 that they had stopped a vehicle at KBC barrier and the driver had declined the vehicle being searched. That he joined the officers at the police yard where the DCIO also joined them. The appellant was asked to open the motor vehicle. He initially refused but he was persuaded to do so. In the trailer they found 89 bales of dry plant material. The same was weighed at 445 kg. They labelled the bales and did some sampling. A weighing certificate and a search certificate were prepared which the appellant signed. He, PW5, prepared an inventory which also the appellant signed. The appellants` passengers were that time not at the police station but they were arrested on the following day and they were jointly charged with the appellant.

6. The case was investigated by Sgt Mohamed Abdulkadir PW7 of Marsabit police station. It was his evidence that on the material day he was at the police station when the appellant`s motor vehicle was escorted to the police station by police officers in motor vehicle registration No.GKB 501T. The escorting police officers told him that the driver of the motor vehicle had refused to have the motor vehicle inspected. They requested for assistance to have the motor vehicle searched. That the driver of the motor vehicle, the appellant caused a commotion at the police station that attracted members of the public. The appellant was saying that he is a presidential aspirant and that searching his motor vehicle amounted to harassment. That he, PW7, persuaded him to have the motor vehicle searched. The appellant opened the motor vehicle. They searched it but they did not find anything. They opened the trailer in which they found bales of polythene papers wrapped with cello tape. They removed 89 bales from the trailer. They weighed each at 5 kg, all totaling to 445 kg. They drew a search certificate, weighing certificate, an inventory and seizure notice. That the accused signed the search certificate. He was placed in the cells and later charged with the offence.

7. It was further evidence of Sgt Abdikadir that the appellant was brought to the police station in the company of two people but they fled from the police station. That on the following day they were informed where the suspects were and they went and arrested them. They charged them jointly with the appellant.

8. Sgt Abdikadir further testified that they established that the motor vehicle was registered jointly in the names of one Moses Mutungi and Family Bank. That the appellant had hired the motor vehicle. The owner went to court and established its ownership and it was released to him. During the hearing the witness produced the search certificate, the weighing certificate, the seizure notice, the inventory, photographs of the trailer and the motor vehicle, the Exhibit memo, the inventory, details of registration of the motor vehicle, details of the owner of the trailer and 89 samples of the green plant material as exhibits.

9. Moses Mutungi PW3, testified that he is a businessman in Nairobi. That he was the owner of motor vehicle registration No. KCF 007Q that he bought in 2017 through financing from Family Bank. That on the 9/5/2019 he leased it to a company called Scenery Ventures Ltd. He signed an agreement of lease with the director of the company, one Monica. That on 20/6/20219 he learned from social media that the appellant had been arrested transporting bhang in the said vehicle. He called Monica and informed her. He reported the matter at Kilimani police station.

10. Monica Musuma PW4 told the trial court that she is a tour and travel agent and a director of Scenery Ventures Ltd. That in 2019 she had hired motor vehicle registration No.KCF OO7Q from Moses

Mutungi PW4. That on 12/4/2019, the appellant hired the said motor vehicle from them and made payments. He signed an agreement of lease with them. He was supposed to return the vehicle on 19/6/2019. She called him on that date but he did not pick her call. On the following day she was called by PW4 who told him that the vehicle was being detained at Marsabit police station. They came to Marsabit police station where they found the motor vehicle detained on allegations that the appellant was found transporting bhang with it.

11. It was the evidence of James Welimo PW6, a government analyst, that on the 27/6/2019, their office received 89 khaki envelopes from Cpl Samuel Gichuki of DCI office Marsabit which contained 2087 grams of dry plant material. They were requested to ascertain whether the plant material contained narcotic drugs. He carried out physical and chemical tests on the plant material and found it to be cannabis. He signed the report. He produced the report in court as exhibit, P.Exh.18.

12. The appellant did not offer any defence as he was not present in court during the trial.

13. The appeal was argued by way of written submissions.

Appellant`s Submissions

14. The appellant through his counsel submitted that the trial court failed to provide the appellant an opportunity to be heard and thus curtailed his right to adduce and challenge evidence. Hence the court condemned the appellant unheard contrary to the provisions of Article 50 of the *Constitution* of Kenya.

15. Additionally, it was submitted that the court failed to provide the appellant an opportunity be present in court during the trial and hence infringed his right to fair trial as enshrined under Article 52(2) (f) of the Constitution. That there was no justification in hearing the case in the absence of the appellant and hence his constitutional rights were infringed.

16. It was submitted that the police upon seizure of the purported drug did not comply with the mandatory procedure as set down under Section 74A of the *Narcotic Drugs and Psychotropic Substances Control Act* and as such a charge of trafficking in drugs was not maintainable under the Act.

17. The appellant submitted that the trial court in the course of the trial issued a warrant of arrest against the appellant and ordered that the same be forwarded to the United Kingdom for enforcement. That the state failed to comply with the said orders and did not give any reason for failing to do so. It was submitted that the appellant was willing to be present in court but feared for his life due to numerous threats received from the police.

18. The appellant submitted that the prosecution did not discharge its burden of proof by proving the case beyond reasonable doubt. The case of *Elizabeth Waithiegeni Gatimu v Republic* (2015) eKLR was cited on what it means to prove the prosecution case beyond reasonable doubt. It was submitted that the trial court has a duty to weigh the prosecution evidence against the defence evidence. That in this case the defence evidence was left out and hence there was no defence evidence upon which the court could way the evidence. It was submitted that the appellant was not granted a fair trial, hence the trial was unconstitutional and illegal. The appellant urged the court to allow the appeal, quash the conviction and set aside the sentence imposed by the trial court.

Respondent`s Submissions

19. The respondent submitted that the appellant was granted bond and deposited his passport with the court. That he later absconded court and escaped to the United Kingdom. That the trial court made a decision to continue with the case in the absence of the appellant a year after the appellant absconded upon becoming apparent that he had no intention of attending the hearing.

20. It was submitted that the trial court was right in proceeding with the case in the absence of the appellant after he absconded. The respondent cited the case of Republic v Galma Abagaro Shano (2017) eKLR where the court found section 206 (1) of the *Criminal Procedure Code* which limited instances where the court can proceed with a criminal trial in the absence of the accused to misdemeanors was inconsistent with Article 50(2) (f) the *Constitution* and expanded it to felonies. The court in that case ordered a murder trial to proceed in the absence of the accused who had absconded. The court cited the Ugandan case of *Uganda v Gulindwa Paul and Tumusiime* HCT-00-ACCM-005-2015 where it was stated that:

> " In my view, a defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by the constitution, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it."

21. The respondent also cited the House of Lords case of *Regina v Jones* (2002) UKHL 5 where similar sentiments were expressed.

22. It was submitted that the argument by the appellant that the state should have enforced the international warrant of arrest against the appellant instead of proceeding with the trial in his absence was untenable because he was aware that the court had issued warrants for his arrest and he should therefore have presented himself to court and seek for the warrants to be lifted. It was submitted that suspending the hearing indefinitely until the warrants of arrest were effected would have given the appellant opportunity to manipulate the system to his advantage.

22. The respondent submitted that the prosecution witnesses PW 5 and 7 told the court that the sampling and weighing of the drug was done in the presence of the appellant who signed the weighing certificate, seizure notice and the inventory of he seized drugs. That though a designated analyst was not present, it was clear from the evidence of PW6 that the plant material was forwarded to him for analysis and he ascertained the same to be bhang. The respondent in this respect relied on the holding in the case of *Moses Banda Daniel v Republic* (2016) eKLR where the Court of Appeal stated that:

> After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like "Where practicable" and "if any" convey the meaning that the procedure is not mandatory but directory and the use of the word "shall" must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure.

23. It was thus submitted that the provisions of Section 74A were substantially complied with and there is nothing to suggest that appellant was prejudiced as pertains to the recovery and handling of the seized drugs.

24. The respondent submitted that the prosecution had proved that the appellant was found trafficking bhang by use of motor vehicle registration number KCF 007Q. That it was proved by PW4 that the appellant had hired the said vehicle from her. That the police officers PW1 and 2 proved that the

appellant was found driving the said vehicle which was found hauling a trailer in which the subject drugs were found. That the same were confirmed by a government analyst PW6 to be cannabis. Therefore, that the charge against the appellant was proved beyond reasonable doubt. The respondent cited the case of *Mohamed Famau Bakari v Republic* (2016) eKLR where the Court of Appeal held that:

> All forms of trafficking in drugs and psychotropic substances are illicit. In terms of the provisions of sections 2(1), 4 and in view of the circumstances of this appeal we are in agreement that the appellant was trafficking by transportation. We find and hold that the offence of trafficking was proved beyond any reasonable doubt and the appellant was liable to the penalty provided for under section 4(a).

25. The respondent submitted that the sentence under section 4(a) (ii) of the *Narcotics Act* where the drug is above 100 grams is a fine of not less than 50 million shillings or three times the market value of the narcotics whichever is greater or to imprisonment for a term of 50 years, or to both such fine and imprisonment.

26. It was submitted that the value of the narcotics in this case is Ksh.11,125,000/=. That it follows that 3 times this value is Ksh.33,375,000/=. That the trial court should therefore have imposed a fine of not less than Ksh.50,000,000/=. The respondent urged the court to dismiss the appeal, uphold the conviction and impose a proper sentence.

Analysis and Determination

27. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court 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 to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.
>
> It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own 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."

28. The issues for determination in this appeal are whether the constitutional rights of the appellant were violated in being tried in absentia; whether section 74A of the *Narcotics and Psychotropic Substances Control Act* were complied with; whether the prosecution proved the case against the appellant beyond reasonable doubt and whether the sentence imposed on the appellant was harsh.

29. The appellant argued that the trial court infringed on his rights to fair trial by proceeding with the trial in his absence as a result of which he was condemned unheard without being given an opportunity to adduce evidence and to challenge the evidence adduced by the prosecution. The respondent countered this argument by stating that the appellant is the one who jumped bail. That it was proper for the trial court to proceed with the case in the absence of the appellant as he was aware of the hearing and deliberately failed to appear for the trial.

30. Article 50 (2) (e) of the *Constitution* of Kenya, 2010 accords an accused person the right to have the trial begin and conclude without unreasonable delay while Article 50 (2) (f) of the *Constitution* of Kenya, 2010 provides that:

> (2) Every accused person has the right to a fair trial, which includes the right:-
>
> (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

31. The record of the trial court indicates that the appellant was reported to have jumped bail in January 2020. The prosecution later made an application to the court to have the case proceed in the absence of the appellant in view of the fact that he had jumped bail. On the 2nd March 2020 the trial court made a ruling in which it directed that the case proceeds in the absence of the appellant. The hearing of the case did not take off until 23/3/2021 when the 3rd witness, PW3 was heard. This was more than a year after the appellant jumped bail.

32. The appellant does not dispute that he jumped bail and went out of the jurisdiction of the trial court. The question is whether the trial court was right or erred in proceeding with the case in the absence of the appellant.

33. The trial court in deciding to proceed with the case in the absence of the appellant relied on the decision in the Ugandan case of *Uganda v Gulindwa Paul and Tumusiime* (*supra*) as followed by the court in the Galma Abagaro Shano where it was held that it is in proper for the court to proceed with the case where an accused person has deliberately absented himself from the court. In the case of *Republic - vs- Galma Abagaro Shano* [2017] eKLR where the accused had jumped bail, the court observed that:-

> "...it is my considered view that the trial against the accused person must proceed in the interest of justice. It has been pending since 14th October, 2015. The family of the deceased deserves justice and their rights must be considered. By absenting himself, the accused abrogated his constitutional right to be present during his trial. I therefore allow this application and direct parties to make final submissions notwithstanding the absence of the accused person to pave the way for judgment on the evidence on record."

34. There are a replete of authorities where courts were of similar finding that where an accused person absents himself from the hearing of a case, the case may continue in the absence of the accused. In the case of *Aggrey Mbai Injaga v Republic* (2014) eKLR and *Republic vs Galma Abagaro Shano*(2017) eKLR where the Accused escaped after he was placed to his defence, the court held that by absenting himself, the Accused had abrogated his Constitutional right to be present during trial.

35. In the case of *Republic v Teteror* (Criminal Case 2 of 2017) [2023] KEHC 18592 (KLR) (15 June 2023) (Ruling) where the accused escaped from lawful custody after he had been placed to his defence on a charge of murder, the court allowed an application by the prosecution to proceed in the absence of the accused. The court in that case cited the case of *Republic v Joshua Chacha Moronge* [2019] eKLR, where the court in considering a relevant matter held that;

> 'The aim of a criminal trial is to expeditiously accord justice to all parties. An accused person found guilty of an offence ought to be accordingly sentenced in line with the law otherwise one must be acquitted forthwith. It is that balance which a trial aims to achieve. Therefore, in a case where one of the parties makes the trial unable to proceed then such a party visits an injustice to the other. That being so, a Court of law is fully enabled to deal with such instances. On one hand if the delay is occasioned by the prosecution the Court has powers

to even compel the hearing to proceed. On the other hand, if the delay is occasioned by the accused person Article 50(2)(f) of the *Constitution* comes to play. For a Court to take refuge in Article 50(2)(f) of the *Constitution* and proceed on with a trial in the absence of an accused person the Court must first be satisfied that such inability to proceed with the trial is caused by the deliberate conduct of the accused person. That therefore means if the Court forms the opinion that the delay is not caused by any deliberate conduct on the part of the accused person then the trial cannot legally proceed in the absence of the accused person. To reach any of the findings, a Court must carefully consider the particular circumstances of the case. In view of the foregone I now find and hold that Article 50(2)(f) of *Constitution* perfectly comes to play in this case and order that the trial shall proceed the absence of the accused person notwithstanding.'

36. It is clear from the above authorities that where an accused person absconds from the jurisdiction of the court, the trial court can proceed with the case in the absence of the accused. The appellant in this case was jointly charged with two other people. It would have been unfair to the appellant`s co-accused and against the tenets of fair trial for the case to be kept in abeyance indefinitely until when the appellant was apprehended or when he decided to turn up in court. The appellant deliberately failed to turn up in court. He cannot turn around and complain of infringement of his constitutional rights on fair trial when it is him who in the first place decided not to turn up in court for trial. His conduct made it impossible for the trial to proceed. By absenting himself from the court the appellant waived his right under Article 52 (2) (f) of the *Constitution*. I find no substance on the argument that the trial court was in error in proceeding with the case in the absence of the appellant.

37. The appellant further argued that the provisions of section 74A of the *Criminal Procedure Code* are mandatory and that they were not complied with. The section provides as follows:

> " 74 A. Procedure upon seizure of narcotic drugs
>
> (1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorized officers") shall, in the presence of, where practicable-
>
> (a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");
>
> (b) a designated analyst;
>
> (c) the advocate (if any) representing the accused person; and
>
> (d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same."

38. The Court of Appeal in *Moses Banda Daniel v Republic* (*supra*) interpreted the provisions of this section to mean that the procedure set out therein is not mandatory due to the use of phrases such as "where practicable" and "if any". The court proceeded to say that the provision was more relevant where a large haul of drugs was concerned. I am in that regard duly guided by the Court of Appeal

decision. The bhang in the appellant`s case was weighed by police officers in the presence of the appellant who signed the weighing certificate. The same was produced in court as exhibit. The fact that the drug was not weighed by an analyst did not cause any prejudice to the appellant. I am accordingly satisfied that the provisions of section 74A were essentially complied with.

39. The appellant argued that the appellant was convicted on evidence that was full of contradictions and without the trial court analyzing the evidence. That the prosecution did not prove the case beyond reasonable doubt.

40. The trial magistrate in her judgment stated that there was evidence that the appellant was found hauling the trailer where the 89 bales of bhang were found. That there was sufficient evidence that the appellant was in control of the motor vehicle that was found hauling the trailer where the bhang was found. That there was evidence that the appellant had hired the motor vehicle from PW4.Therefore that possession of the bhang was proved against the appellant. That the government analyst PW6 examined the plant material and found it to be cannabis.

41. The question was whether the appellant was found in possession of the 89 bales of cannabis. The *Black`s Law Dictionary* 10th Edition defines the term "possession" to mean –

> The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls."

42. The prosecution was therefore required to prove that the bhang was under the physical control of the appellant and that he had the knowledge of the existence of the bhang in the trailer.

43. It was the evidence of the arresting officers PW1 and PW2 that they stopped the appellant`s vehicle and he refused to have his vehicle and trailer searched. It was their evidence that they escorted the appellant to the police station where the trailer was searched and 89 bales of bhang were found inside. It was the evidence of PC Naibei PW5 and Sgt Abdikadir PW7 that they joined the arresting officers at the police station yard where they witnessed the trailer attached to the appellant`s vehicle being searched and 89 bales were found stashed inside.

45. I have considered the evidence that was adduced against the appellant. The evidence of the police officers as stated above was not challenged. It was clear that the appellant was found driving the subject motor vehicle that was hauling a trailer. He declined to have the vehicles searched on the basis that he was a presidential aspirant and being searched amounted to harassment. When the police stood their ground and searched the trailer, they found 89 bales of green plant material inside the trailer. Samples of the green material were sent to the government analyst PW6 who did a test on them and found them to be cannabis. There was no doubt from the evidence adduced before the trial court that the appellant was found in possession of 89 bales of cannabis. He had the physical control and knowledge of the existence of the bhang in the trailer. The only reason why the appellant could refuse to allow the police to search his motor vehicle and the trailer is that he had knowledge that there were drugs in the trailer.

46. It is clear from the evidence adduced before the lower court that the appellant signed the search certificate, the seizure notice, the inventory and the weighing certificate after the cannabis was recovered. All these documents were produced in court as exhibits. I find overwhelming evidence that the appellant was found in possession of the cannabis.

47. Though the appellant argued that the trial court convicted him on contradictory evidence, he did not substantiate this argument. He did not point out any contradictions in the prosecution evidence. I

have not seen any contradictions in the whole of the evidence. I find that the appellant was convicted on concrete and credible evidence.

48. The appellant was charged with trafficking in narcotic drugs. "Trafficking" is defined in section 2 of the relevant Act to mean:

> ...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...

49. There was sufficient evidence that the appellant was found transporting the 89 bales of cannabis in motor vehicle registration No.KCF 007Q along Moyale/Marsabit highway. This amounted to trafficking. I find that the trial court was right in convicting the appellant for trafficking of narcotics. The conviction is therefore upheld.

Sentence

50. The appellant argued that the sentence imposed on him was harsh. The trial magistrate sentenced the appellant to a fine of Ksh.33,375,000/= (which was three times the market value of the cannabis the accused was found in possession of) in default to serve imprisonment for a period of 5 years. In addition of the said fine, he was sentenced to serve imprisonment for a period of ten years.

51. The Court of Appeal in *Robert Mutungi Muumbi v Republic*, [2015] eKLR, cited with approval its decision in *Bernard Kimani Gacheru v Republic*, [2002] eKLR where it held thus:

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

52. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No.4 of 1994 provides as follows:

> 4. Penalty for trafficking in narcotic drugs, etc.
>
> 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—
>
> (a) in respect of any narcotic drug or psychotropic substance—
>
> (i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;
>
> (ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic

psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;

53. The appellant was found trafficking 445 Kg of cannabis. That offence falls under section 4(a) (ii) of the *Act* that attracts a fine of not less than fifty million shillings or three times the market value of the drug, whichever is greater. The said Act thereby imposes a minimum fine of Ksh.50 million where a person is found guilty of possession of more than 100 grams of a narcotic drug. The current jurisprudence in Kenyan Courts is that minimum sentences are unconstitutional as they take away the discretion of the court in imposing appropriate sentences in deserving cases. The trial court in this case did not impose the minimum sentence but imposed a fine that was three times the market value of the drug in default to serve 5 years imprisonment. I find the fine imposed by the trial court to have been proper and appropriate. There is no reason to interfere with it.

54. The appellant was in addition to being fined sentenced to serve 10 years. Trafficking in drugs is a very serious offence. Consumption of drugs has the effect of destroying the health of our people. In my view, the sentence of 10 years imprisonment was appropriate in the circumstances of the case, taking into consideration the quantity of drugs found with the appellant. I thereby uphold the said sentence.

55. The upshot is therefore that this court finds no merit in the appeal. The appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 18TH DAY OF SEPTEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Munyambu H/B for Dr. Khaminwa for appellant

Mr. Magero for Respondent

Appellant - Absent

Court Assistant – Barako

14 days R/A.