



REPUBLIC OF KENYA



KENYA LAW
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**Lekesike v Republic (Criminal Appeal E164 of 2022)
[2023] KEHC 517 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E164 OF 2022
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

ISAAC LITUMURA LEKESIKE APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Isiolo Criminal
Case Number 133 of 2020 by Hon. E.Ngigi (PM) on 09.09.2021)*

JUDGMENT

1. Isaac Litumura Lekesike (appellant) was charged in Isiolo Criminal Case Number 73 of 2021 with trafficking in narcotic drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994 in that on June 2, 2020 at around 17.30 hrs at along Isiolo-Marsabit Highway was found trafficking in narcotic drugs namely cannabis sativa 1kg and 10 rolls worthy Kshs 20,500/- was not medically prepared
2. PC Dasir Adan and PC Betty Kananu stated that appellant who was holding a bag was arrested from a matatu and the bag after being searched was 1kg and 10 rolls of some plant material suspected to be cannabis. The matatu driver stated that appellant was his passenger and that he witnessed the recovery of the 1kg and 10 rolls of plant material from his bag. The government analyst confirmed by a report dated 10th August that the plant weighing 1.2 kg and 10 rolls was cannabis. Appellant was subsequently charged.
3. Appellant stated that the bag from which the cannabis was recovered was not his.
4. The trial magistrate having heard both the prosecution and defence cases found the prosecution case proved, convicted appellant and sentenced him to serve 7 years' imprisonment. The conviction and sentences provoked this appeal.



Determination

5. I have considered the appeal, the evidence, the submissions and authorities relied upon by the respondent appellant having not filed submissions.
6. The Court of Appeal appreciated the holding in the foregoing decisions and in *Kiilu & Another v Republic [2005]1 KLR 174*, stated that:
 1. 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 conclusions.
 2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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
7. In *Mkendesbwa v Republic [2002] 1 KLR 461*, the Court of Appeal stated that;

' In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.'
8. With those parameters in mind, I have on the first issue considered whether the evidence by the prosecution witnesses was beyond doubt. It is without doubt that the testimonies by PW1, PW2 and PW3 were central to the prosecution case. PW3 stated that appellant was a passenger in the matatu he was driving. He also identified the bag that Appellant had at the time of boarding the matatu. The bag was searched and found to contain cannabis. From the foregoing, I find that the evidence that the cannabis was recovered from appellant's bag was well corroborated.
9. I have considered whether the charge of trafficking was proved. 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.'
10. In *Gabriel Ojiambo Nambesi v Republic, [2007] eKLR*, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs. The court stated thus:

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



11. In this case, the particulars of the charge in this case did not specify clearly the conduct of an accused person which constitutes trafficking. However, and more importantly, the prosecution at the trial did prove by evidence the conduct of an accused person which constitutes trafficking by conveying.
12. The foregoing notwithstanding, evidence that appellant was found in possession of cannabis is as stated hereinabove well corroborated and he ought to have been convicted of possession and not trafficking.
13. The applicant was charged under section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* which provides that:
 - ' Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—
 - (a) In respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or
 - (b) .”
14. In the present case, the applicant was sentenced to serve seven (7) years imprisonment. Under section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act, the appellant was liable to be fined Kshs One (1) million or three times the market value of the narcotic drug or psychotropic substance whichever is greater and in addition to imprisonment for life.
15. The trial magistrate appreciated that the sentences were to mandatory. Appellant was a first offender and considering the value of the cannabis recovered, I find the sentence of 7 years, though lawful was excessive.
16. Consequently, the conviction is upheld. The sentence of 7 years is set aside and substituted with a term of 18 months' imprisonment term from September 9, 2021 when appellant was sentenced.

DELIVERED AT MERU THIS 02 ND DAY OF FEBRUARY 2023

WAMAE TW CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellants - Present

For the State - Ms Kitoto (PPC)

