



REPUBLIC OF KENYA



**Gatuku v Republic (Criminal Appeal 24 of 2020)
[2023] KEHC 2099 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 24 OF 2020
J WAKIAGA, J
MARCH 15, 2023**

BETWEEN

FRANCIS MUKIRI GATUKU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against an original conviction and sentence arising
from the Judgement of CMCC NO 1442 of 2017 Hon. V. Ochanda)*

JUDGMENT

1. The Appellant was charged with the offence of being in possession of Cannabis contrary to Section 3(1) as read with Section 2(a) of the [Narcotic Drugs and Psychotropic Substances Act](#) No 4 of 1994. The particulars of which were that on September 11, 2017 at 2230 hours in Makuyu market he was found in possession of five sachets of Cannabis.
2. He pleaded not guilty, was tried convicted and sentenced to serve seven (7) years imprisonment. Being dissatisfied with the conviction and sentence he filed this Appeal and raised the following grounds of Appeal:
 - a. Possession was not proved.
 - b. Vital witnesses including the arresting officer were not called to testify.
 - c. The trial Court did not take into account the fact that he was already serving a sentence of seven years in Criminal Case No 1847 of 2017 in respect of similar offence and should have ordered the sentences to run concurrently.
3. When the Appeal came up for hearing, the Appellant who was not represented filed submissions and further submissions wherein he contended that he was convicted based on evidence of a single witness Contrary to Section 124 of the [Evidence Act](#) and that the Government Analyst was never called to



produce his report, which report was produced by the Investigating Officer who was not the maker thereof, thereby denying him a chance to cross examine the same.

4. It was submitted further that he was framed and that there was a history of a grudge between him and the arresting officer leading to his arrest and subsequent conviction in Criminal Case No 1847 of 2017 by the same trial Magistrate and that the trial Court did not evaluate his plausible defence contrary to the provisions of Section 169 of the CPC as was stated in the case of *Joseph Wanyonyi Wafukho v Republic [2014] eKLR*.
5. The state conceded to the Appeal on the ground that only one witness testified during the trial and there was no basis laid as to why the other witnesses were not called to testify and that the Court failed to comply with the provisions of Sections 33 and 77 of the Evidence Act and therefore the Appellant's conviction was not safe.

Determination

6. The Court is not under obligation to allow the Appeal on the basis that the same is conceded to by the prosecution and must assess the evidence tendered before the trial Court and to come to its own determination thereon.
7. In this case the only witness who testified against the Appellant was PW1 PC Mwoyo Waweru whose evidence as that they were on patrol when they stopped some men and that upon searching them, they found five sachets of bhang which they sent to the Government Chemist for analysis and proceeded to produce the exhibits.
8. When put on his defence, the Appellant, stated that he saw the police motor vehicle stop next to him and an armed officer handcuffed him because he was drunk and as they were being booked an officer came with a paper containing bhang which they planted on him.
9. In convicting the Appellant, the trial Court had this to say:

' The burden is on the prosecution to prove that they recovered the plant material from the accused and that the said plant material is cannabis. Accused concurs with the prosecution when they placed him at the scene. So it is no doubt that the accused was at the scene when the police ran into him. The question now is, did the police recover any plant material from him? Prosecution said so, while the defence denied. The plant material allegedly recovered from the accused was confirmed to be cannabis sativa. I have no doubt that there was a plant material confirmed to be cannabis.'
10. It is clear that the evidence of the prosecution witness was not corroborated and neither did the Court give reasons as to why she did not believe the Appellant. As conceded by the prosecution, I find and hold that the exhibits were produced contrary to the provisions of the Evidence Act and therefore the Appellant convictions on the same was in error.
11. This was a clear case which should have gone back for retrial but I have taken into account that the alleged offence was committed in the year 2017 almost six (6) years ago and it will not be in the best interest of justice to subject the Appellant a fresh trial.
12. I therefore allow the Appeal herein, set aside the conviction and quash the sentence. The Appellant should be set free forthwith unless otherwise lawfully held and it so ordered.

SIGNED, DATED AND DELIVERED AT MURANGA THIS DAY 15th DAY OF MARCH, 2023.

J. WAKIAGA



JUDGE

In the presence of:

The Appellant in person

The prosecution Counsel

