



REPUBLIC OF KENYA



**KENYA LAW**  
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**Aweso v Republic (Criminal Appeal E021 of 2022)  
[2023] KEHC 20639 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20639 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E021 OF 2022  
SM GITHINJI, J  
JULY 19, 2023**

**BETWEEN**

**IMU OMAR AWESO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Original conviction and sentence by Hon T.A.Sitati – Principal Magistrate at Lamu in Criminal Case No.E025 of 2021 delivered on 27<sup>th</sup> June, 2022)*

**JUDGMENT**

**CORAM:** Hon. Justice S. M. Githinji

Mr Aboubakar for the Appellant

Ms Mkongo for the State

- 1 Imu Omar Aweso was charged in the lower court with a main count of Trafficking in Narcotic drugs, contrary to section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act, 1994](#).
- 2 The particulars of this offence are that on the 20<sup>th</sup> day of January, 2021, at around 10.30hours at Ndau Jett, Ndau village, Lamu East Sub-County within Lamu County, the appellant was found trafficking in Narcotic drugs by conveyance, to wit 6 rolls of cannabis, each measuring approximately 34 centimeters, of estimated value of Kshs. 3,600/= in contravention of the said Act.
- 3 In the alternative, he faced a charge of being in possession of Narcotic drugs, contrary to section 3 (1) as read with section 3 (2) (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act 1994](#).
- 4 The particulars of this offence are that on the 20<sup>th</sup> day of January, 2021 at around 10.30hours at Ndau Jetty, Ndau village, Lamu East Sub-County within Lamu County, the appellant was found in



possession of Narcotic drugs to wit 6 rolls of cannabis, each measuring approximately 34 centimeters, of estimated value of Kshs. 3,600/= in contravention of the said Act.

- 5 The prosecution called two witnesses and their case is that on January 20, 2021 at about 10.30am. Pw-1 and another police officer called APC Willis Ochieng both attached then at Ndaui Border Police Unit, were on duty at Ndaui Jetty. While there they noted of the appellant herein who was pushing a wheelbarrow full of potato sacks. When the appellant saw the two police officers, he appeared scared and trembled. The two officers given his conduct became suspicious of him. They decided to search his cargo. Inside the potatoes sack they found a nylon bag which had 6 big rolls of a substance which the officers suspected to be cannabis sativa. Each was 30cm long. It was seized and the appellant was questioned as to who was it's real owner. He gave a name, Shurem. The police officers tried to get the said Shurem but in vain. The appellant was then taken to Kizingitini Police Station with the luggage. The matter was investigated by Pc Cosmas Juma. Pc Eric Lang'at took the rolls to Government Chemist in Mombasa for examination on 28/1/2021. An expert, David Ngumbao examined it and in accordance to a report he made which was produced as Exhibit 6, found it to be cannabis sativa. He used Fast Blue B Test and UV Spectroscopy.
- 6 The appellant was then charged with the offences in the charge sheet.
- 7 The appellant's defence is that he was working as a porter at Ndaui Jetty. On the material day and time he was at the Jetty waiting for passengers to disembark from boats. He saw the police officers who knew him as a porter. He was hired by a woman to carry her goods and did so. A young man called Shurem requested him also to carry a bag of potatoes. He agreed. He was not aware that the police officers had been tipped that the sack had drugs. The police officers pounced on him and Shurem. They seized the bag of potatoes and therein recovered 250 rolls of cannabis sativa. Shurem relatives gave the police a big bribe and Shurem was released and handed 244 rolls of cannabis sativa back. The appellant herein was not able to pay a bribe and was charged with the remainder 6 rolls planted on him. He alleged he was held as the fall guy.
- 8 The trial magistrate evaluated the evidence and found that the prosecution had proved the offence in the main count beyond reasonable doubt. He was convicted of it and sentenced to serve 10 years imprisonment together with a fine of 10,000/= in default to serve additional 3 months imprisonment.
- 9 The appellant dissatisfied with the said conviction and sentence appealed to his court on the grounds that; -
1. The appellant was not represented by an Advocate during trial and substantial injustice was likely to result given the technical nature of the charges.
  2. The prosecution evidence is unbelievable given the defence.
  3. Proper investigations were not conducted in relation to the disclosed owner of the bag of potatoes, one Shurem.
  4. Shurem was not summoned to attend court as a witness, under section 150 of the CPC.
  5. The Government Analyst report was not produced by the maker.
- 10 The appeal was canvassed by way of written submissions. The appellant filed his submissions twice through Mr Orina Advocate and Mr Aboubakar. However, the prosecution did not file their submissions.
- 11 I have considered the charges, evidence on record, judgment by the lower court and sentence meted against the appellant, grounds of appeal and submissions by the appellant.



- 12 The undisputed or settled facts of this case are that the appellant herein was found pushing a wheelbarrow which had a sack of potatoes in which inside there were rolls of cannabis sativa. Whether they were 6 or 250 rolls that is something else. However, the more they are the weightier would be the offence. Holding they were 6, is definitely to the advantage of the appellant. I also do note that in relation to the number of the rolls he did not question Pw-1. It therefore appears that his claim in defence that they were 250 and 244 were released to Shurem was an afterthought. The trial court had sound basis to settle on the fact that they were 6 rolls.
- 13 The two issues for determination are therefore whether the appellant was trafficking the 6 rolls of cannabis sativa, and if he was, whether the sentence meted is harsh and excessive given the circumstances. “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.....”
- 14 While it’s not disputed that the appellant was arrested while conveying or delivering the 6 rolls of cannabis sativa hidden or concealed in a bag of potatoes on a wheelbarrow, of which constitutes actus reus for the offence, the court also need consider the disputed element of mens rea. The appellant states he was not aware that the bag had cannabis sativa as he was hired by Shurem to carry for him, as a porter. However, the evidence of Pw-1 shows the officer had not been tipped of about the presence of the drugs as alleged by the appellant. They became suspicious, given the conduct of the appellant when he saw them. He became fearful and troubled. This conduct clearly shows he was aware of what he was carrying, of which constitutes the mens rea for the offence.
- 15 The trial court was therefore correct in finding the appellant guilty of the offence in the main count.
- 16 On sentence, the appellant is a first offender. He had 6 rolls of cannabis sativa. 10 years imprisonment and in addition a fine of 10,000/= in default to serve extra 3 months imprisonment, is in my view excessive. A lesser sentence of 4 years imprisonment would achieve ends of justice in the matter. I accordingly allow the appeal on sentence and reduce the sentence in place to 4 years imprisonment. Sentence to run from the date of sentence by the lower court and won’t count for the period he was out on bond pending appeal.

**JUDGMENT FOR GARSEN DATED, SIGNED AND DELIVERED AT MALINDI THIS 19<sup>TH</sup> DAY OF JULY, 2023**

.....

**S.M.GITHINJI**

**JUDGE**

**In The Presence Of; -**

The Appellant in Person

Ms Mkongo for the Prosecution

