



**Kanario v Republic (Criminal Appeal E133 of 2022)  
[2024] KEHC 14745 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14745 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E133 OF 2022  
LW GITARI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**FAITH KANARIO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appeal arises from the proceedings in Criminal Case No.21/2020 in Chief Magistrate's Court at Isiolo where the appellant was charged with Trafficking in Narcotic contrary to Section 4 Drugs, and Psychotropic substances Control Act No.4/1994 in that on 7/2/2020 at around 9.30 Hours at Learata Area Samburu East Sub-County within Samburu County he was trafficking in Narcotic Drugs (Cannabis Sativa) to wit approximately 3 Kilogrammes worth ksh.30,000/- contrary to the said Act which was not medical preparation. The appellant denied the charge but after a full trial he was found guilty, convicted and sentenced to serve seven 7 years imprisonment.
2. The appellant was dissatisfied with the conviction and filed this appeal based on the following grounds:-
  - i. That the learned trial magistrate erred in both matters of law and fact by convicting and sentencing the appellant relying on evidence which was marred with irrefutable contradictions, inconsistent and discrepancies.
  - ii. That the trial court misdirected itself by convicting and sentencing the appellant based on a wrong principle hence presumed the competency of PW5 to guess the value of the narcotics and by doing this gave police free hand to deny the importance of valuation certificate.
  - iii. That, that may this honourable court of competent jurisdiction find that the extenuating factors during sentencing are not static but have changed and putting a subtle ear on the best interest of children also a symmetrical eye of balance to interrogate the ethos and pathos as



painted by the scenario of ailing parent and children without care. May you find it imperative to review the sentence by replacing it with a non-custodial or clemency and set aside the sentence.

He prays that the appeal be allowed, the sentence be set aside and he be set at liberty.

3. The respondent opposed the appeal and prayed that it be dismissed.

### **The Prosecutions Case**

4. The prosecution called a total of five witnesses. PW1 was Police Constable Regina Leparuiya who is stationed at Mararal Police Station and she testified that on 7/2/2020 while manning a road block with thirteen of her colleagues who were thirteen in number. In the course of her duties she stopped a motor vehicle registration number KCT 667 F which was heading to Nairobi from Moyale direction. She stopped the motor vehicle and ordered the passenger to alight. She then conducted a search and came across the appellant who was carrying a bag and on searching the bag, she came across a hard substance in a bundle which she suspected to be drugs. It weighed 1.5 kilogrammes. She called PW2 – Hassan Boru who was the driver of the subject vehicle who witnessed when the bundles were recovered from the bag of the appellant. PW4 recovered the bundles of suspect drugs (exhibit 1 and 2) and the appellant's bag. The appellant was arrested and escorted to Archer's Post Police Station. The bundles of plant material were escorted to the Government Chemist for Analysis. The Government Analyst Nelius Njeri Maingi (PW4) who is a Government Analyst confirmed that the plant material was Cannabis Sativa. She produced the report as exhibit 4 a. The appellant was then charged.
5. The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution evidence was marred with contradictions and inconsistencies. He relies on the case of Richard Munene –v- Republic (2018) eKLR where the Judge stated that;  

“Where contradictions, discrepancies and inconsistencies are proved they must be resolved in favour of the accused. It is settled principle of the law therefore that it is not every trifling contradictions or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistency are substantial and fundamental to the main issue in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to the benefit of it.”
6. The appellant submits PW1 referred to a public service vehicle (P.S.V) KCT 667F while PW2 referred to motor vehicle KCJ 667F. PW3 on the other hand referred to motor vehicle KCJ 667A. That the registration number of the motor vehicle which PW1 stopped and searched was not proved beyond any reasonable doubts.
7. The appellant further submits that the exhibit which was received at the Government Chemist was wrapped with black cello tape (sic). The appellant submits that the errors are not curable and double created should go to the favour of the appellant.
8. The appellant submits that the learned trial magistrate erred as he failed to take into account her mitigation and that she had pleaded guilty to the charge. I however note that the appellant is not candid as she was convicted after a full trial but not on plea of guilty. He relies on Caroline Auma Majabu – v- Republic [2014] eKLR.
9. The appellant prays that the court considers the sentencing Police Guidelines which provides for proportionality, equality, uniformity, parity, consistency and impartiality in sentencing and treat her with leniency. She relies on the case of Titus Ngamau Musila alias Katitu which cited the case of Santa Sigh –v- State of Punjab (1978) 4Sc 190 on proper sentencing principles and guidelines.



## Respondents Submissions:

10. Respondent submits that the contention by the appellant that the Evidence relied on is contradictory inconsistent and is marred with discrepancies is false, misleading and wrongly anchored on facts and the law.
11. He submits that the term Trafficking is defined under Section 2 of the Narcotic Drugs and Psychotropic Substances Control Act. He relies on the Court of Appeal decision in Gabriel Odhiambo Nambesi –v- Republic (2007)eKLR on what the prosecution is supposed to prove in a charge of trafficking . He submits that the evidence adduced showed that the appellant was in transit in the vehicle that was driven by PW2. That the fact of being in the motor vehicle with illicit substance amounted to conveyancing. The respondent further submits contradictions and inconsistencies in the evidence of a witness that would be fatal must rebate to material facts and must be substantial. That minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. That credible and reliable witnesses gave a clear account of what occurred in connection with the case. On the value of the drugs, the respondent relies on the case Kabibi Kalume –v- Republic (205) eKLR and Nicanor Agondo Radolo –v- Republic (2020) eKLR and submits that a certificate produced by the prosecution cannot vitiate the conviction.
12. On the 3<sup>rd</sup> ground the respondent submits that the learned magistrate considered the appellant’s mitigation and all the relevant factors including the gravity and the value of the drugs then meted out a sentence that was not harsh or excessive in the circumstances of the case. He relies on Omuse-v- Republic (2009) KLR 214 where he stated;

“Sentence imposed on an accused person must be commensurate to the moral blame worthiness of the offender and the proper exercise of discretion in sentencing requires the court to consider that fact and circumstances of the case in their entirety before settling for any given sentence.”
13. He also relies on Robert Mugungi Muumbi-v- Republic (2015) eKLR cited with approval in Benard Kimani Gacheru –v- Republic (2002) eKLR where it was stated that –

“It is now settled law, following several authorities that sentencing is a matter that rests in the discretion of the trial court. Similarly sentence must depend on the fact of each case. On appeal, the appellate court will not easily interfere with the 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 any one of the matters already stated is shown to exist”
14. The respondent submits that the learned magistrate stated the factors she considered before sentencing the appellant and due to the nature of the charge she was not entitled to leniency. The respondent submits that the charge was proved beyond any reasonable doubts and the conviction and sentence should be upheld.



### **Analysis and Determination:**

15. I have considered the proceedings before the trial court, the grounds of appeal and the submissions by the parties. The issues which arise for determination are:
  1. Whether the charge sheet was defective.
  2. Whether the prosecution proved the charge against the appellant beyond any reasonable doubts.
16. This is the first appellate court and the duties of this court have been settled in various decisions of this court and the Court of Appeal. One of the leading authorities on the duties of the first appellate court is the case of *Okeno-v- Republic* (1972) E.A 32 where it was stated that the first appellate court has a duty to analyse the evidence, re-evaluate it and come up with its own independent finding.
17. The court is supposed to leave room for the fact that it did not have an opportunity to see the witnesses when they testified and leave room for that.
18. In *Kiilu-v- Republic* (2005) 1 KLR 174, Court of Appeal, it was stated as follows:-

“ An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court’s own decision on the evidence. The appellate court must itself weight conflicting evidence and draw its own conclusion.

It is not the function of the 1<sup>st</sup> appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported.

In so doing, it should make allowance for the fact that the trial court had no advantage of seeing and hearing the witnesses.”
19. The 1<sup>st</sup> appellate court has jurisdiction to consider facts and the law.

Section 347 of the Criminal Procedure Code provides as follows:

“(1) Save as is in this Part provided -

  - (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
  - (b) (Repealed by 5 of 2003, s. 93.)

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.
20. I will proceed to analyze the issues for determination

### **Whether the charge sheet was defective.**

21. The law requires that an accused person should be charged with an offence that is known in law. When a person is charged the charge is supposed to give all the relevant information which would enable an accused person to prepare and put up his defence.



Section 134 of the Criminal Procedure Code provides that:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

It is important to look at the charge which the respondent preferred against the appellant. It states:-

“ Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substance Control *Act No.4 of 1994.*

Particulars:

Faith Kanario: On 7<sup>th</sup> day of February 2020 at Learata Area in Samburu East Sub-County within Samburu County was trafficking in Narcotic Drugs (Cannabis Sativa) to wit approximately 3 kg worth Ksh.30,000/- contrary to the said act which was not medicary (sic) prepared.”

22. The particulars which are given in support of the charge can render a charge sheet to be defective. In *Yongo –v- Republic (1983) eKLR* the Court of Appeal held that a charge can be defective if the evidence adduced in its support is at variance with the offence disclosed in the charge or its particulars.

23. In this case the term trafficking is defined as follows:-

“The importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drugs or a psychotropic substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect therefore”

24. The Section discloses various modes of trafficking in narcotic drugs and therefore a proper charge should be disclosed the manner in the person charged was trafficking in narcotic drugs. This is what the court of Appeal stated in *Gabriel Oriambo-v- Republic (2007) eKLR* cited by the respondent when it stated:-

“For a 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 which constitutes trafficking.”

25. Thus the respondent should first and foremost specify the conduct of the accused which constitutes trafficking and secondly tender evidence at the trial to prove that conduct beyond any reasonable doubts which is the standard of prove. It is in vain for the respondent to tender evidence when the conduct is not disclosed in the particulars of the charge. I find that the charge sheet as drawn is defective.



26. In this case the charge sheet is defective for failure to disclose the conduct which constitutes trafficking. The next issue to be considered is whether the defect can be remedied. The Court of Appeal in Peter Ngure Mwangi –v- Republic (2014) eKLR stated as follows:-

“On the issue of a defective charge sheet there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective whereas the second deals with the issue as to whether even if a charge sheet is defective that defect is curable or not.”

26. This is because Section 382 Criminal Procedure Code provides a remedy for defective charge sheet. It provides as follows:-

“(382)Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

27. When dealing with the question whether a defect in the charge sheet is fatal, the Court of Appeal in the case of Benard Ombuna –v- Republic (2019) eKLR the Court of Appeal stated:

“In a nutshell the test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellate to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against and as a result he was not able to put up an appropriate defence.”

28. In the Supreme Court of India in Willie (William) Staney –v- State of Madhya Pradesh A.I.R 1956 Madras Weekly Notes 391) cited in Dennis Sundo Mokera –v- Republic Criminal Appeal E012/2022 (2023) KEHC 22910 (KLR 28 September 2023, it was stated:-

“Whatever the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer Justice and Justice includes the punishment of the guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of substantial technicalities.”

29. In this appeal, as pointed out above, various conducts constitutes the offence of trafficking. Failure to specify the conducts which constitutes trafficking is prejudicial to an accused as he/she has to raise a defence to all the modes of trafficking defined under Section 2 of the Act, (supra).

30. The defect on the charge sheet is substantial and prejudiced the appellant to the extent that she was not aware of or at least she was confused of the nature of the charges preferred against her and would not have been able to put up an appropriate defence. The charge sheet was fatally defective. It cannot be cured by the evidence for the reason that the evidence did not support the charge.

31. The charge sheet states that ‘she was trafficking in Narcotic Drugs at Learate area in Samburu County.’



32. In court the evidence was that it was at Wamba junction and she was in a public service vehicle which was going towards Nairobi.

The evidence is completely at variance with the charge.

**2. Whether the charge was proved beyond any reasonable doubts.:**

33. The charge sheet is fatally defective. The evidence adduced by the prosecution did not support the charge and was marred with contradictions, inconsistencies and discrepancies. It is well settled that that grave contradictions will led to the rejection evidence.

34. In the case of Twehangane Alfred –v- Uganda Criminal Appeal No.139/2001) 2003 UGCA 6 which was quoted with approval by the Court of Appeal in the case of Erick Onyango Odeng –v- Republic (2014) eKLR it was held as follows:-

“With regard to contradictions the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or it they do not affect the main substance of the prosecution case.”

35. In this case, the charge sheet had not mentioned that a vehicle was involved.

36. Secondly, the court was treated to contradictions on the motor vehicle which were involved.

37. I am of the view that the contradictions inconsistencies and discrepancies on the evidence is grave and have left doubts in the mind of the court as whether a motor vehicle was involved or not and if it was, what are the true particulars of the motor vehicle.

38. For these reasons I find that the charge was not proved beyond any reasonable doubts.

**Conclusion:**

39. I find that the appeal has merits.

I order that:

1. The appeal is allowed.
2. The conviction is quashed.
3. The sentence is set aside.
4. The appellant is set at liberty unless she is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**L.W. GITARI**

**JUDGE**

**7/11/2024**

The Judgment has been read out in open court.

