



REPUBLIC OF KENYA



KENYA LAW

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**Wote & 2 others v Republic (Criminal Appeal E037, E039 & E064 of 2024
(Consolidated)) [2024] KEHC 15909 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E037, E039 & E064 OF 2024 (CONSOLIDATED)**

DR KAVEDZA, J

DECEMBER 17, 2024

BETWEEN

MOHAMOOD CHUTE WOTE 1ST APPELLANT

HUSSEIN ABDIKADIR SAID 2ND APPELLANT

QARE ALI SAYA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. N. Thuk (SPM) on 21st May 2024 at JKIA Chief Magistrate's
Court Criminal Case No. E034 of 2020 Mohamood Chute Wote & 2 others)*

JUDGMENT

1. The appellants were jointly charged and after a full trial convicted for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control [Act No. 4 of 1994](#). The first and second appellants were each sentenced to serve twenty-one years and six months imprisonment. In addition, they were each sentenced to pay a fine of Kshs. 36,000,000 in default to serve one-year imprisonment. The third appellant was sentenced to serve twenty-five years imprisonment. In addition to pay a fine of Kshs. 36,000,000 in default to serve one-year imprisonment. The default sentences are running concurrently.
2. Being aggrieved, the appellant filed their respective appeals which were later consolidated by this court. The grounds raised are coalized as follows: The appellants challenged the totality of the prosecutions evidence against which they were convicted. The appellants argued that the prosecution failed to prove the ingredients of the offence charged. The appellant complained that the trial court failed to consider their defence and finally that the sentence imposed was harsh and excessive.



3. The prosecution's evidence was that on November 10, 2020, PW1 Elly Simiyu, and PW 2 Dorcas Muthoni police officers were part of a multi-agency team acting on a tip-off regarding suspected of trafficking narcotic drugs. The team intercepted a car with registration number KCY 446T, which the third appellant was travelling in, approximately 50km from Isiolo town. She was in the company of her children and house help. The 3rd appellant claimed she was merely receiving a lift. A search of the vehicle did not yield anything. The suspect was handed her over to DCI officers from Nairobi Headquarters.
4. PW3, Yusuf Kakimon, a police officer from the Transnational Crime Unit (TOCU), testified about his role in the investigation. On November 11, 2020, after her arrest, he escorted her and her children to Nairobi. He prepared an inventory of the 3rd appellant's personal items, including her mobile phone and national identity card, which were handed over to the Anti-Narcotics Unit (ANU) officers.
5. PW4 David Koech, a police officer with ANU, testified that on November 14, 2020, he received a motor vehicle, registration KCA 292P, from TOCU officers and witnessed a search of the canter. A false compartment was found containing 122 packages, which PW4 confirmed weighed 400kg. He prepared a Weighing Certificate, which was witnessed by other officers and the appellant. PW4 also escorted 122 samples to the Government Chemist for analysis. PW4 further testified that photographs were taken of the seized packages, and although he did not know if the canter had been sealed or locked, he confirmed that the packages were properly weighed and marked. He did not see the appellant during the handover process.
6. On November 14, 2020, Corporal Michael Awiti (PW5) was tasked with searching for a Mitsubishi Canter registration No. KCA 292P at the DCI Headquarters. He began by inspecting the cabin and underside of the vehicle but found no drugs. Upon examining the back of the lorry, he identified a false compartment on the right side, which was reinforced with metal bars. After using a grinder to open it, PW5 retrieved 122 bales of dry plant material. He then prepared a Search Certificate and an inventory, which were witnessed by the appellant.
7. Denis Owino Onyango (PW6), an analyst at the Government Chemist, was present when the 122 packages were weighed. The total weight was found to be 400kg. PW6 took a sample from each of the packages, amounting to 12.475kg, and prepared a Certificate of Sampling, which was signed by the appellant and police officers. Following analysis, PW6 confirmed the plant material was cannabis, as stated in his report produced in court.
8. Chief Inspector Philip Langat (PW7) was responsible for valuing the seized cannabis. He was contacted on November 14, 2020, to provide a valuation, which he calculated to be Kshs 12 million based on intelligence that one gram of cannabis is worth Kshs 30. He later prepared a Valuation Certificate using this data, which was also produced in court.
9. Chief Inspector Stephen Kosgei (PW8) testified about the interception of the Mitsubishi Canter. On November 10, 2020, PW8 and his team received information that a lorry, suspected of carrying narcotic drugs, had been stopped in Maralal. Upon their arrival, they found the lorry and two suspects, Mohamood Chute Wote and Hussein Abdikadir Said, the first and second appellants herein. The officers prepared an inventory of items found with the suspects, including money and identification documents. The lorry was then searched at the DCI Headquarters, where the false compartment was discovered and 122 packages of cannabis were seized. PW8 confirmed that the compartment was intentionally concealed.
10. Inspector Sammy Ndungu (PW9) from the Cybercrime and Digital Forensic Laboratory analysed a Samsung phone belonging to one of the appellants. The phone contained a Safaricom SIM card, and PW9 was instructed to investigate communications linked to specific phone numbers. He submitted



his findings, which included images, but during cross-examination, he noted that it was unclear whether the images were of incoming or outgoing calls. PW9 also clarified that none of the images depicted the inside of the lorry, and he could not identify the registered subscribers of the phone numbers in question.

11. Corporal Grace Njoroge (PW10) testified that on November 14, 2020, she was instructed by IP Oruko to accompany her colleagues to the DCI Headquarters. Upon arrival, they were briefed by Deputy Director Janet Shako, after which they proceeded to Archer's Post and Maralal. At Archer's Post, the 3rd appellant was apprehended, while the other two were arrested in Maralal, PW10 described the lorry as having an incision revealing packages wrapped in yellow tape. Welders cut open a false compartment in the right side of the lorry, uncovering 122 packages of dry plant material, weighing 400kg in total. Grace witnessed the weighing and sampling, and received the inventory and handover notes from TOCU officers.
12. PW10 prepared several documents, including Notices of Seizure for the recovered money (Kshs 10,400 from Mohamood and Kshs 60,000 from Hussein), the Mitsubishi Canter (KCA 292P), and the 122 packages of cannabis. She also prepared a Record of Custody for the seized substances.
13. She testified that upon analysis of the 3rd appellant's phone records, it was revealed that there were 48 communications with the 1st appellant between November 1-8, 2020, and 108 communications with the 2nd appellant between November 6-10, 2020. Kshs 10,000 had also been transferred from her phone to the 1st appellant on November 4, 2020. PW10 concluded that the money found with Mohamood and Hussein was likely intended for bribery, facilitating their journey to Nairobi. She noted the 3rd appellant's close contact with the other two appellants.
14. She noted that the individuals arrested on that date were the first and second appellants and identified them in court. She testified that they were also present during the search, weighing, and sampling processes, reinforcing the prosecution's case.
15. The chain of custody for the substances recovered in the case against the appellants is well documented through the testimonies of various witnesses. The investigating officer detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the motor vehicle the 1st and 2nd appellants were arrested in, as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
16. On whether the substance recovered was narcotic, the government analyst, PW6 testified that his role was to ascertain whether the plant material was a narcotic drug. He analysed the green plant material which weighed 400 kilograms found that the green plant material was cannabis, a narcotic drug listed under the *Narcotic Drugs and Psychotropic Substances (Control) Act*. 1994.
17. In their respective defences, the first appellant testified that he was a driver and was hired by Juma the former driver. On October 24, 2020, he was asked to pick up a vehicle from Shura, Marsabit County. However, due to heavy rains, he could not proceed and instead went to Karatina for work. Once the roads were passable, he travelled to Marsabit on November 8, 2020, where he picked up a Mitsubishi FH Canter, receiving the keys from the 2nd appellant. The two set off on their journey, accompanied by another canter with other occupants. After encountering difficulties and getting stuck, they continued their journey but were arrested on November 10, 2020. The 1st appellant had Kshs 10,600, which he claimed was sent by the 3rd appellant. After their arrest, the 1st and 2nd appellant were taken to Muthaiga Police Station, where they witnessed the canter being opened, revealing its contents. In cross-



- examination, he stated he did not know the 3rd appellant before the incident, only communicating with her regarding the canter due to the weather.
18. The 2nd appellant testified that he was a boda boda rider and a second-hand clothes dealer. He told the court that he met the 1st appellant when he asked for a lift to Nairobi to buy clothes, paying Kshs 1,000 for the ride and carrying Kshs 60,000 for the purchase of clothes. The 2nd appellant claimed he did not know what was in the canter when they began their journey. He described his arrest and denied any prior communication with the 3rd appellant stating he met her for the first time at Muthaiga Police Station. He also denied being in charge of 1st appellant or knowing what was in the canter.
 19. The 3rd appellant testified that she was arrested on November 10, 2020, while travelling with her children, a helper, and two other men. She denied any connection to the canter or the other appellants. She stated she was not found with any narcotics, and no evidence linking her to the drug haul. She suggested that the name "Qare Ali Saya" might be common, and it was possible that Mohamood and Hussein had spoken to another person with the same name. In cross-examination, the 3rd appellant maintained that she did not know the other appellant and denied the charges, stating there was nothing in her statement or theirs to link her to the crime.
 20. The connection between the 1st appellant, the 2nd appellant, and the 3rd appellant is evidenced through digital forensics by Inspector Sammy Ndungu PW9, corroborated by Investigating Officer Grace Njoroge PW10. PW9's report dated 5th March 2022 and 20th June 2022, reveals substantial communication between the appellants.
 21. Between 1st and 8th November 2020, there were 48 call logs between the 1st appellant and the 3rd appellant and an M-Pesa transaction of Kshs 10,000/- from the 3rd appellant to the 1st appellant on 4th November 2020. Additionally, from 6th to 10th November 2020, there were 108 call logs between the 2nd appellant and the 3rd appellant. PW10's investigation confirms that the 1st and 2nd appellants were aware of the lorry's modifications and contents. The 2nd appellant was guarding the lorry before the 1st appellant collected it.
 22. The defence of the appellants that they were unacquainted prior to arrest is deemed implausible. The 1st appellant admitted to communicating with the 3rd appellant, receiving Kshs 10,000/- via M-Pesa, and collecting the lorry's keys from the 2nd appellant. His claim of ignorance regarding the cargo is dismissed as mere denial. The prosecution established that 1st appellant knowingly transported cannabis.
 23. The 2nd appellant Hussein's defence is similarly discredited. He was entrusted with Kshs 60,000/- and was in constant communication with the 3rd appellant. The court finds his defence a sham.
 24. The 3rd appellant's defence asserting she was not implicated and that her name is common, is also rejected. The forensic evidence shows she instructed the 1st and 2nd appellant to transport the cannabis and also funded the operation, and had images of the lorry on her phone. Her admission that the phone lacked an SD card reinforces ownership. Her denial of knowing the co-appellants is implausible.
 25. The prosecution therefore proved beyond reasonable doubt that the appellant acted jointly in trafficking in narcotic drugs. The conviction for the trial court is therefore affirmed.
 26. On sentence, the first and second appellants were each sentenced to serve twenty-one years and six months imprisonment. In addition, they were each sentenced to pay a fine of Kshs. 36,000,000 in default to serve one-year imprisonment. The third appellant was sentenced to serve twenty-five years imprisonment. In addition to pay a fine of Kshs. 36,000,000 in default to serve one-year imprisonment. The default sentences are running concurrently.



27. In the sentencing proceedings, the trial court considered that the appellants were first offenders, the presentencing reports before imposing the sentence. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.
28. In that regard, I find that the sentence meted out was lawful and in accordance with the trial magistrate's discretion. I am guided by the decision in *Wagude v R* (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag. JA. held that:

“The Court may interfere with the sentence only if it is shown that it was manifestly excessive....”

29. Although the sentence imposed by the trial court was within the parameters of the law, it is my considered view that it was manifestly excessive and, therefore, ought to be set aside. Accordingly, the appeal on the sentence succeeds. The sentences imposed by the trial court are hereby substituted as follows:

- I. The appellants Mohamood Chute Wote, Hussein Abdikadir Said and Qare Ali Saya are each sentenced to pay a fine of Kshs. 36,000,000 in default to serve 12 months imprisonment in accordance with section 28(2) of the Penal Code, Cap 63 Laws of Kenya.
- II. In addition to the sentence in (1) above, the 1st and 2nd appellants Mohamood Chute Wote and Hussein Abdikadir Said are each sentenced to serve fifteen (15) years imprisonment with effect from 11th November 2020 the date of their arrest pursuant to section 333(2) of the Criminal Procedure Code.
- III. In addition to the sentence in (I) above the 3rd appellant Qare Ali Saya sentenced to serve fifteen (15) years imprisonment with effect from 21st May 2024 the date of their conviction before the trial court.
- IV. The sentences imposed shall run consecutively.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024.

D. KAVEDZA

JUDGE

In the presence of:

Appellants present

Bosire for the Appellants

Mburugu for the Respondent

Achode Court Assistant.

