



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 188 OF 2019

BARAK EDIN HALAKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of Trafficking in Narcotic Drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Act. The particulars of offence as per the charge sheet were as follows: -

‘Barak Edin Halake, on the 15th day of April 2019, at 0430 hrs along Merti – Malkadaka - Barambate Road at Barambate, Isiolo Location in Garbatula Subcounty within Isiolo County, you and others not before Court were found trafficking 18 stones of cannabis sativa (bhanga) from Moyale to Meru to wit 88,850 grams (Eighty Eight Thousand, Eight Hundred and Fifty grams) and of street value of Ksh 1,777,000/= (One Million, Seven Hundred and Seventy Seven Thousand Shillings) on board motor cycle registration number KMET 060M, Boxer Bajaj Model, which was not in its medicinal preparation form.’

2. The Appellant pleaded not guilty to the charge. Following full trial, the Appellant was found guilty and sentenced to pay a fine of Ksh 5 Million in default, to serve 5 years imprisonment in addition to an imprisonment of 10 years.

3. Being dissatisfied with the outcome of the Judgment of the trial Court, the Appellant has proffered the instant appeal. The appeal is premised on the 8 grounds of appeal as per the Appellant’s Petition of Appeal dated 23rd October 2019. The said grounds are as follows: -

i) THAT the Learned trial magistrate erred in law and in fact in failing to consider the fact that no photographs of the Appellant’s motorbike and the bags of bhanga were taken at the time of arrest to prove that indeed the bags were not planted on the Appellant.

ii) THAT the Learned trial magistrate erred in law by shifting the burden of proof on the Appellant whereas the same is always on the part of the Respondent.

iii) THAT the Learned trial magistrate erred in law and in fact in failing to properly consider and analyze all the evidence adduced thereby convicting the Appellant against the weight of evidence.

iv) THAT the Learned trial magistrate erred in fact and misdirected himself in his finding that the Appellant exchanged fire with the police yet no firearm was recovered from him.

v) THAT the Learned trial magistrate erred in fact and misdirected himself in his finding that the 3 bags of bhanga were recovered from the Appellant’s motorcycle yet there was another motor cycle that was recovered with bhanga and whose owner was not charged as well as other cyclists who escaped hence a reasonable possibility that the 3 bags were planted on the Appellant.

vi) THAT the Learned trial magistrate erred in law and in fact by failing to consider that the value of the said 3 bags of bhanga were skyrocketed by the Prosecution without proper valuation.

vii) THAT the Learned trial magistrate erred in law and in fact by disregarding the Appellant’s mitigation and the fact that he was a first time offender of a young age of just 19 years old.

viii) THAT the Learned trial magistrate erred in law and in fact by giving the Appellant a harsh sentence in the circumstances of the case.

4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 19th May 2020. On ground number 1, which concerns failure to take photographs of the Appellant's motor cycle and the bags of bhang at the time of arrest, which failure thereby purportedly infers that the bags of bhang may have been planted on the Appellant, the Appellant submits that from the Prosecution's evidence, it is clear that there were more than 2 motor cycles and more than 3 bags of bhang and that the same exchanged hands severally, and there was therefore need to photograph the motor cycles and the bags at the point of arrest as the Appellant was not present when the same was loaded on the GK motor vehicle. He submits that this leaves the question as to whether the alleged bags indeed belonged to the Appellants as there were about 4 motor cycles some of which disappeared into the bushes. He submits that there was no proof that the Appellant was indeed carrying the alleged cannabis sativa (bhang) to the standard of beyond reasonable doubt as required by law. On ground number 2, which concerns the purported shifting of the burden of proof on the Appellant, whereas the same is always on the part of the Respondent, the Appellant argues that the Respondent failed to discharge the burden since the charge of trafficking of narcotic drugs was not established it being that there were more than 3 motor cycles and the Appellant was merely caught in the mix. In essence, ground number 2 is an extension of ground number 1. The Appellant submitted on grounds number 3, 4 and 5 together. They concern purported failure to properly analyze and consider the evidence adduced thereby convicting the Appellant against the weight of the evidence; Finding that the Appellant exchanged firearms with the police yet no firearm was recovered from him; Finding that the 3 bags of bhang were recovered from the Appellant's motor cycle yet there was another motor cycle that was recovered with bhang and whose owner was not charged as well as other cyclists who escaped hence a reasonable possibility that the 3 bags were planted on the Appellant. The Appellant argues that there were contradictions on the Prosecution's evidence in that PW1 testified that they were forced to fire into the air because the riders refused stop, however according to PW2, it is the riders who fired at them first and they shot back. He argues that there was no evidence that the Appellant was armed as no weapon was recovered from him. He also argues that no witness claimed that the 3 bags were recovered from the scene where the Appellant and the motor cycle were lying and hence the Appellant was only a victim of the circumstances. The Appellant submitted on grounds number 6, 7 and 8 together. They concern purported failure to consider that the value of the said 3 bags were skyrocketed by the Prosecution without proper valuation; Purported disregard of the Appellant's mitigation and the fact that he was a first time offender of a young age of just 19 years old; Giving the Appellant a harsh sentence in the circumstances of the case. The Appellant submits that the Prosecution did guess work in arriving at the value of the cannabis sativa as no valuation report was produced to support the alleged street value of Ksh 1,777,000/=. He submits that the Learned Magistrate erred in relying on this unsubstantiated value to sentence him.

5. The Respondent filed submissions dated 19th February 2021. Addressing ground 1 of the Petition of Appeal, the Respondent argues that the Prosecution adduced cogent, corroborative and uncontroverted evidence that the Appellant was trafficking 3 bags of cannabis sativa; That the evidence of PW1 and PW2 was to the effect that there were 4 motor bikes and that PW1 and PW2 were the two witnesses who participated in the chase and subsequent arrest of the Appellant; This was after they had been tipped off on the 15th day of April 2019 at around 4.00 a.m that there were some people transporting cannabis to Isiolo using boxer bikes along Markadaka road heading to Barbate. Among the 4 motor cycles, 3 of them had bags loaded onto them and the fourth motor cycle had a rider and 2 passengers who were armed and appeared to be escorting the three other motorcycles. PW1 and PW2 unsuccessfully ordered them to stop and they instead engaged PW1 and PW2 in a shoot out. PW1 shot 15 rounds in the air and PW2 shot 5 rounds, 2 in the air and 3 towards the tires of the motor cycle. One of the riders lost control and fell into a ditch and broke his leg. PW1 and PW2 did first aid on him. He was later taken to Barbate Dispensary. Their escorts diverted into the bushes and disappeared after putting off the motorbike lights. PW1 was left behind guarding the motorbike together with 3 bags. PW2 together with his other colleagues proceeded on with the chase and that is when they came across the Appellant lying in the bushes together with his motor cycle registration number KMET 060M which had 3 bags which contained 18 bales. The police then took the Appellant to Barbate Dispensary because he had sustained a gunshot wound. That the evidence of PW1 and PW2 clearly confirm the fact the Appellant was indeed among the four riders who were transporting cannabis sativa and additionally he was found in possession of the three bags. The Respondent further submits that going by the definition of the word 'possession' as per the Penal Code, the Black's Law Dictionary, and in the case of **Marcy Awuor v Republic (2018) eKLR**, the Appellant was indeed found in constructive possession of the cannabis sativa since they were in the 3 bags which were produced as exhibits 1a, 1b and 1c. That PW2's evidence confirmed that when they found the Appellant lying down, his motor cycle was also lying down and the same had 3 big bags which were later confirmed to be cannabis sativa as per exhibit 6, the government analyst report. The Respondent further submits that there was an inventory produced as exhibit 3 which was taken at Merti Police Station whereby the Appellant signed the same thus confirming that the Appellant was indeed found in possession of the bags which contained 18 bales of cannabis sativa. With respect to grounds 2, 3, 4 and 5, the Respondent argues that the Prosecution adduced evidence which established that the substance found in the Appellant's possession was a psychotropic substance within the meaning ascribed to it by Section 2 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act, in the first schedule thereof as confirmed by the evidence of the government analyst who and compiled the report produced as exhibit 6. They submit that the Appellant had a rebuttable presumption under Section 119 of the Evidence Act and he failed to discharge that burden to controvert the Prosecution case to prove that the narcotic drug or controlled substances recovered from his motor cycle was not under his custody or control and further to controvert the presumption that he knew the nature of the narcotic drug or controlled substance. They submit that the Appellant's defence wherein he averred that he was carrying goat feed from Moyale to Barbate because of scarcity of the same was indeed considered by the trial Court and it was found that the defence did not hold water as it did not make any economic sense to ferry goat feed from Moyale which is 500km away from Garbatulla when the same can easily be sourced from Meru which is less than 100km away and that the Appellant did not have to risk attacks by wild animals, robbers and armed bandits at 4 a.m in the morning through bushy roads instead of travelling during the daytime using the normal passenger routes if indeed the Appellant was ferrying goat feed. With respect to grounds 6, 7 and 8 the Respondent submits that the value of the 3 bags of cannabis sativa was not skyrocketed rather, that was the street value of the same at the time the offence was committed. They submit that this point was not raised by the Appellant in the trial Court and further, relying on the cases of **Thomas Mutume v Republic (2019) eKLR** where Justice L. Kimari quoted the Court of Appeal in **Kabibi Kalume Katsui v Republic** they submit that failure to provide a valuation certificate cannot be a ground for quashing a conviction as the valuation report is only meant to guide the Court in imposing the appropriate sentence. They submit that the age of the Appellant was indeed taken into account as well as the seriousness of the offence and that the sentence meted out was within the law and should be upheld. They pray that the Appeal be dismissed for lack of merit.

6. This being a first appeal, this Court is invited to look at both questions of fact and of law. The 8 grounds of Appeal can be condensed into 3 points which form the gravamen of the Appellant's Appeal as per the issues hereunder: -

i) Whether or not there was sufficient evidence adduced, to the required standard to confirm that the Appellant was found with the 3 bags of cannabis sativa.

ii) Whether or not there was an error in finding that the Appellant exchanged firearms with the police.

iii) Whether or not the sentence meted out was excessive in the circumstances of the case.

Whether or not there was sufficient evidence adduced, to the required standard to confirm that the Appellant was found with the 3 bags of cannabis sativa.

7. To begin with, this Court shall consider the necessary ingredients for the offence of ‘Trafficking of Narcotic Drugs Contrary to Section 4 (a) of the Drugs and Psychotropic Substances Control Act No. 4 of 1994. The said section provides as follows: -

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 an 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 greater, and, in addition, to imprisonment for life;

8. The definition of the term trafficking under Section 2 of the Act implies that the same is a general term with different meanings and connotations including: -

‘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.’

9. The Prosecution adduced evidenced from a total of 6 witnesses. PW1 namely PC John Wambua testified that on 15th April 2019, he was on duty and they had been tipped off that bhang was being transported along Markadaka road. He was with PC Sanya and PC Wamalwa, led by their Inspector. They were using motor vehicle KCB 867F of the DCI. They met a motor bike with passengers along Markadaka Barbate road which was heading to Isiolo and they waved at the rider to stop but he escaped into the bush and that they were armed. After about half a kilometer, they met another bike and the rider was carrying bags and they waved at him to stop but he rode into the bushes and disappeared. They moved on and met two other bikes which were headed to Barbate carrying bags and they challenged the riders to stop but they refused forcing them to shoot in the air. He fired 15 rounds and PC Sanya also fired. That the 1st rider looked back, lost control of the bike and landed in a ditch and broke his leg and the stopped, did first aid on him and PC Mutinda took him to Barbate dispensary as he remained guarding the bike, KMER 132 H Boxer which was loaded with bags each having bales inside and that PC Wamalwa then came back with the other bike followed by their motor vehicle and that the other rider had also fallen and gotten injured as he had sustained a gunshot on the back. He was taken to hospital and his motor bike was KMET 060 M Baja Boxer which was carrying 3 bags loaded with bales. He said that at about 7 p.m, IP Kahari, PC Ouma and PC Hussein came and took the exhibits in a GKB 504U Toyota land cruiser. He said that prior to the arrest, the Appellant was not known to him.

10. PW2 namely PC Eric Sanya corroborated PW1’s evidence. He testified that on 15th April 2019, at around 4.00am, he was with colleagues along Isiolo South Road including IP Msado and PC Wamalwa in CID Motor Vehicle KCB 867F heading to Isiolo after a tip off that some people were transporting cannabis to Isiolo using a boxer bike. At Markadaka heading to Barbate, they saw 4 bikes following each other and three had bags loaded on them. That the 4th bike has 2 passengers and they appeared to be escorting the others. That they tried to chase and stop the riders but they accelerated. That the escorts were armed and they fired at them to which they also shot back. He fired 5 rounds, 2 in the air and others towards the tires of the bike. PW1 fired 15 rounds. That they managed to arrest two of the bikers and their escorts diverted into the bushes and disappeared after putting off the bike lights. The 1st rider lost control and fell into a ditch and broke his leg. That they stopped and lifted him from the bike which had 3 bags of cannabis. They searched the rider and he had nothing. They did first aid and took him to Barbate Dispensary. PC Mutinda and PC Muli remained guarding the bike and the cannabis. That after about 1 kilometer, when heading to Barbate, they found a man lying down and his motorbike was lying down and it had 3 bags. They discovered that the rider had sustained a bullet wound on the back and his bike was KMET 060M Baja Boxer and that as they took him to Barbate dispensary, PC Wamalwa took the bike back where he had left the other one with the bags. That at around 7.00am CP Kahari and other colleagues came and took the bikes and bags to the Police Station in Merti. He said that prior to the arrest, the Appellant was not known to him.

11. PW 3 was Corporal Anthony Maina who was attached to Merti Police Station Crime Office. He testified that on 15th April 2019, at around 5.00 am, they were called by the OCS CIP Matodo and told to arrange with three officers and to meet him at Barbate area. He then went with IP Kahari and they met an officer called John Muli and Patrick Mutinda guarding 2 motorbikes and six bags of cannabis. (From a reading of the proceedings of 24th July 2019, he had first said 3 bags but later clarified that they were 6 bags) He testified that the bikes were KMET 060M Boxer Bajaj and KMER 132 Boxer. That the officers told them that they had met bhang traffickers in 4 bikes but 2 of them had escaped and the other 2 had been apprehended and were injured. That they went round searching for the other 2 bikes but did not find them. That the OCS and PC Sanya came and told them that they had taken the cyclists to a nearby dispensary. That they then loaded the bikes and the bhang in the vehicles and went to the dispensary where they found one Barak Edin who had been injured on the chest and Daudi Huka who had a leg injury. That the Doctor referred them to Isiolo and they were taken in an ambulance which was summoned and Edin was then referred to Meru Hospital. That they took the bikes and bhang to their station and prepared an inventory for Edin. He said that prior to the arrest, the Appellant was not known to him.

12. PW4 was IP Theophilus Kahari who was the investigating officer. He testified that on 15th April 2019, at around 5 a.m, he was called by Ogul, the OCPD who told him that their colleagues who were heading to Isiolo had met drug peddlers and needed reinforcement. That he went with Corporal Maina, PC Victor and PC Hussein and PC Nywngwanga to the scene which was between Mukabat and Barbate on the way to Isiolo where they found PC Mutinda guarding 2 motor bikes one of which belongs to the Accused KMED 060M Boxer Bajaj. He testified that they were told that 4 motor bikes had been seen but they refused to stop and they had managed to arrest 2 of them, both of whom had been injured. He testified that the bikes had cannabis in bags, each bike having 18 bales of cannabis. The bike belonging to the

Appellant had 3 bags i.e PMFI 1A, 1B and 1C. That they separated the items from each bike then went to Barbate Dispensary. That they sent a sample from each bale for analysis by the government chemist and they got a report thereafter PMFI6 which was dated 1st July 2019 and which confirmed that the samples were cannabis sativa. He said that they weighed the cannabis and found that the bales weighed 88.5 kgs in total with a street value of about Ksh 1.7 Million. He produced the weighing certificate. He said that the Appellant was a stranger to him.

13. This Court has analyzed the Prosecution evidence as adduced in the lower Court. This Court indeed finds that the evidence led was consistent and it confirmed that indeed the Appellant was one of the 4 motorbikes involved in the chase and he was among the two persons arrested on the morning of 15th April 2019 with 3 bags of cannabis sativa on his motorcycle. There was consistency in the date, timing and the order of events, starting with the tip off, followed by the chase, the escape of the 2 riders who so escaped by diverting into the bushes, the subsequent chase of the remaining 2 riders, the shots that were fired in pursuit of the remaining 2 riders, the fall of one the riders whose leg got injured, the fall of the other rider who had sustained a gun shot, the conveyance of the persons arrested to hospital and collection and transportation of the bikes and bhang to the police station. There was also consistency in the items found being 2 motorbikes KMER 132H and KMET 060M each having 3 bags, totaling 6 bags. There was also consistency in the evidence tendered with respect to the persons, being policemen, who were involved at various points of the arrest and incident. For instance, after the arrest of the 1st rider, PC Mutinda took him to hospital and PC Wambua was left guarding the bike. PC Wamalwa who had proceeded to chase after the 2nd rider, the Appellant herein together with PC Sanya then came with the Appellant's bike back to where PC Wambua was.

14. From the defence tendered by the Appellant, this Court observed that indeed, he confirmed being on the road Merti – Markadaka – Barbate Road on the morning (at 4 a.m) of 15th April 2020. The point of departure was only on the contents of what he was carrying as he stated that what he was ferrying in the bags was goat feed which he was ferrying from Moyale to Barbate since there was scarcity of grass.

15. The Prosecution however led evidence to show that the contents of the 3 bags found on the Appellant's motor cycle were subjected to testing by the government analyst and it was confirmed that what was in there was cannabis. Prosecution adduced Exhibit 6 being a report from the government analyst dated 1st July 2019 which confirmed that the plant material availed to him with respect to the Appellant's case was indeed examined and found to be cannabis which is listed as one of the drugs for which the Narcotic Drugs and Psychotropic Substances (Control) Act 1994 applies to.

16. The question that begs from the Appellants' Petition of Appeal is whether failure to take photographs to confirm the facts as adduced could infer doubt as to whether the 3 bags of bhang were in the possession of the Appellant. The Appellant argues that there were 4 motor bikes involved in the escapade and that in the absence of photographs, it is possible that the police planted the bags on him. To address this issue, this Court first confirms that it would of course been better for the Prosecution to have taken photographs to confirm that the 3 bags of bhang were in possession of the Appellant; but even if this was not done, this Court is convinced, owing to the consistency in the Prosecution's case, that indeed the said bags were in the possession of the Appellant. As rightly pointed out by the Appellant, there were indeed 4 motorbikes. The first two motor bikes are said to have disappeared into the bushes and despite a spirited attempt to chase after them, the polices' efforts were futile. The Prosecution did not lead any evidence to the effect that any bags of bhang were retrieved from any of these 2 motor cycles that had disappeared into the bushes. In any event, the 1st motorcycle is said to have been carrying passengers who appeared to be escorting the others. For the other 2 motor bikes, the riders of which were arrested, and one of whom is the Appellant herein, this Court observes that the evidence as adduced clearly shows that each of the 2 had 3 bags of cannabis. They were arrested at different points and it was therefore possible to distinguish the bags of one from those of the other. Materially, in the trial Court, the Appellant did not question this issue during cross examination. This Court is aware that had there been photographs taken, there would have been exceedingly overwhelming evidence to prove that the Appellant was in possession of the 3 bags. However, this Court is also alive to the consistent nature of the evidence led by the Prosecution to show that the 3 bags were found on the Appellant's motor cycle. Despite claiming that none of the other riders who were involved in the escapade had been charged, the record confirms that the other rider who was arrested was charged. See the Exhibit Memo form dated 10th June 2019 which confirms that from the incident, 2 persons were charged namely Daud Huka and Barak Edin, the Appellant.

17. The Respondent argues that the evidence of PW1 and PW2 clearly confirms that the Appellant was indeed amongst the 4 riders who were transporting cannabis sativa and additionally, he was found in possession of the 3 bags. They argue that the definition of the term possession is not limited to what is one's personal possession but also includes constructive possession which the item may not be with the person but is within the person's area of control.

18. With respect to this assertion, this Court finds that from the evidence adduced, which confirms that 3 bags of bhang were in the Appellant's physical possession, it is not necessary to dissect the different forms of possession. This notwithstanding, this Court associates itself with the submission by the Respondent that possession is a multidimensional element and includes both physical possession and constructive possession to the extent that even if the 3 bags had not been found with the Appellant, it being that the Appellant was among the 4 transporting the bhang to Barbate, thereby confirming his involvement in the plans to traffic, then he can still be said to be in possession.

19. None of the prosecution witnesses knew the Appellant prior to the arrest and it is unlikely that the Appellant was framed by planting on him the bags of bhang as alleged.

20. This Court therefore finds that there was indeed enough evidence to confirm that the 3 bags of bhang were found on the Appellant's motorcycle.

Whether or not there was an error in finding that the Appellant exchanged firearms with the police.

21. The Appellant argues that the Court erred in finding that the Appellant exchanged firearms with the police. He argues that there was inconsistency in the evidence adduced in that according to PW1's testimony, they, the police were forced to fire because the riders refused to stop but according to PW2's testimony, it is the riders who had shot at them first and they were then forced to fire back in reaction.

22. To address this concern, a clear review of the evidence does not expressly disclose who amongst the 4 riders had the firearms. None of

the witnesses expressly mentioned the Appellant as having exchanged firearms. In fact, to use the words of PW2, the evidence was as follows: -

'The escorts were armed. They fired at us. We also shot back at them.'

The above statement implicates the 'escorts', i.e the riders who appeared to be escorting the rest. These are the ones who disappeared into the bushes. This Court has also perused the Judgment of the lower Court with respect to the shoot out and observes that similarly, the Court merely made a general statement as follows at page 3: -

'The riders engaged them in a shoot out.'

It is therefore not true that there was any such finding to the effect that the Appellant exchanged firearms with the police and the Prosecution cannot be faulted for failing to produce the said firearm.

23. This Court however finds that the act of firing and whether or not it was the riders who first fired and the police then fired out of reaction or whether it was only the police who fired in order to ensure a successful arrest does not affect and/or go into the element of the offence of Trafficking in Narcotic Drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Act.

24. The Appellant seeks to use his submission to persuade the Court that his defence as raised in the trial Court, that he was merely ferrying goat feed when he was shot from the back by the police at which point he fell down and was taken to Barbate Dispensary. This Court has already made its findings concerning the defence that was raised by the Appellant in the trial Court. This Court also observes that the Appellant did not raise this issue during cross examination.

Whether or not the sentence meted out was excessive in the circumstances of the case.

25. To urge that the sentence meted out was excessive, the Appellant argues that the value ascribed to the 3 bags of bhang were skyrocketed by the Prosecution without proper valuation. He also argues that the trial Court disregarded his mitigation and the fact that he was a first time offender of a young age of just 19 years old and that the trial Court gave him a harsh sentence in the circumstances of the case. The Appellant submits that the Prosecution did guess work in arriving at the value of the cannabis sativa as no valuation report was produced to support the alleged street value of Ksh 1,777,000/=. He submits that the Learned Magistrate erred in relying on this unsubstantiated value to sentence him.

26. To begin with, this Court must first look into the legality of the sentence imposed. Section 4 (a) provides for the penalty for the offence of trafficking in narcotic drug or psychotropic substance and it is provided as follows: -

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—

b) in respect of an 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 greater, and, in addition, to imprisonment for life:

27. The Appellant was sentenced to pay a fine of Ksh 5 Million in default, to serve 5 years imprisonment in addition to an imprisonment of 10 years. From a reading of the aforementioned provision, the sentence meted out ought to be a fine and in addition, imprisonment. The section does not prescribe for what imprisonment term one ought to serve for failure to pay the fine that is imposed. In the circumstances, the provision of law to fall back on is Section 28 (2) of the Criminal Procedure Code which provides as follows:-

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

<i>Amount</i>	<i>Maximum period</i>
<i>Not exceeding Sh. 500</i>	<i>14 days</i>
<i>Exceeding Sh. 500 but not exceeding Sh. 2,500</i>	<i>1 month</i>
<i>Exceeding Sh. 2,500 but not exceeding Sh. 15,000</i>	<i>3 months</i>
<i>Exceeding Sh. 15,000 but not exceeding Sh. 50,000</i>	<i>6 months</i>
<i>Exceeding Sh. 50,000</i>	<i>12 months</i>

28. In the premises, the imprisonment term for nonpayment of any amount exceeding Ksh 50,000/= ought not to exceed 12 months. This Court thereby finds that the 5 years sentence imposed by the trial Court, to be served in default of the payment of the fine is illegal.

29. Concerning the 10 years imposed, it appears that the trial Court was cognizant of the import of the term 'liable' as per the decision in ***Opoya v Uganda Criminal Appeal No. 94 of 1967 EALR 1967 (pg 752)*** and it exercised its discretion in giving 10 years as opposed to the maximum life imprisonment term. However, in exercise of its discretion, this Court finds that the term of 10 years is too harsh, considering the age of the Appellant who was 19 years at the time of arrest. He was a mere transporter and/or conveyor and this Court is cognizant of the fact that there are other persons who being the main peddlers of the drugs contribute to a larger extent to the drug menace in the country. This Court is alive to the ramifications of drug use more so amongst the youth, and it is necessary to impose a deterrence sentence not just to the Appellant but to society as well. Nonetheless, this Court finds that the Appellant, being a young man of 19 years, ought to be rehabilitated and given a chance to go back to society and find some other occupation. The Court therefore finds reason to reduce the 10 years sentence and substitute it with 5 years.

30. Concerning the value of the bhang recovered, the Prosecution has submitted that the value ascribed, being Ksh.1,777,000/= was street value at the time. They have also argued that failure to adduce a valuation report is not enough to quash the conviction as valuation is only meant to the wording of the section uses the term liable meaning that the Court still has discretion to impose a fine. This Court finds that issue of valuation speaks to the sentence and not the conviction, and the appellant was properly convicted. On the fine, the court in exercise of discretion imposes a fine of Ksh.1,000,000/=, in default of the payment of which the offender shall in accordance with section 28(2) of the penal Code serve imprisonment for 12 months. .

ORDERS

31. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The Appeal on conviction is hereby declined and the finding of the lower Court on conviction is hereby upheld.

ii) The Appeal on sentence is allowed and the sentenced imposed by the trial Court is hereby set aside and substituted with the following: -

(a) The Appellant shall serve imprisonment for five (5) years imprisonment.

(b) The period of time the Appellant has been in custody shall be taken into account in computing the time to be served, pursuant to section 333(2) of the Criminal Procedure Code.

(c) The appellant shall in addition to the sentence of imprisonment pay a fine of Ksh.1,000,000/= in default of which he shall serve 12 months imprisonment.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MARCH 2021.

EDWARD M. MURIITHI

JUDGE

APEARANCES:

M/S Kaberia Arimba & Company Advocates, Advocates for the Appellant.

Ms Nandwa, Prosecution Counsel for the Respondent.