Opiyo v Republic (Criminal Appeal 139 of 2018)
[2025] KECA 1618 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1618 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 139 OF 2018

MSA MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA

OCTOBER 3, 2025

BETWEEN

JOSEPH ODHIAMBO OPIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Migori (Mrima, J.) dated 23rd February, 2017 in HCCRA No. 63 of 2015)

JUDGMENT

1. Joseph Odhiambo Opiyo, the appellant, was arraigned and charged before the Senior Principal Magistrate's Court at Migori with two counts; one trafficking in narcotic drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* and two, with unlawful use of motor vehicle contrary to section 294 of the Penal Code.

2. The particulars of count I were that, on 9th February, 2013 at Rakwaro area in Migori County, jointly with another not before the court were found trafficking in narcotic drugs, namely bhang [cannabis sativa] to wit 576 kgs with a street value of Kshs. 5.76 million in a motor vehicle registration number KBP 325M a Toyota Voxy black in colour in contravention of the Act.

3. In count II, the appellant was charged with unlawful use of a motor vehicle contrary to section 294 of the Penal Code. The particulars were that on 9th February, 2013 at Rakwaro area in Migori County, jointly with another not before court unlawfully and without any colour of right but not so as to be guilty of stealing converted to his own use a motor vehicle registration number KBP 325M a Toyota Voxy black in colour.

4. The appellant pleaded not guilty to both counts. After a full trial, the trial court found the appellant guilty of count I and acquitted him under section 215 of the Criminal Procedure Code on count II. The appellant was sentenced to serve 20 years' imprisonment.

His appeal to the High Court was dismissed in its entirety.

5. Aggrieved, the appellant filed this appeal, faulting the learned judge for failing to analyze and evaluate the evidence; failing to consider his plea in mitigation and failing to sentence the appellant to the least severe sentence.

6. Briefly, the facts of the prosecution case were that on 9th February, 2013 at around 08:10 am, PC Isabel Ndana (PW1) of the Anti- Narcotics Unit in Migori received a call from Corporal Bashir of the Criminal Investigations Department who informed her that he was chasing after a motor vehicle registration number KBP 325M make Toyota Voxy black (the vehicle) that had been spotted along M'torabu - Mabera road which was suspected of trafficking some narcotics. PC Ndana and her colleagues quickly used a private taxi to take part in tracking the said vehicle. As the vehicle was reportedly past Migori town, PC Ndana called the OCS of Kamagambo Police Station and requested a road block to be mounted at around Rakwaro area.

7. A police roadblock was set up, but the suspects, upon noticing it, made a U-turn and fled towards Migori town. Police officers, including Corporal John Chemweno PW2, gave chase. Near Rakwaro, the suspects encountered more police officers and diverted into a feeder road, eventually landing in a ditch. The two occupants fled; the appellant, who was the driver, was pursued by Corporal Chemweno and arrested in a sugar farm. Upon inspecting the abandoned vehicle, officers discovered 576 kg of cannabis sativa packed in 14 bags, valued at Kshs.5,760,000. The appellant was taken to Kamagambo Police Station, and both the drugs and vehicle were later produced in court as exhibits.

8. Placed on his defence, the appellant denied the charges and alleged that he was not the driver of the vehicle as he was arrested by one officer, Jack, who did not testify and that he was arrested as he was just taking a walk.

9. At the plenary hearing of the appeal, the appellant appeared in person from Shikutsa prison while Mr. Okango learned Assistant Director of Public Prosecutions appeared holding brief for Mr. Oyimbo for the respondent. Both parties relied on their written submissions.

10. In support of the appeal, the appellant submitted that firstly, he was charged on a defective charge sheet. Secondly, his identification was not positive as it was based on suspicion. The appellant contended that in his evidence, Corporal Chemweno stated that the appellant was in the motor vehicle; however, upon being cross-examined, he could not confirm whether or not the appellant was the driver of the said motor vehicle.

11. Regarding the sentence, the appellant complained that the sentence was manifestly harsh and excessive in the circumstances. In meting out the sentence, both the trial court and the first appellate court failed to consider the appellant's mitigation.

12. The appeal is opposed by the respondent, who contends that the prosecution proved its case to the required standards. The testimony of PW1, PW2 and PW3 was consistent and corroborative leading to his conviction.

13. Regarding the defective charge sheet, the respondent submits that the charge sheet contained the offence the appellant was charged with, an offence which is unknown in law. In its determination, the high court found it defective but exercised its discretion under section 79 of the criminal procedure code and convicted the appellant to a lesser offence of possession of cannabis sativa contrary to section 3(1) as read with Section 3(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*.

14. On identification, the respondent contends that PW3 testified that immediately upon receipt of information that a vehicle was carrying suspected bhang, they pursued the vehicle; overtook it, and saw

the occupants. He managed to see the appellant who was the driver. PW3 further testified that when the driver saw the police, he abandoned the motor vehicle and ran away. PW3 saw the appellant coming out of the motor vehicle from the driver's side therefore, the identification was proper and sufficient since PW3 had been following the vehicle at all times and saw the appellant alight from the driver's side and escape.

15. It is further submitted that the prosecution proved the offence to the required standard. The prosecution argued that the appellant, as the driver of the vehicle carrying cannabis sativa, was in control and knowingly transported the drugs. His attempt to flee after abandoning the vehicle indicated awareness of the illegal cargo. The testimony of PW4 confirmed that 24 kg of the substance was tested and identified as cannabis sativa, a classified narcotic. The vehicle was being pursued on suspicion of drug trafficking and was found to contain 14 bags weighing 575 kg, valued at Kshs.

5. 76 million. The quantity and packaging suggested an intent to distribute. The prosecution concluded that all elements of the offence were proved and urged the court to uphold the conviction.

16. Regarding the sentence, it is submitted that the appellant was apprehended in possession of a substantial quantity of cannabis sativa, with an estimated street value of Ksh.5.76 million; that this warranted the imposition of the maximum penalty prescribed under the *Narcotic Drugs and Psychotropic Substances (Control) Act* as such the 20-year imprisonment sentence falls within the statutory limits, considering the significant quantity of drugs involved and the imperative to deter drug trafficking.

17. Relying on the case of Ibrahim vs. Republic (Criminal Appeal No. E90 of 2022)[2023]KEHC 24627 (KLR) (13 October 2023), the respondent maintained that the appellant failed to demonstrate any exceptional circumstances that would justify a reduction of the sentence.

18. This being a second appeal, the Court by dint of Section 361 (1) (a) of the Criminal Procedure Code, is mandated to consider only matters of law. In the case of David Njoroge Macharia vs. Republic [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.

19. Having duly considered the record of appeal, the memorandum of appeal, the submissions, authorities referred to by the parties and the court's mandate, the main issues of law for determination are whether the offence was proved beyond a reasonable doubt and whether he sentence was harsh and excessive.

20. As to whether the prosecution proved its case against the appellant beyond a reasonable doubt, there is no dispute that the appellant, at the time he was charged was the driver of the vehicle that was used to transport the cannabis sativa. We say this because there is evidence from PC Ndana, who testified that upon being informed of a vehicle suspected of trafficking narcotics, she and her colleagues began tracking down the vehicle. When the appellant noticed a roadblock set up at Rakwaro area, he made a U-turn and fled towards Migori town. Police officers, including Corporal John Chemweno PW2, gave chase. Upon encountering more police officers, the appellant diverted onto a feeder road and eventually ended up in a ditch. The two occupants fled, but the driver, being the appellant, was pursued by Corporal Chemweno, and arrested in a sugar cane farm. The abandoned vehicle was inspected, and the officers discovered 576 kg of cannabis sativa packed in 14 bags. PW4 confirmed that out of that, a sample 24 kg was tested and confirmed to be cannabis sativa, a classified narcotic drug.

21. Taking into consideration the entire evidence on record, coupled with the testimony of the arresting officer (PW2), leaves no doubt, as the trial court found, that the appellant was in possession of the narcotic drugs in the manner described. The trial court considered all the evidence presented and having done so came to a proper conclusion. The guilt of the appellant was proved beyond a reasonable doubt by overwhelming evidence on record.

22. Regarding the defective charge sheet, the learned judge noted that the charge sheet used the general word 'trafficking' without adding what exactly the Appellant was doing that constituted trafficking. The learned judge properly invoked his powers under Section 361(4) of the Criminal Procedure Code and convicted the Appellant of a lesser but cognate offence by substituting the conviction for trafficking with that of possession of cannabis sativa contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act. The ground fails.

23. With regard to the sentence being harsh and excessive, section 361(1)(a) of the Criminal Procedure Code militates against the Court hearing a second appeal on sentence, as to severity of sentence meted out is a matter of fact. It states:

> A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:
>
> (a) On a matter of fact, and severity of sentence is a matter of fact.

24. In MGK vs. Republic [2020] eKLR, this Court while emphasizing the afore-stated section stated that:

> "As regards the sentence, under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

25. Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act provides that:

Penalty for possession of narcotic drugs, etc.

1. Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

2. A person guilty of an offence under subsection (1) shall be liable- a. in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and.....

26. The trial court sentenced the appellant to 20 years' imprisonment on the 1st count. On first appeal, the learned Judge sustained the sentence. As already stated, the Court's mandate as regards sentence is confined to a matter of law, and the Court can only interfere with the sentence imposed if the same is unlawful. Having regard to what Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act, it follows that the sentence imposed was lawful therefore, there is no basis on which to interfere therewith. We find that the appeal lacks merit in its entirety and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR