



**Republic v Itulya & another (Criminal Case E491 of 2022)
[2025] KEMC 125 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 125 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE E491 OF 2022
YA SHIKANDA, SPM
MAY 21, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID ITULYA 1ST ACCUSED

GEDION MUTUKU 2ND ACCUSED

JUDGMENT

The Charge

1. David Itulya and Gedion Mutuku (hereinafter referred to as the 1st and 2nd accused persons respectively) were charged with the offence of being in possession of narcotics drugs contrary to section 3(1) as read with section 3(2) (a) of the Narcotics Drugs and Psychotropic Substances (Control) Act. The 1st accused person pleaded guilty to the charge against him and was subsequently convicted and sentenced accordingly. This judgment is thus in respect of the 2nd accused person. The particulars of the offence against the 2nd accused person are that on 10/7/2022 at Makindu upper market, in Makindu Sub-county within Makueni County, the 2nd accused person was found in possession of 23 rolls of cannabis with a street value of Ksh. 1,150/=, which was not medically prepared. As already alluded to hereinabove, the 2nd accused person pleaded not guilty to the charge. The matter was set down for hearing.

The Evidence

The Prosecution Case

2. The entire prosecution case was heard by another Magistrate who was subsequently transferred. I will thus rely entirely on the record since I did not see nor hear the prosecution witnesses. The prosecution called a total of four (4) witnesses in a bid to prove its case. PW 1 Police Constable Michael Maweu



testified that on 9/7/2022 at about 10:00 pm he was on normal patrol duties in Makindu town when he received information from members of public that there was a group of boys who were smoking cannabis at a certain place. The witness informed the OCS as well as one of his colleagues. They proceeded to the area and when they approached, they saw smoke and could also smell the cannabis.

3. The police officers entered the house where the smoke was coming from. They found six boys and one girl smoking cannabis. On the floor, there was 26 rolls and loose cannabis. Body searches were conducted on the boys and 23 rolls of cannabis were found on the 2nd accused person. PW 2 Police Constable Daniel Maina gave testimony that was similar to that of PW 1. PW 3 Chief Inspector of Police Robert Sungut testified that he was with PW 1 and PW 2 when they proceeded to the house where the suspects were said to be. His testimony was similar to that of PW 1 and PW 2. PW 4 Police Constable Hildan Ochieng testified that he was the investigating officer herein. That he recorded statements from the arresting officers and took the substance for analysis. That the substance was confirmed to be cannabis.

The Defence Case

4. When he was placed on his defence, the 2nd accused person gave sworn testimony without calling any other witness. The 2nd accused person testified that he was a boda boda operator and that on the material night, he had carried a customer and ferried him to his house when he was arrested by the police officers. He stated that he did not know that the customer had cannabis and denied that the cannabis belonged to him.

Main Issues for Determination

5. It is not in dispute that the 2nd accused person was arrested by the police on the material night. It is also not in dispute that the 2nd accused person was arrested in the 1st accused person's house. In my view, the main issues for determination are as follows:
 - i. Whether the 2nd accused person was found in possession of cannabis;
 - ii. If so, whether such possession was unlawful; and
 - iii. Whether the prosecution has proven its case against the 2nd accused person beyond reasonable doubt.

Analysis and Determination

6. I have carefully considered the evidence on record and as well as the law applicable. In my considered view, for the court to find that the prosecution has proven its case against an accused person, the prosecution must have proven the following beyond reasonable doubt:
 - a. That the offence complained of was indeed committed; and
 - b. That the evidence links the accused person to the offence complained of.
7. The accused person is charged with the offence of possession of narcotic drugs. The particulars of the charge indicate that he was found with 23 rolls of cannabis in contravention of the law. The alleged cannabis was not produced in evidence. What is on record are narratives which are not supported by material evidence. From the testimony of PW 1, it would appear that the prosecution purported to rely on the exhibits that were produced when the 1st accused person pleaded guilty. To begin with, only the cannabis that related to the 1st accused person was produced in evidence when he pleaded guilty. Secondly, even assuming that the prosecution has mistakenly produced the cannabis that related to



the 2nd accused person when the 1st accused person pleaded guilty, the court could not rely on such proceedings as they did not involve the 2nd accused person. Material evidence cannot precede witness testimony. Furthermore, the 2nd accused person would have been denied a chance to challenge such evidence. The procedure for production of exhibits during trial is clear. There are no shortcuts.

8. Without production of the alleged cannabis in evidence, it cannot be said that the offence was committed. Besides, there would be nothing to link the 2nd accused person to the offence complained of. In the case of *Gerald Munyao Ngaa v Republic* [2018] eKLR, the court observed thus:

“I have also considered the evidence in respect of the recovery of other stolen items. As pointed out by the appellant counsel and admitted by the respondent’s counsel, the evidence in that respect was full of contradictions. It was said that the appellant led the police to his house in Nakuru where the items were recovered. On the other hand, the complainant says that he saw the items at the police station, while the appellant says that he was forced to sign an inventory. More critically, none of the items were produced in court and positive possession was not proved.” (Emphasis supplied)

9. Similarly, in the case of *Moses Macharia Kiarie v Republic* [2014] eKLR, the court held as follows:

“The rest of the prosecution case appears to be that the Appellant led police officers from Kigumo Police Station to PW2 and PW4 to whom he had allegedly sold some of the stolen items, and from whom the police recovered those stolen items. No police officer from that police station or anywhere else testified. The investigating officer of the case never testified and the alleged stolen items were never produced in evidence as they should have been. There was thus no good evidence of recovery of the stolen items properly linking the Appellant to them. In criminal trials the chain of evidence and sanctity thereof is absolutely important. In the present case a proper chain of evidence is lacking. To begin with, the persons who allegedly saw the Appellant breaking into the complainant’s house never testified, and no reasons were given why they did not. Secondly, the police officers who arrested the Appellant, and whom the Appellant allegedly led to the stolen items, never testified. Again, no reasons were given why they did not testify. Thirdly, the allegedly stolen items that were recovered were never produced in evidence before the trial court. The investigating officer who should have produced them never testified. It is also to be noted that there is no evidence of the complainant’s positive identification as his of the alleged stolen items that were recovered. They were all common household and personal goods readily available to anyone. With all the lacunas highlighted above, it is clear that the offences in count 1 were not proved against the Appellant beyond reasonable doubt. He should have been acquitted.” (Underlining mine)

10. I have considered the 2nd accused person’s defence. He denied having been found with the alleged drugs. I am aware that an accused person is under no duty to prove his innocence. The duty is on the prosecution to prove its case against the accused person beyond reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of



the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *FESTUS MUKATI MURWA V R*, [2013] eKLR.”

11. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

12. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (Emphasis mine)

13. Having considered the entire evidence on record, it is my finding that reasonable doubt has been cast in the prosecution case, particularly on possession and the identity of the drugs that were allegedly recovered from the 2nd accused person. As a matter of law, the doubt MUST be resolved in favour of the 2nd accused person.

Disposition

14. I find that the prosecution has failed to prove its case against the 2nd accused person beyond reasonable doubt. Consequently, I make the following orders:
- a. The 2nd accused person is found not guilty of the offence of possession of narcotic drugs;
 - b. The 2nd accused person is hereby acquitted of the charge pursuant to section 215 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 21ST DAY OF MAY, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

