



**Republic v Irungu (Criminal Case 3805 of 2021)  
[2024] KEMC 168 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 168 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CRIMINAL CASE 3805 OF 2021  
PA NDEGE, SPM  
JULY 4, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SAMWEL MWANGI IRUNGU ..... ACCUSED**

**JUDGMENT**

1. Samwel Mwangi Irungu the accused herein, was arraigned in court on 02.09.2021, to answer the charges of Cultivating Prohibited Plants C/S 6(a) of the Narcotics Drugs and Psychotropic Substances (Control) *Act no. 4 of 1994* (hereinafter abbreviated as NDPSA) and also being in possession of narcotic drugs c/s 3(1) as read with 3(2) of the same Act. He pleaded not guilty.
2. The hearing took off before Hon Y. I. Khatambi, Principal Magistrate (PM) and the prosecution called four witnesses to testify in its case: the assistant chief, the chief, government analyst and a police officer. The then trial magistrate upon analyzing the evidence of the prosecution witnesses, found that a prima facie case had been disclosed and called upon the accused person to make his defense. I then took over the conduct of the hearing on 31/05/2023 when necessary directions under section 200(3) of the criminal procedure code were taken and the accused opted to have the hearing proceed from where it had reached. The accused then gave his defense on 27/05/2024 and thereafter closed his case.

**The Charge**

3. As aforesaid, on 2nd September 2021, the accused herein was charged with the offences of Cultivating Narcotic plants c/s 6(a) of The Narcotic and Psychotropic Substances *Act No.4 of 1994*. He was also charged with the offence of being in possession of narcotic drugs c/s 3(1) as read together with section 3(2) of the Narcotic and Psychotropic Substances *Act No. 4 of 1994*. The particulars alleged and the accused denied that on 2nd September 2021, at Ngoriga village, Njoro sub- location within Nakuru county, he was found to have planted 78 stems of Cannabis Sativa with a street value



of Kshs 240 000. He also denied being in possession of 2 rolls of bhang which were valued at Kshs 60 thereby contravening the said Act. The court's responsibility now is to determine whether the evidence presented, along with the defense put forth by the accused, is sufficient to establish the accused's liability for the charges brought against him. The court must carefully examine all the evidence on record, considering both the prosecution's arguments and the defense statement, to reach a fair and just decision regarding the accused's culpability. This process ensures that the verdict is based on a comprehensive evaluation of all relevant facts and legal arguments.

### **The Evidence**

4. On 02.09.2021 at around 7:30 am, PW1, Millicent Kangethe (assistant chief,) and PW2, John Mwangi Kuria (chef); both went to the accused home. They had received information on the previous day that a resident had planted bhang. They conducted a search at the accused house and found two rolls of bhang in a geometrical set in a cup-board. They later proceeded to his farm and found bhang planted in the middle of maize plantation. They pulled them out and called an officer (PW4, 110444 Christopher Muleba) who came to the scene and arrested the accused.
5. The 78 stems uprooted from the farm and the two rolls of bhang were taken to a chemist to be analyzed and a report was made by PW3 (Richard Kimutai Lang'at). In his report, he stated that the plant material was examined and found to be cannabis which is included in the first schedule of the Narcotic Drugs and Psychotropic Substances (control) Act. 1994.
6. It trite law that the burden of proof is always on the prosecution to prove its case beyond reasonable doubt. It is therefore the duty of the prosecution to marshal all the evidence necessary to prove the charges against the accused herein to that standard. In simple terms, the prosecution bears the legal burden of proof. Once the prosecution has adduced sufficient evidence, the accused herein may be required in law to discharge as provided for under section 111(1) of the *Evidence Act* which provides as follows:
  1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence
7. The charge herein as frames and answered by the accused herein also alleges that the accused herein;
  - a. On the 02.09.2021, at Ngoriga village in Njoro sub- location within Nakuru county, was found cultivating Narcotic plants and
  - b. Was found in possession of the Narcotic drugs

### **Determination**

Charge 1; Cultivation Of Prohibited Plants Contrary To Section 6 (a) Of The Narcotic Drugs And Psychotropic Substances Act.1994



8. According to Section 2 of the Narcotic and Psychotropic Substances Act.1994, to cultivate means, in relation to any plant, includes growing the plant, sowing or scattering the seed produced by the plant or any part thereof, nurturing or tending the plant or harvesting the flowers, fruits, leaves or seeds or the whole or any part of the plant. Since the plant stems were alleged to been found growing in the middle of maize plantation, that alone cannot by itself prove that the accused herein was the one who was growing or cultivating them.
9. According to Section 6(b) of the NDPSA, penalty for cultivation is imposed on any person who— being the owner, occupier or concerned in the management of any premises, permits the premises to be used for the purpose of the cultivation, gathering or production of any prohibited plant. In this suit, the prosecution has not proved any of the above as aforesaid. No proof has been provided in court to prove that the accused is the true owner of land where the alleged prohibited plants were found growing.
10. Not all parts of the cannabis have been illegalized by the NDPCA. The definition of cannabis in section 2 of the act is clearly restrictive in nature and when read alongside the provisions of section 3(2) of the same act as first schedule thereof restricts the applicability of the provisions to "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted, by whatever name they may be designated. The evidence laid by the prosecution does not therefore exclude the seeds and leaves. The prosecutor has thus failed to prove to the required standard of beyond reasonable doubt that the plants herein was cannabis as defined under section 2 of the NDPSA. There was therefore need for the government analyst to clarify which Part of the cannabis plant the said plant materials are alleged to have come from given that it could have come from roots or the stems of the cannabis thereby rendering them not illegal.
11. I do therefore find that there is no proof to the requisite standard that the accused herein was in cultivation of the 78 stems to the exclusion of any other person, or that he was aware that the plant was growing between the maize plantation herein as had been claimed herein. I further find no evidence that the plant materials herein were Cannabis Sativa.

## Charge II

12. There is the issue of possession of narcotic drugs. We rely on the definition of the term "possession" in Black's Law Dictionary to mean: 'The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls.'
13. Section 4(a) of the [Penal Code](#) defines possession as: "be in possession of "or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in a place (where belonging to or occupied by oneself or not) for the use or benefit of oneself or of another person.
14. The definition of possession therefore connotes two elements –
  1. being in physical control of the items of the offence and or in joint control with another
  2. knowledge or intention of having the article, instruments, thing or items constituting the offence.



15. The court in the case of Jean Wanjala Songoi & Patrick Manyola v Republic (2014) eKLR, held that:

...Possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, the aspect of the offence was not established beyond reasonable doubt against the appellants.

16. Also, in the case of Peter Mwangi Kariuki v Republic (2015) eKLR, Mativo J. stated that:

In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly, he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it.

17. Relying in the case of Jean Wanjala Songoi & another v Republic (2015) eKLR, I find that the evidence of possession herein scanty. It was alleged that the two rolls of bhang were found in a geometrical set in a cupboard in the house belonging to the accused. The house had other persons living, the wife and the son. The prosecution was therefore required to prove that the bhang was under the physical control of the accused and that he had the knowledge of the existence of the bhang in the geometrical set at the cupboard. Since the two rolls were alleged to be found in the accused house, that alone cannot by itself prove that the accused herein was the one in possession of the two rolls of bhang, or that he had knowledge that the bhang was in the house.

18. I find that there is no proof of the requisite standard that the defendant herein was in possession of the two rolls of bhang or that he was aware that bhang was in his house as had been claimed herein. The upshot is that I do hereby enter a finding of not guilty against the accused herein. Pursuant to provisions of section 215 of the criminal procedure code, I do hereby dismiss the charges herein and do hereby acquit the defendant herein of the offences of Cultivation of prohibited plants contrary to section 6(a) of the Narcotic Drugs and Psychotropic Substances Act. Of 1994 and being in possession of narcotic substances contrary to section 3(1) as read with section 3(2) of the same Act.

**DATED SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 04<sup>TH</sup> DAY OF JULY 2024**

**A.P NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of

Court interpreter: Janet

Prosecutions counsel: Chinga

Accused: Present

