



REPUBLIC OF KENYA



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**Republic v Wanjiru (Criminal Case E3801 of 2021)
[2024] KEMC 151 (KLR) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 151 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CRIMINAL CASE E3801 OF 2021
PA NDEGE, SPM
JULY 2, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SERAH WANJIKU WANJIRU ACCUSED

JUDGMENT

1. Serah Wanjiku Wanjiru, the accused herein, is facing the following charges namely: -
 - (a) Count I: Trafficking in narcotic drugs contrary to section 4(a) of the Narcotics Drugs and Psychotropic Substances Control [Act No. 4 of 1994](#) (hereinafter abbreviated as NDPSCA). The particulars as per the charge sheet are that on the 2/9/2021 at around 0700 hrs at Naishi centre, Njoro subcounty within Nakuru County, she trafficked by storing narcotic drugs namely cannabis to wit 1330 grams with a street value of ksh.39,900/= in contravention of the said Act.
 - (b) Count II: Selling alcoholic drinks that does not conform to the prescribed standard of the Alcoholic Drinks Act contrary to section 32(1) (2) of the [Alcoholic Drinks Control Act](#) No.4 of 2010 (hereinafter abbreviated as ADCA) (sic). The particulars as per the charge sheet are that on 2/9/2021 at about 0700 hrs at Naishi centre, Njoro Subcounty within Nakuru County, she was found selling alcoholic drinks namely chang'aa to wit 120ltrs which does not bear a statement as to its constituents and health warning message which contravenes the said Act.
 - (c) Count III: Selling alcoholic drinks without a licence contrary to section 37 as read with section 62 of the [Alcoholic Drinks Control Act](#) No 4 of 2010. The particulars are that on 2/9/2021 at about 0700 hrs at Naishi Centre, Njoro Subcounty within Nakuru County, she was found selling alcoholic drinks namely chang'aa to wit 120 litres without a licence for the year 2021.



2. The accused person was arraigned in court on 3/9/2021 and denied all the charges. On 20/9/2021, upon presenting a surety, she was released on a bond of ksh.500,000. She has therefore been out on the bond throughout the duration of the trial herein.
3. The prosecution of this case had been commenced by Mr. Mwangi, and later taken over by Ms. Chinga both prosecutions counsel duly instructed by the Director of Public Prosecutions, who by virtue of Article 157(6) of *the Constitution*, exercises state powers of prosecution within the Republic of Kenya. The accused person, however, had no legal representation and therefore represented herself. During the hearing of the prosecution's case, they called a total of 4 witnesses.
4. The court on 5/4/2023 gave a ruling that the prosecution has established a prima facie case against the accused person after carefully considering the evidence on record. The accused then gave her defence on 27/05/2024; and thereafter closed her case.
5. The burden of proof in criminal cases lies on the prosecution. For a prosecution's case to convict, it must meet the evidential threshold of proof. It is trite law that the standard of proof in criminal cases for the purposes of a conviction is beyond reasonable doubt. Justice S. Mutuku in *Republic vs Hassan Mohamud Osman* (2013) eKLR, commented as follows:

The burden of proving a criminal case lies with the prosecution and never shifts to the accused unless where the law specifically provides the same. Even where the court calls upon an accused person to testify in his defence, it is not so as to prove himself innocent. Courts do so with a view to allowing an accused person to have his day in court and perhaps adduce evidence that may rebut the prosecution evidence and raise the much valuable doubt. Even in cases where the defence of insanity or other statutory defence available to an accused person exists the accused is only required to prove such defence on a balance of probability and not beyond reasonable doubt.

6. PW1, John Mwangi Kuria, who is a chief in Lake location testified as follows. That on 2/9/2021, he was at the DCC'S office where he met other chiefs from the same sub-County. They met because the previous day they had received information of someone, Nduko, selling chang'aa within the area. They proceeded to Nduko's compound and on arrival found that Nduko, was absent. They interrogated her children who informed them that she had gone to visit her eldest child Wanjiru. They proceeded to Wanjiru's house and found her outside her house. That she lived in a rented plot. They asked her to show them her house and that she pointed her house to them. A search was conducted and 4, 30 litres' containers, black in colour were found full of chang'aa. On the bed they found a school bag which contained some dried plant materials. An inventory was prepared which was signed by accused on her own volition. He also stated that he knows Wanjiru since she lives in his jurisdiction and has lived in the area for long. He also stated that they had arrested the accused person due to the sale of chang'aa but during cross examination by the accused person, he appeared to deny. During re-examination, he stated that they recovered the items in accused person's house and that she is the one who showed them the house.
7. PW2, Millicent Nyambura, an assistant chief, confirmed that they went to the accused person's home which she knew since she is the assistant chief of the area. That she lived in a rental house. That the accused showed them her house where they conducted a search and found 4 jerrycans full of chang'aa and bhang. Though she was not sure whether the accused lived alone, but that on the material day, they found her all alone. That the police came to scene and arrested her. They signed the inventory together with the accused person.



8. PW3, Richard Kimutai Langat, is a government analyst duly authorized vide gazette notice 1873 of 18/3/2005. He stated that on 10/9/2021, he received an exhibit memo form from Naishi Police Station, CR.76F/29/2021 where the accused was Serah Wanjiku Ref. No. K447/21. The same contained dry plant material. He analysed the dry plant material under a VR machine and found it to be bhang. He prepared his report which he produced as PEXH. NO. 5. On 10/9/2021, he received another exhibit memo form from the same officer bearing the same name i.e. Serah Wanjiku. The memo form had liquid contents in a plastic bottle. He analysed the fluid by smelling and use of chemicals and a special machine and found the liquid to be chang'aa. He prepared the report on 14/9/2021 and signed the same. The second government analyst report dated 14th September 2021 was also PEXH. NO. 7.
9. PW4, No.58576 CPL Otieno, from Ndichu Police Station was at the police station on 2/9/2021 at 7.00am when he received a call from the assistant county commission informing him that they were at a plot in Soweto 2 where some suspects had been arrested while in possession of narcotic drugs and illicit brew. They went to scene and collected the narcotic drugs. The suspects were found in possession of a brown bag that contained bhang. He therefore prepared an exhibit memo form to forward the necessary samples for analysis. The brown bag (PEXH NO. 1), dry plant material (PEXH. NO. 2), chang'aa (PEXH. NO.3 a-d), exhibit memo (PEXH. NO.4), and memo for chang'aa (PEXH. NO.6), were respectively produced as exhibits. During cross examination, he stated that alcohol is sold at the said plot at both the accused person's and a neighbour's houses. That he found the chief while carrying alcohol from the accused person's house.
10. The accused person in her defence gave an unsworn testimony stating that she is from Njoro subcounty and that since she was born she has never committed such offences as the ones charged with herein. That she washes people's clothes for a living.
11. The following issues arise for determination;
 - (a) Whether the accused person committed the offence of trafficking contrary to section 4(a) of the Narcotics and Psychotropic Control Act?
 - (b) Whether the accused person committed the offence of selling alcoholic drugs that do not conform to the prescribed standard?
 - (c) Whether the accused person committed the offence of selling alcoholic drinks without a licence?
12. As aforesaid, for a court to convict, the prosecution must adduce the necessary evidence to prove all the main ingredients of the offence/s. In the first issue of whether the accused person was trafficking bhang contrary to section 4(a) of the Narcotics and Psychotropic Substances Act, Section 4(a) of the said Act provides as follows:

Any person who trafficks 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 in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychological substance, whichever is the greater, and in addition, to imprisonment for life.

In this case, the ingredients of the offence would be: one, the accused person is found trafficking and; two, she is trafficking in a narcotic drug/psychotropic substance.
13. The word 'trafficking' is defined under section 2 of the Narcotic and Psychotropic Substances. It means importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering,



conveyance, 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/psychotropic substance or making of any offer in respect thereof. In *Maldine Akoth Barasa and another vs Republic (2007) e KLR*, the Court of Appeal held that it is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs.

14. In the present charge, the accused person is said to have stored cannabis in her house which supports the definition under section 2 of the Act. It was the prosecution's case that 1330 grams of cannabis were recovered in a brown bag found on the bed in the accused's house. The prosecution also alluded to the dry plant being cannabis sativa. On expounding on the same, they tendered a government analyst report which confirmed that the dry plant materials were actually cannabis which falls under the first schedule of the Narcotic and Psychotropic Substance Act. The accused did not contest to the aforesaid government report.
15. Since the accused person was found storing the bhang in her house, the issue of possession arises. Black's Law Dictionary defines 'possession' 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.
16. Possession is also defined in section 4(a) of the *Penal Code* 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 / occupied by oneself or not) for the use or benefit of oneself or another person. In *Peter Mwangi Kariuki vs Republic (2015) e KLR*, Mativo J stated that:

In my view, possession includes two elements; namely being in physical control of the item and knowledge of 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. According to the facts of the case, PW1 and PW2 had received information that there was a person called Nduko who was selling chang'aa. They proceeded to her place and did not find her and only found her children who told her that she had gone to visit Wanjiru. PW2 in her testimony stated that she knew the accused person's compound. They proceeded to the said compound and stated that she lived in a rented plot and asked her to show them the house and she pointed out the house and a search was conducted where the bhang and 4 jerricans of chang'aa were recovered. The first element of possession is being in physical control of the item. The accused person in her statement stated that she has never done that since she was born. If she was really in physical control of the bhang, she would have not cooperated with the chief or would have done something to get rid of it. She would have even distracted them if she had physical control of them.
18. The second element of possession is that the accused person must be shown to have knowledge that the item was in his custody and he knew that the item in question was prohibited. PW2 in her statement stated that the accused lived in a rented plot and that she did not know whether she lived alone or not. Had the accused person had the knowledge that the bhang was in her custody and that it was prohibited, she would not have allowed the chief and assistant chief to enter the said house. The chief and assistant chief ought to know where a person within their jurisdiction lives. The accused lived in a rented plot, meaning there are many houses. When someone points out that this is my house, she may



be lying. PW1 and PW4 did not even conduct further investigations to determine that the house the bhang was recovered from was the accused person's house. During cross-examination of PW1, he stated that they have never arrested the accused person for the sale of bhang and chang'aa. The prosecution did not also conduct investigations to confirm whether the accused person lived alone or with other people such as her mother who was the suspect initially.

19. moreover, not all parts of the cannabis plant have been illegalised by the NDPCA. The definition of cannabis in section 2 of the Act is clearly restrictive. It provides that 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. There was need for the government analyst to clarify which part of the cannabis plant the dry plant material found in the bag came from since not all parts have been illegalised. The prosecution therefore in this case did not adduce sufficient evidence.
20. The prosecution's case has not satisfied the two elements of possession i.e. physical control and knowledge of the item hence the finding that the accused person was not in possession of bhang and 4 jerrycans of chang'aa. The prosecution has not proved their case beyond reasonable doubt.
21. The second issue was whether the accused person has committed the offence of selling alcoholic drinks that do not conform to the prescribed standard of the Alcoholic Drinks Act contrary to section 32(1) (2) of the Act.

Section 32(1) provides that subject to this section, no person shall –

- a. Manufacture
- b. Import
- c. Sell or distribute,

An alcoholic drink unless the package containing the alcoholic drink conforms to the requirements of subsection (2).

- (2) Every package containing an alcoholic drink shall- (a) bear a statement as to its constituents and (b) have at least two of the health warning messages prescribed in the second schedule, in English or Kiswahili.

22. PW1 stated that after a search was conducted in the house, they found four jerrycans full of chang'aa. This evidence was corroborated by the evidence of the other witness. A government report was also produced to show that the liquid contents in the jerrycans were chang'aa. The particulars of the offence as per the charge sheet are that the accused person was found selling alcoholic drinks namely chang'aa to wit 120 ltrs which does not bear a statement as to its constituents and health warning message. This contravenes the evidence produced by the prosecution that the jerrycans containing the chang'aa were found in the house. There is no act of 'sale' of the chang'aa produced as evidence by the prosecution.
23. The *Alcoholic Drinks Control Act* defines the word 'sell' to include:
 - a. Barter or exchange without use of money
 - b. Offer or expose for sale, barter or exchange without use of money
 - c. Supply, or offer to supply, in circumstances in which the supplier derives or would derive, a direct or indirect pecuniary benefit
 - d. Supply, or offer to supply, gratuitously but with a view of gaining or maintaining custom, or otherwise with a view for commercial gain.



24. The prosecution has not proved any of the sells as provided above. In their evidence, they stated that when a search was conducted in the house, they found 4 jerricans containing the chang'aa and that the accused person was seated outside. They have also not produced any evidence showing that she was selling the chang'aa to another person. There is no evidence showing that she exchanged the chang'aa with someone else for something different or that she supplies chang'aa.
25. The third issue that arose was that of whether the accused person committed the offence of selling alcohol without a licence contrary to section 37 as read with section 62 of *Alcoholic Drinks Control Act*. Section 37(2) provides that if a licensee whose licence does not cover the sale of alcoholic drink to be consumed on his premises himself takes or carries, or employs or suffers any other person to take or to carry, any alcohol drinks out of or from his premises for the purposes of being sold on his account, or for his benefit or profit, and of being drunk or consumed in any place (whether enclosed or not, and whether or not a public thoroughfare) other than the licensed premises, with intent to evade the conditions of the licence, the licensee commits an offence, and, if the place is any house, tent, shed or other building belonging to the licensee or hired, used or occupied by him, the licensee shall be deemed, unless the contrary is proved, to have intended to evade the conditions of the licence. Section 37 of the Act gives the provision of sale without licence. The particulars of the charge state that the accused person was found selling alcoholic drink, chang'aa without a licence. The prosecution produced evidence that when a search was conducted in the said house, 4 jerricans were found containing chang'aa. They conducted the search while the accused person was outside meaning that she was not selling to anybody the chang'aa, hence the issue of licence should not arise.
26. The last issue is what is the effect of an inventory not being produced in court. The provisions of section 60(1) of ADCA definitely provides for a full inventory of the seized alcoholic drinks. It provides that during an inspection under this act, an authorised officer may seize any alcoholic drink or thing by means of which or in relation to which the officer believes, on reasonable grounds, that this Act has been contravened and a full inventory thereof shall be made at the time of such seizure by such officer. Failure an inventory being made at the time of seizure may make the court refuse to admit and rely on exhibits which had been produced.
27. The undisputed facts by the prosecution's witnesses in this case are that an inventory was prepared at the time of seizure but was not produced in court. PW1 in his statement stated that an inventory was prepared and the accused signed the same on her own volition. The inventory dated 2/9/2021 were marked as (Pm F1 4). PW2 also confirmed that they signed the inventory. She also stated that the accused signed the inventory and she was not forced to sign. This evidence shows that an inventory was prepared at the time of seizure and but was only marked and not produced in court at any point.

The effect of failure to produce documents marked for identification was dealt with by the Court of Appeal in the case of *Kenneth Nyaga Mwise v Austin Kiguta & 2 Others* [2015] eKLR where the Court of Appeal held:-

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record, if admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account..... a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to



be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value... in our view, the trial judge erred in evaluating the evidence on record and basing his decision on “MFI 2” which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.[Emphasis added]

28. I do therefore find that the prosecution has not proven their case beyond reasonable doubt and pursuant to section 215 of the *Criminal Procedure Code*, I do hereby dismiss the charges against the accused person and consequently do hereby acquit her of all the offences, trafficking of narcotic drugs contrary to section 4(a) of the Narcotics and Psychotropic Substances, selling alcoholic drinks that do not conform to the prescribed standard contrary to section 32(1)(2) of ADCA and selling alcoholic drinks without a licence contrary to section 37 read together with section 62 of the *Alcoholic Drinks Control Act*. Her surety is hereby discharged and any security deposited on her behalf herein to be released to the depositor.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS ...02nd . DAY OF JULY 2024.

A.P. NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Court interpreter: Janet

Prosecutions counsel: Okachi

Accused: Present

