

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**CRIMINAL APPEAL NO. E049 OF 2023**

**RACHEL MUGAMBI.....APPELLANT**

-

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant herein and 2 other persons were in Mariakani Criminal Case No. E033 of 2022, convicted of the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, (the Act). The particulars of the offence are that on 19.1.22 at around 0800 hours at a room in Mission estate in Mazeras township, Rabai sub county within Kilifi County, with another not before court, the Appellant and her co-accused were found trafficking in narcotic drugs by storing in a room, 399 sticks and 1000 grammes of dry green plant materials suspected to be *cannabis sativa* with a street value of Kshs. 300,000/= in contravention of the said Act. Following trial, the Appellant and her co-accused were each sentenced to 8 years imprisonment without the option of a fine.
2. The Appellant is aggrieved by the conviction and has filed the Appeal herein. The grounds are that the learned Magistrate erred in law and fact by:
  - i) convicting the Appellant in the absence of any evidence linking her to the ownership and possession of the narcotics in question.
  - ii) finding that the Appellant knew that the substance in the carton and polythene bags was cannabis.
  - iii) finding the Appellant was guilty of the offence by the mere fact that she was an employee of the owner of the house in which the drugs are alleged to have been found.
  - iv) failing to consider the Appellant’s defence.
  - v) convicting the Appellant on the basis of police evidence which was full of gaps.
  - vi) imposing a harsh and excessive sentence.
3. The appeal is opposed by the Respondent *vide* submissions dated 12.1.24.
4. As a first appellate Court, I am required to subject the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that

unlike the trial court, I neither saw nor heard the witnesses. See **Okeno v. Republic [1972] EA 32** and **Kariuki Karanja v Republic [1986] KLR 190**.

5. PW3 No. 239028 Inspector Joseph Ondieki stated that on 19.1.22, he got a tip off that someone had been seen taking a carton to a house at Mission area, Mazeras. They rushed to the said house and found 3 suspects, the Appellant and her co-accused. The owner of the house, one Evans however fled. They confiscated a carton and polythene bags containing what was suspected to be bhang. They also found a brown wallet containing a copy of Evans' ID, a kitchen knife, nylon packing papers, a calculator, rizler papers, green small bags, 2 black polythene bags and carton containing 399 rolls of bhang. PW3 stated that the 3 suspects were seated around carton which was sufficient to infer that they were dealing with the consignment.
6. PW4 No. 112760 PC Ronald Omwenga testified when they got into the house, they found the 3 suspects. They also found in the house, a large carton and 2 polythene bags containing green plant material. There was also a knife, 2 razors and nylon packing bags. On opening the carton which was sealed, they found rolls of cannabis. He did not find the suspects handling the rolls was not able to establish the owner thereof. They arrested the 3 suspects.
7. PW5 No. 258892 PC Cornelius Otieno also stated that in the house, they found the 3 suspects. There was a big carton containing 399 rolls of bhang, a back pack bag, wallet, knife, calculator, rizler paper and 2 plastic bags which also contained bhang. They did not find that suspects holding the carton. They arrested the 3 suspects.
8. PW No. 100451 PC Shadrack Otieno, the investigating officer stated that he recorded statements from the police officers who effected the arrest of the suspects. He produced the carton containing the 399 rolls of bhang and the other items recovered from the house. He forwarded the exhibits for analysis.
9. he carton was sealed and
10. The Appellant submitted that the case against her was not proved beyond reasonable doubt. It is the Appellant's contention that she had no knowledge of the narcotic drugs and that she was a victim of circumstances, being in the wrong place at the wrong time. She maintained that she worked at a shop owned by one Evans and that on the material day, she had gone to his house to collect the shop keys. While there, police officers got into the house and ordered those present to kneel. They were taken outside the house and a box was brought and she was ordered to sign a paper whose contents she did not understand. The Appellant submitted that

the police ought to have arrested Evans to give evidence on how and why the narcotics were recovered in his house. The Appellant asserted that the prosecution did not prove that the narcotics belonged to her and that she was wrongly convicted.

11. The Appellant was convicted of the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Act which provides as follows:

***Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—***

***(a) in respect of any narcotic drug or psychotropic substance—***

***(i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;***

***(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;***

12. Section 2 of the Act defines trafficking as:

***"trafficking" means the 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, but does not include—***

13. For the prosecution to prove a charge of trafficking in drugs or psychotropic substance, it must establish any one of 2 ingredients. First, that the accused was found trafficking in a narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance. Second, that an accused had in his possession a narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance. Section 4 proceeds to provide for the penalties in respect of the said offence.

14. Section 2 of the Act defines trafficking as 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.

15. In the matter herein, the prosecution case was that following a tip off, PW3, PW4 and PW5 stated that when they went to the house in question, they found the Appellant and her co-accused while one person, Evans, dashed out and fled. Inside the house was 1 large carton and 2 polythene bags containing green plant material, a kitchen knife nylon packing bags. Upon analysis by the government analyst, the green plant material was found to be cannabis.
16. In her defence, the Appellant stated that she used to work as a maid for Evans at his wines and spirits shop. On the material date which was her second day of work, she went to Evans' house to pick keys for the shop and found him preparing to take his son to school. On his return, he came back with her 2 co-accused. Evans then left for the shopping centre. Shortly after, police came and took them out to the corridor and ordered them to sit down. PW3 then brought a big box from behind a tank which was in the corridor. There were rolls inside the box which PW3 said were bhang. He asked them to sign a paper the contents of which she did not know, which she signed because her co-accused had signed.
17. The question for this Court is whether the offence against the Appellant was proved to the required standard.
18. The Appellant was convicted of the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Act which provides as follows:

***Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—***

***(b) in respect of any narcotic drug or psychotropic substance—***

***(j) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;***

***(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;***
19. Section 2 of the Act defines trafficking as:

***"trafficking" means the 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, but does not include—***

20. For the prosecution to prove a charge of trafficking in drugs or psychotropic substance, it must establish any one of 2 ingredients. First, that the accused was found trafficking in a narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance. Second, that an accused had in his possession a narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance.
21. Section 2 of the Act defines trafficking as 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.
22. In his judgment, the trial Magistrate rejected the claim by the Appellant and her co-accused in their defence, that the carton was and polythene bags were not found inside the house. He noted that there was nothing in cross examination of prosecution witnesses, that suggested that the carton and polythene bags were found outside the house or that they had been threatened or coerced to sign the inventory. Their cross examination dwelt on the fact that they were not found holding in their hands the items in question. The trial Magistrate dismissed the Appellants' defence and found that the prosecution had proved beyond reasonable doubt that Appellant and her co-accused as well as the carton and polythene bags and their contents were found in the same house. He further found that the presence of the cannabis in that house fits well in the definition of storing. I concur with the trial magistrate. The prosecution evidence remained unshaken by the defence by the Appellant.
23. The undisputed facts are that the Appellant and her co-accused were found in the house that was said to belong to Evans, who fled when the police came. Further, that the carton and polythene bags contained bhang. I have already upheld the trial Magistrate's finding that the bhang and the Appellant and her co-accused were found in the same house.
24. It is the Appellant's contention that she was just in the wrong place at the wrong time and was not privy to what was in the carton. She stated that she had only worked for Evans for one

day. On the material day she had gone to her Evans' house to collect the keys to the liquor shop to open the same, when the police came in and arrested her and her co-accused.

25. She relied on the case of **Ahmed Salim & Another Vs Republic [1997] KECA 308 (KLR)**, where the Court of Appeal had this to say:

***The drugs in question were found in the house which the appellants had visited. The owner of the house and another who were also arrested with the appellants but released and never called to testify at the trial. This raises the inevitable presumption that witnesses if called would have given unfavourable evidence against the prosecution. This failure on the part of the prosecution was fatal to conviction. There is no evidence sufficient to raise any presumption of possession against the appellants.***

26. In the cited case, the Court of Appeal found that the evidence was not sufficient to raise any presumption of possession of the drugs against the appellants. It is noted that the appellants in the cited case were charged with being in possession of narcotic drugs contrary to section 3(1) of the Act. In the instant case, the Appellant was charged with the offence of trafficking contrary to section 4(a) of the Act. Accordingly, the cited authority is not helpful.

27. The evidence on record clearly shows that the Appellant and her co-accused were found in the same house with the cannabis. Given that the definition of trafficking in Section 2 includes storing, it follows that the offence with which the Appellant was charged was proved and I find no reason to interfere with the finding of the trial court. In this regard, I am guided by the decision in **Gabriel Ojiambo Nambesi V Republic, [2007] eKLR**, where the Court of Appeal considered the definition of "trafficking" and stated as follows:

***It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.***

28. The Appellant's defence and main contention is that she was found in the wrong place at the wrong time. Her case is that she had gone to Evans' house to collect the keys to the shop. It is not clear why when she went for the shop keys, she opted to remain at the house while Evans took his child to school. What was she doing in the house with her co-accused? Why did she not take the keys and go open the shop, if indeed that was the reason she had gone to Evans'

house? My view is that the Appellant did not satisfactorily explain her presence in the house where the narcotics were found. Her defence rings hollow and did not shake the prosecution case. Given that the definition of trafficking in Section 2 includes storing, it follows that the offence with which the Appellant was charged, was proved and I find no reason to interfere with the finding of the trial Magistrate.

29. On sentence, the Appellant urged that the Court considers the Appellant's mitigation and set aside the sentence imposed on the Appellant. The Court was urged to consider that the Appellant is a mother of 3 children and a first time offender who has served almost 3 years of her term.
30. In imposing sentence, the trial Magistrate considered the Appellant was a first offender and was guided by the holding in *Caroline Auma Majabu v Republic* [2014] KECA 269 (KLR) where the Court of Appeal had this to say on the sentence under Section 4(a) of the Act:

***[14] Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.***

31. Sentencing is a matter of judicial discretion and it is well settled that appellate courts must exercise restraint in interfering with judicial discretion (see ***Mbogo v Shah [1968] EA 93***). Where it is found necessary to interfere with judicial discretion on sentence, an appellate court will be guided by the principles set out in *Ogolla s/o Owuor vs Republic*, [1954] EACA 270, where the Court of Appeal stated:

***The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***

***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was***

***applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306).***

32. The trial court did consider the mitigation of the Appellant and that the sentences prescribed in the Act represent the maximum possible sentence and proceeded to impose a lenient sentence of 8 years imprisonment. The Appellant has not demonstrated that the trial Magistrate in the exercise his discretion, misdirected himself or took into account an irrelevant factor or applied a wrong principle thereby arriving at a wrong decision or that the sentence itself is excessive.
33. In the end and in view of the foregoing, I find that the Appeal herein lacks merit and the same is hereby dismissed. Both conviction and sentence are upheld save that the sentence will run from 19.1.22, the date of the Appellant's arrest.

**DATED and DELIVERED in MALINDI this 31<sup>st</sup> day of October 2025**

---

**M. THANDE**  
**JUDGE**

