Muguna v Republic (Criminal Appeal E031 of 2024)
[2025] KEHC 16568 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E031 OF 2024

JN NJAGI, J

NOVEMBER 13, 2025

BETWEEN

LUCAS OPONDO MUGUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. P. E. Nabwana, SRM in Mpeketoni Senior Resident Magistrate's Court Criminal Case No. 39 of 2019 delivered on 31/7/2023)

JUDGMENT

1. The Appellant herein was convicted over trafficking in narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994. The particulars of the offence were that on the 23rd day of January, 2019 at Moa Stage along Minjila – Mokowe road of Lamu West Sub County within Lamu County was found trafficking in narcotic drugs, namely, cannabis (bhang) to wit 401 big rolls valued at Kshs. 200,500/= by transporting the same by a motorcycle Registration No. KMEL 630Z make Honda in contravention of the said Act.

2. The appellant was sentenced to pay a fine of Ksh.1,000,000/= and in default he was to serve ten years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:

    1. The learned trial magistrate erred in law and fact by failing to consider that the prosecution did not prove their case beyond reasonable doubt.

    2. That the trial Magistrate erred both in fact and law in failing to find that the prosecution's evidence contradicted itself.

3. That the trial magistrate erred in law and fact by failing to consider that both conviction and sentence were against the weight of the evidence adduced by the prosecution

4. That the trial magistrate erred in law and fact by failing to adequately consider his defence evidence.

3. The case for the prosecution was that on the 23/1/2019, a Kenya Police Reservist, PW1 was at a place called Woche when he received information that there was a suspected luggage that was to be dropped at Moa stage by a bus from Mombasa. He informed the officer in charge of the Rapid Response unit. He proceeded to the said stage with 5 officers from that unit. On getting there they found the appellant loading a makuti basket luggage onto a motor cycle reg. No. KMEL 63002 Honda belonging to a boda boda operator, PW2. They opened the basket and found it to contain saw dust, blocks of ice and rolls of what they suspected was bhang. They arrested the appellant and the boda boda operator, PW2 and took them to Idzoe police station. The rolls were counted and found to be 401.The case was investigated by PC Akeya PW4.

4. An exhibit memo was prepared and 20 of the rolls were sent to the government chemist laboratory at Mombasa for examination. They were examined by a government analyst called Yahya Maingo and found to be cannabis sativa, bhang. The Appellant was charged with the offence. During the hearing, a government analyst, David Mbao, PW3 produced the analyst`s report as exhibit, P.Exh.6. The investigating officer, PC Akeya PW4 produced the basket that contained the bhang, the saw dust and the 401 rolls of bhang as exhibits, P.Exh. 1, 2 and 3 respectively.

5. After the Appellant was placed to his defence, he jumped bail and did not turn up to defend himself. The court proceeded to deliver a judgment in which it found the appellant guilty of the offence, convicted him and sentenced him in his absence. He was later found and sent to jail. He then filed this appeal

Submissions

6. The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution failed to discharge the burden of proof against him as envisaged by Section 107 and 109 of the *Evidence Act*. Consequently, that the ingredients of the offence were not proved.

7. It was submitted that the street value of the drugs is a critical component of the offence of trafficking as it is the one to determine the fine to be paid if the accused is convicted of the offence. That the sampling and evaluation in this case were done by a person who not authorized by the minister by notification in the gazette. More so that no certificate of evaluation was tendered before the court as prima facie evidence of the value thereof. Additionally, that none of the officers who testified mentioned the market value of the drugs and no evidence was led on the value of Ksh. 200,500/= as stated in the charge sheet.

8. It was submitted that the appellant was tried and convicted in his absence which violated his right to fair trial. That the trial was against the provisions of section 99 of the Penal Code which provides that only a person charged with a misdemeanor and not one charged with a felony, can be tried and sentenced in his absence. That the offence the appellant was facing was a felony. He appeared in court under warrant of arrest after sentence had been passed and he explained that he has been involved in a road traffic accident and had been hospitalized which was proved by medical evidence. It was submitted that the trial court should have, in face of this evidence, set aside the conviction and allowed the appellant to offer his defence.

9. The appellant faulted the trial court for not reading the judgment to him after he was arrested so that he could know the reasons for his conviction. The court was also faulted for not giving the appellant an opportunity to offer his mitigation. That having been denied the right to defend himself, the trial cannot be said to have been conducted fairly. That the sentence imposed in his absence amounts to a mistrial.

10. It was submitted that the government analyst who produced the report in court, PW3, was not the maker of the report. That PW3 did not lay out a basis as required by section 33 of the *Evidence Act*, why the officer who made the report, Yahya Malu, could not avail himself to court to present the report. More so, PW3 did not demonstrate to the court that he was familiar with the hand writing of the officer who made the report or that he had the same qualifications as the said officer. That the absence of the maker of the report denied the appellant an opportunity to cross-examine him on the contents of the report. That his failure to turn up dented the prosecution case and left gaps in the prosecution case which occasioned a failure of justice to the appellant by denying him a right to fair trial.

11. The appellant urged this court to quash and set aside the judgment of the trial court on the ground that the appellant was not afforded a fair trial and that the entire proceedings were a sham and a gross violation of the constitutional provisions safeguarding a fair trial.

12. The respondent on the other hand submitted that the charge against the appellant was proved beyond reasonable doubt. That the government analyst PW3 stated that the substance was tested and was found to be cannabis. That the appellant was found having loaded the luggage containing the cannabis on a motor cycle and was ready to leave. That it was proved that the appellant was trafficking the narcotics by conveyance of the same.

13. On the failure by the prosecution to call an expert to evaluate the market value of the narcotics, the respondent agreed with the citation by the trial court of the Court of Appeal decision in Kabibi Kalume Katsoi v Republic (2015) eKLR since the officers from DCI who investigated the case had experience in such investigations and were in a position to estimate the market value of the drugs. That the trial court fined the appellant the prescribed fine of Ksh.1,000,000/= and not the three times market value so that the same was within the confines of the law.

14. It was submitted that the appellant absconded after he was placed to his defence and after the case was mentioned many times without the appellant availing himself, his counsel pulled out of the case. After many more mentions the defence case was closed and the court proceeded to deliver the judgment on 30/7/2023 in the absence of the appellant. The appellant was arrested under warrant on 15/2/2024. He was presented before the court for sentencing.

15. The respondent submitted that Article 50(f) of *the Constitution* states that every person has a right to be present when being tried unless his conduct makes it impossible for the trial to proceed. That the appellant`s conduct of not attending court for over one year made it impossible for the trial to proceed in his presence. Therefore, that the trial court was within its mandate when it closed the defence case and delivered the judgment in his absence.

16. On the sentence meted out on the appellant, it was submitted that the same was lenient and should be upheld. The appellant relied on the holding in the case of Bernard Kimani Gacheru v Republic (2002) eKLR where it was held that:

> Sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material,

or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

17. The appellant urged the court to dismiss the appeal.

Analysis and determination

18. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court was succinctly captured by the Court of Appeal in Kiilu & Another V Republic, [2005] eKLR, to be as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.
>
> It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusion. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

19. I have considered the grounds of appeal, the evidence on record and the written submissions made on behalf of the parties. Having done so, I find that the key issues that call for determination are whether the prosecution proved the guilt of the appellant as charged beyond any reasonable doubt and whether his constitutional rights were violated.

20. For the prosecution to prove the offence of trafficking in narcotic drugs or psychotropic substances, the following ingredients must be established:

    a. The act of knowingly possessing, manufacturing, selling, buying, transporting, or otherwise dealing with narcotic drugs or psychotropic substances.

    b. The Act must prohibit the substance.

    c. The quantity must be more than for one's consumption.

    d. The prosecution must establish that the accused intended to engage in trafficking or dealing with narcotics, or an inference of such intention may be discerned from the circumstances.

21. The issue as to whether the appellant was trafficking in narcotic drugs lies in the definition of that term. The term "trafficking" in section 2 of the *Narcotic Drugs and Psychotropic Substances (Control) Act* is defined as follows:

> " 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,...."

22. In Gabriel Ojiambo Nambesi V Republic, [2007] eKLR, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs. The court stated thus:

> " 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."

23. In this case, the prosecution adduced evidence that the appellant trafficked in cannabis to wit 401 rolls valued at Kshs. 200,500/- by conveying it by a motorcycle Registration Number KMEL 630Z. In Mohamed Famau Bakari [supra], the Court of Appeal considered the definition of the term "conveyance" as stated in Section 2 of the Act and stated as follows:

> " The term 'conveyance' is defined to mean; "... a conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel". As defined above and used throughout in the Act, "conveyance" is not the action or process of transportation but the means of transport."

24. It was the evidence of the boda boda operator PW2 that he was on the material day at 4pm on the way to Kibaoni from Idzowe on his motor cycle. That on reaching Moa stage he saw two ladies alighting from a bus. They boarded motor cycles and went away. They left behind one lady and a man. The man was the appellant. The appellant approached him and asked him to ferry him together with his basket luggage. They negotiated the charges and they agreed on Ksh.150/=. He, PW2 started to load the basket onto the motor cycle. As he did so he was confronted by police officers. He told them that the basket belonged to the appellant. It was opened and they found it to contain saw dust, hard ice and rolls of bhang. They were taken to Witu police station where the rolls of bhang were counted.

25. The Police Reservist PW1 testified that he received information that there was a luggage to be dropped by a bus at Moa stage. He went to the stage with 5 officers from Rapid Response Unit. They found the appellant loading a basket luggage onto a motor cycle. Before he could leave thy ordered him to alight. They inspected the luggage and found it to contain saw dust, blocks of ice and bhang. They took him together with the motor cycle operator PW2 to Witu to police station. The sticks of bhang were counted at 401.

26. PC Akeya of DCI Witu told the court that a n exhibit memo was filled by PC Muchai and 20 rolls were sent to the government chemist for examination. He said that PC Muchai is not gazetted as a sampling officer. That the motor vehicle operator PW2 was treated as a witness against the appellant. He said that he was not at the police station when the consignment was taken to the police station but he was present when it was opened. Further that a valuation certificate was not availed.

27. A government analyst PW3 testified that 20 samples of the plant material were examined at their laboratory by an analyst called Yahya Malu who ascertained them to be cannabis.

28. The trial magistrate in his judgment said that the fact that sampling was not done by a proper officer does not negate the fact that samples were taken from the consignment recovered by the prosecution witnesses. Therefore, that it was proved that the samples were cannabis.

29. The trial court held that the appellant was found in possession of the cannabis. That the evidence of the motor cycle operator PW2 to that end was corroborated by the police reservist PW1 who made the arrest.

30. The trial court held that though none of the prosecution witnesses mentioned the market value of the drug and no proper officer was called to testify on the market value of the narcotic drug, the court was guided by the Court of Appeal decision in the Kabibi Kalume Katsoi case (supra) where it was held that:

> There was therefore no real basis for ascertaining the value of the drugs so as to justify the sentence imposed. The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that PW4 and PW2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks.

31. I have considered the evidence adduced against the appellant before the trial court. There was no doubt as found by the trial court that the appellant was found in possession of a makuti basket that contained plant material that was suspected to be bhang. The trial court was satisfied that the motor cycle operator PW2 was only engaged by the appellant to ferry the luggage that contained the material. There was no reason to doubt the evidence of PW2 that he was a motor cycle operator in the area and that he was engaged by the appellant to ferry the luggage after it was dropped by a bus. The police reservist PW1 found PW2 loading the luggage onto his motor cycle in the presence of the appellant. It was therefore proved that the appellant was the owner of the luggage that contained the plant material suspected to be cannabis.

32. The appellant argued that it was irregular for PW3 to produce the government analyst`s report in court without laying out a basis why the maker of the document could not be availed in court to produce the document himself. PW3 told the trial court that he was producing the report in court on behalf of a fellow government analyst, Mr. Yahya Malu who was unavailable to produce the document in court.

33. Section 33 of the *Evidence Act* allows the production of a document by a person who is not the maker if it is shown that the maker cannot be procured without undue delay or expense. The appellant was at the time of hearing represented by an advocate, Mr. Omwancha. The advocate did not raise any objection to PW3 producing the report on behalf of his unavailable colleague. Counsel did not demand that they wanted the maker of the document himself to be summoned to produce the report. I therefore do not find any substance in the argument that the document was irregularly produced when the defence did not object to the production of the document. PW3 was working with the maker of the document. I therefore find that the production of the government analyst`s report by PW3 was proper.

34. The government analyst`s report indicated that the 20 samples examined were cannabis. There is no reason to differ with the findings. It was therefore proved that the plant material the appellant was found in possession of was cannabis sativa, bhang.

35. On the issue of the market value of the drug, the value given by the prosecution was not more than a million shillings. The market value only comes into relevance during sentencing. Since the 3 times market value given by the police was less than one million shillings, the fine imposed by the court would have remained at one million shillings in view of the fact that the market value was less than one million

shillings. The appellant did not suffer any prejudice by failure by the prosecution to prove the market value of the drugs.

36. The appellant argued that his right to fair trial was violated in the trial court ordering the closure of the defence case in his absence and delivering the judgment and sentencing him in his absence.

37. Article 50 ((f) of *the Constitution* allows a court to proceed with a case in the absence of an accused person where the conduct of the person makes it impossible for the trial to proceed. Section 206 of the Criminal Procedure Code on the other hand provides that:

206..

(1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.

(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.

(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.

38. More so, section 99 of the Penal Code provides that only persons charged with misdemeanors can be tried in their absence. The section bars the trial of a person charged with an offence amounting to a felony in the absence of that person.

39. Article 50 (2)(f) of *the Constitution* however does not make a distinction between felonies and misdemeanors as alluded to in section 99 of the Penal Code. *The Constitution* is the supreme law in the land and any provision of statute law that is in contravention with *the Constitution* is null and void. In the case of Republic v Galma Abagaro Shano [2017] eKLR the High Court held that section 206 of the Penal Code is in contravention of Article 50 (2)(f) of *the Constitution*. In that case the court cited the Ugandan case of Uganda v. Gulindwa Paul and Tumusiime HCT-00-AC-CM-005-2015 where the court held that:

> " In my view, a defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by *the constitution*, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it."

40. The same position was taken in Aggrey Mbai Injaga v Republic (2014) eKLR where the accused escaped when he was placed on his defence and the court held that by absenting himself, the accused had abrogated his constitutional right to be present during trial.

The appellant in this case absconded court after he was placed to his defence. He knew the case was pending in court. He did not give a convincing reason for his absence from court. His absence made it impossible for the matter to proceed. There is no substance in his argument that the trial court violated his rights in trying him in his absence. By absenting himself from court he abrogated his constitutional right to be present during trial. The conviction is thereby upheld.

41. The sentence for trafficking in narcotic drugs under section 4 (a) of the Act at the time the appellant was charged was a fine of one million shillings or three times the market value of the narcotic drug, whichever is the greater, and, in addition, to imprisonment for life. The charge sheet indicated the market value of the drug the appellant was found with as Ksh.200,500/=. Three times the market value would be Ksh.750,000/=.

42. The appellant herein was sentenced to pay a fine of Ksh.1,000,000/= and in default to serve ten years imprisonment. The sentence was ordered to commence from the date of sentence. Since 3 times the market value of the drug was Ksh.750,000/=, the imposition of a fine of Ksh.1,000,000/= was proper as the same is greater than Ksh.750,000/=. The fine of Ksh.1, 000,000/= is thereby affirmed.

43. The maximum sentence as was provided by the Act was imprisonment for life. Though the offence committed was a serious one, I find the sentence of ten years imprisonment for possession of 401 rolls of bhang to be excessive. I consider a sentence of six years imprisonment to be sufficient. Consequently, the appellant is sentenced to a fine of Ksh.1,000,000/= as imposed by the trial court in default of payment of the same to serve six years imprisonment.

It is so ordered.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 13TH DAY OF NOVEMBER 2025

J.N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant present virtually at G.K Prison Malindi

Court Assistant – Jumaa