

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E130 OF 2024

FRANCIS WAMBUA MUTHINI.....

APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. Ngii,
Principal Magistrate, in Mariakani, Senior Resident Magistrate`s Court
Criminal case No.247 of 2018 delivered on 11/3/2021)*

JUDGMENT

1. The Appellant herein was convicted for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994 Laws of Kenya. The particulars of the offence were that on the 7th August 2020 at around 2000 hours along Mombasa -Nairobi Highway in Rabai Sub-county of Kilifi County within coast region was trafficking narcotic drug suspected to be bhang to wit 2165 sticks of a street value of Kshs.433,000/= using a tuk tuk registration No. KTWB 587Y make Bajaj yellow in colour, thereby contravening the said Act and endangering the lives of members of the public.

2. The Appellant was sentenced to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal.

3. The grounds of appeal are that:

1. That the learned trial magistrate erred in both law and facts by failing to appreciate the provisions of sections 110 and 111 of the Evidence Act.
2. That the learned trial magistrate erred in both law and facts by failing to appreciate contradictions and inconsistencies in the evidence of prosecution witnesses.
3. That the learned magistrate erred in both law and facts by failing to appreciate that sections 8 (1) (3) (4) (5) of the Narcotic and Psychotropic Substances (Control) Act No.4 of 1994 were grossly violated.
4. That the learned trial magistrate erred in both law and facts by failing to appreciate that no photographs were taken at the scene to capture the incident.
5. That the learned trial magistrate erred in both law and facts by failing to appreciate Articles 49 (1) (i) and 50 (2) of the constitution of Kenya 2010 were violated.
6. That the learned trial magistrate erred in both law and facts by failing to appreciate that the case was not sufficiently investigated.

Prosecution case

4. The case for the prosecution was that one Mohamed Ismail Juma PW1 operates tuk tuk business in Mombasa town and is the owner of the aforementioned tuk tuk motor vehicle. George Mbagala PW2 is his business manager. That on the 7/8/2020 the aforementioned vehicle was allocated to their driver called Kazungu. That Kazungu did not return the vehicle in the evening. He later went to PW1 and told him that he had given the tuk tuk to a person called Francis Wambua to go for a trip. PW1 sent Kazungu to look for the said person. PW1 made a report of the missing vehicle at Makupa police station. Kazungu disclosed where Francis used to live in Tudor. PW1 sent his manager George to look for him. He PW1 was later told by the police that the tuk tuk was at Rabai police station. He went there and found it.
5. George PW2 testified that he had on 7/8/2020 allocated the aforementioned tuktuk to Kazungu who by evening had not returned it. He looked for him on the following day and found him. He told him that he had given the tuktuk to someone called Murasta who did not return it. He started to look for Murasta. He found him at Tudor and called the police. They arrested him, who happened to be the Appellant. He told them that the tuk tuk had been impounded by the police. He took them to Bonje area. He told them he was at Mazeras area when he was stopped by the police at the area and abandoned the tuk tuk. Later police informed PW2 that the tuktuk was at Rabai

police station. He went and found it there. He was told that it had been found with bhang.

6. PC Mwasambu PW3 of Rabai police station testified that on 7/8/2020 he was on duty along Mombasa-Mariakani highway in a GK patrol car of which he was the driver. That at 7pm a tuk tuk came from Mazeras direction going towards Mombasa. They flagged it down but it did not stop. They gave a chase. That on nearing Bonje and when they were close to it he signaled the driver using torchlights to stop. He did not. The driver of the tuk tuk was in the company of another person at the front cabin. The driver rode into Miritini estate and abandoned the tuk tuk there and escaped. They found 3 sacks at the passenger seat of the tuk tuk. They removed them and put them in their vehicle. They towed the tuk tuk to Rabai police station. At the station they checked the sacks and found they contained 2165 sticks of bhang.
7. It was the evidence of PC Mwasambu PW3 that he saw the driver of the tuk tuk properly. He said that the Appellant was the one. That he flashed a torch at him as he stopped.
8. PC Safari Chea PW4 of Makupa police station testified that PW1 had on 7/8/20 made a report of the loss of his tuk tuk vehicle while in custody of one Kazungu. That the said Kazungu was taken to the police station. He told them that he had given it one Rasta who had called him and told him that the same had been impounded by the police. That on the following day they received information that

Rasta had been seen within Tudor area. The manager to PW1 took them to Tudor area. Rasta was pointed out to them and they arrested him. He was the appellant. He told them that the tuk tuk had been impounded by the police. That Kazungu identified him as the person he had given the vehicle. PW4 made inquiries and received a report that there was a tuk tuk being detailed at Rabai police station. They went to the said police station and found the tuk tuk. The Appellant confirmed that it is the one he had. They were told that it was found ferrying bhang.

9. PC Muturi PW5 said that she was called to go and assist her colleagues who had impounded a tuk tuk on Mombasa-Mariakani highway. She went and they towed the tuk tuk to Rabai police station. It was found carrying 3 sacks of bhang with a total of 2165 sticks. She investigated the case. She prepared an inventory. An exhibit memo was prepared and the sticks taken to the government analyst. They were examined and confirmed to be bhang. The appellant was charged with the offence.
10. During the hearing of the case in court the investigating officer PW5 produced the bhang, the inventory, the exhibit memo and the government analyst's report as exhibits, P.Exh. 4(a) - (c), 5 and 6(a) and (b) respectively.

Defence Case

11. When placed on his defence the Appellant stated in a sworn statement that he hails from Tudor in Mombasa. That he is a chef. That on 8/8/20 he was on the way to his hotel when he found policemen. He and other people were arrested by the police for violating COVID-19 Rules. They were taken to Makupa police station. Policemen demanded for Kshs.5,000/= for him to be released. He did not have the money. He was shown some substances and was later taken to Rabai police station. He was held for long before being taken to court. He was later charged over things he had no knowledge of.

Submissions

12. The appeal was canvassed by way of written submissions. The Appellant submitted that the person who is said to have given him the tuk tuk did not testify in the case. More so that he was not arrested at the scene so as to link him with the offence of trafficking in drugs. That he was arrested on a different date. Neither was he found with the exhibits when he was arrested.

13. The Appellant submitted that the statutory requirement of recovery, seizure, weighing and testing of the narcotic drugs was not adhered to. That no valuation report was produced. More so that the government analyst`s report was produced by a person who was not the author of the report. Therefore, that there was no evidence that the substance was bhang.

14. The Respondent on the other hand submitted that PW3 clearly saw the Appellant driving the tuk tuk in which cannabis sativa was recovered. That the owner of the tuk tuk PW1 and his manager PW2 identified the tuk tuk the Appellant was found driving as the one from which the bhang was recovered. That though the person who gave the tuk tuk to the Appellant did not testify in the case the trial court was correct in finding that the investigations conducted in the case leading to the arrest of the appellant left no doubt that he was the one who committed the offence. That the government analyst's report P.Exh. 6(b) was sufficient to prove that what was recovered from the tuk tuk was indeed cannabis. Therefore, that the charge was proved beyond reasonable doubt.

Analysis and Determination

15. I have considered the grounds of appeal, the evidence adduced before the trial court and the submissions tendered by both the Appellant and the respondent. The question is whether the charge of trafficking in drugs was proved against the Appellant beyond reasonable doubt. The questions that arise for determination are, first whether the Appellant was identified as the person who was driving the tuk tuk at the time it was found ferrying suspected bhang and secondly, whether what was found in the tuk tuk was bhang.

16. In the first place, the person who is said to have given the tuk tuk to the Appellant called Kazungu did not

testify in the case. No explanation was given why he did not testify in the case, yet evidence was given that he was arrested and taken to Makupa police station. In the absence of the evidence from the said person, the evidence that the Appellant was given the tuk tuk by the said Kazungu was hearsay evidence.

17. PC Fadhili Mwasambu PW3 told the trial court he on the 7/8/2020 at around 7pm gave chase to a tuktuk vehicle that failed to comply with an order to stop at a road block. That when they were close to the tuktuk he flashed a torch on the driver and he saw who he was. He said that the person was the Appellant. That the Appellant abandoned the tuk tuk and escaped.

18. The appellant was said to have been found driving the tuk tuk at night. The question then was whether PC Mwasambu identified the appellant at night.

19. The law is that evidence of identification especially where identification takes place in difficult circumstances should be treated with a lot of care so as to avoid convicting the accused person on evidence of mistaken identity. In ***Francis Karuiki and 7 others vs. Republic*** Cr. Appeal No 6 of 2001 [200] eKLR it was held that;

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the

identification is positive and free from possibility of error.”

20. In **Kimea v Republic (Criminal Appeal 010 of 2020) [2022] KEHC 104 (KLR) (18 February 2022)** (Judgment), the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.
21. PC Mwasambu in his evidence did not state how far he was from the tuk tuk when he flashed a torch light at the driver. He did not state on which side of the road he was when he did so. Though he said that the Appellant was seated with another person at the front of the tuk tuk he did not say whether or not he had a clear view of the driver and that the passenger in the tuk tuk did not obstruct his view of the driver. He did not state how strong the light from the torch was. Neither did he state the length of time he had the driver under observation. These were things that would have shown that the police officer positively identified the Appellant as the person who was driving the tuktuk at the material time. Without such evidence it cannot be said that his identification of the Appellant was free from the possibility of error.
22. Further to the foregoing, no identification parade was conducted after the arrest of the Appellant to test whether

PC Mwasambu could in actual fact identify the Appellant. Without such, the evidence on identification was doubtful.

23. The report of the government chemist was produced in court by the investigating officer PW5. The question is whether the same was admissible in court as exhibit.

24. In the case of **Soki -v- Republic (2004) eKLR 21**, the Court of Appeal held that a police officer can produce an expert's report in court where there is no objection from the accused. The court added that the trial court must in such circumstances inform the accused person of the right to cross-examine the maker of the document. In the present case the investigating officer proceeded to produce the government analyst's report in court without asking the appellant whether he had any objection to the officer producing the report. He was not informed of his right to cross-examine the maker of the document. I find that it was prejudicial to the accused for the report to be produced in court by the investigating officer without the accused giving his consent and being informed of his right to cross-examine the maker of the document. The end result is that there was no evidence that what was found in the tuk tuk was bhang.

25. The upshot is that the prosecution did not prove that the Appellant was found trafficking in drugs. I find the appeal to be merited. Consequently, the conviction is quashed and sentence set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at GARSEN this 18th day of February 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for Respondent

Appellant - Present in person at G.K. Prison Hindi

Court Assistant - Rahma