

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. E058 OF 2025

DOUGLAS

KISUNTE

MOGENDI..... APPELLANT

VERSUS

REPUBLIC

..RESPONDENT

JUDGMENT

1. This is an appeal on conviction and sentence from the Judgment of Hon. M. Obiero (SPM) given on 03.06.2025, in Kehancha SPMCR No. E721 of 2023. The appellant was charged and convicted of trafficking of narcotics contrary to Section 4 (1) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that on 28.08.2023, at Nyangi'ti area of Nyametaburo in Kuria west sub-county within Migori County, jointly with others not before court, were found trafficking narcotic drugs to wit, 285.4 Kg of bhang with a street value of Ksh 8,562,000/= in contravention of the provision of the said Act.

2. The appellant filed grounds and amended grounds, as follows:
a) That I pleaded not guilty to the charge herein.

- b) That no prima facie case was established against me.
 - c) That the witness testimonies were full of inconsistencies and discrepancies thus could not sustain a conviction.
 - d) That the sentence pronounced by the trial court is harsh, excessive and unreasonable as it goes against the tenets of fair trial under article 50(2) of the Constitution.
 - e) That the trial court failed to appreciate other forms of punishment available to the appellant such as fines and/or noncustodial sentence.
 - f) That the trial court erred in both law and facts by meting a harsh and excessive sentence on a defective charge sheet.
3. PW1 was 114157 PC Daniel Mutua of Isebania Police Station who stated that at 11.20 pm, he was together with Sergeant Kweyu, PC Omamo, and PC (Driver) George on patrol at Kibugi village. They alighted from their vehicle, and saw two motor cycles coming from the United Republic of Tanzania, which switched off the lights. This made the officers suspicious. They entered the vehicle and proceeded to the place and found there motor cycles, two of which had three green sacks each, which they suspected to contain bhang.
4. They found that the appellant was in one of the motor cycles containing three sacks while two of the riders escaped. When they were handcuffing him, the appellant started screaming

and people in neighbouring home started screaming, and started throwing stones and arrows at them. One arrow hit the windscreen of the motor vehicle and it cracked. The officers shot in the air and the crowd dispersed. They were able to place the bags in the vehicle. They did not take the motorcycles as the vehicle was full and the neighbours became hostile. They arrested the accused person.

5. On cross examination, the witness stated that he was not in the motorcycle but was in uniform. He stated that the appellant did not want to be arrested, did not escape, and they could not take the photographs because the crowd was hostile. The appellant had three sacks. The neighbours were hostile.

6. PC 116337 Alex Mutiga Gwantai was PW2. He was based at the DCI at Isebania. He stated that on 27.08.2023 at 10.00 am he was with PC Festus Mate, when he received instructions to go to the police stations to take over six sacks of bhang. PC Omamo handed over 6 bags of what was suspected to be bhang. They went to their office and weighed the bhang and found it to be 285.4 Kg and issued a weighing certificate that was signed by the officers and the suspect. PC Mate prepared an exhibit memo, which was received by the Government Chemist the same day.

7. They received a report dated 21.09. 2023. The report confirmed that the substance was bhang. He produced the

inventory, which the accused signed and the 6 sacks of bhang together with the weighing certificate. The appellant did not cross examine him.

8. PW3 was PC Philemon Kipchumba of Isebania Police Station. He recalled that on 26.08.2023, at about 11.00 pm they patrolled towards Nyang'iti. When they reached Kebutwe, they stopped their vehicle and alighted. After about 5 minutes they saw two motor cycles from Tanzania, which switched off its lights. They entered the vehicle and drove towards the motorcycle.
9. When they reached at the motor cycles, they found three motor cycles, with two carrying three bags of bhang each. They suspected that they were carrying cannabis sativa. There were three people and they gave a chase and arrested one of the persons, who is the appellant. The appellant screamed for help and villagers came with crude weapons and they started screaming. The bags were loaded to the motor vehicle.
10. The windscreen of the vehicle was damaged. They left the motor cycle at the scene. Later they handed over the 6 sacks to the DCI for further investigations. On cross examination he stated that he was present when the accused was arrested. He stated that the members of public started screaming and they were unable to take the motor cycle.

11. PW4 was Kimutai Lagat, a Government Chemist based in Kisumu laboratory. He stated that on 19.09.2023 they received exhibits from PC Mate of DCI Isebania where the accused was Douglas Kisunte. He marked the memo form for identification. He stated that he received 282.4 Kg of bhang. He marked all the exhibits for identification purposes. He analyzed a dry plant matter and found out that all of them were cannabis sativa. He produced the exhibit memo and report as exhibit 4 and 5. He was not cross examined.
12. The appellant was found to have a case to answer and was placed on his defence. The appellant stated that he was to give unsworn evidence and call three witnesses.
13. The appellant gave evidence as DW1, that on 26.08.2023, he was from Sirare town and going back home. When he reached near home, he found two people who were on a motor cycle. That they asked him where he was coming from and he told them that he was going home. One of them slapped him and he screamed. He stated that this was about 9.00 pm. When the members of the public came, the two identified themselves as police officers and they started shooting in the air. The motor vehicle came after 10 minutes. He was arrested and placed in a motor vehicle. He saw luggage in the police vehicle. He later came to learn that the luggage was bhang.

14. DW2 was Brian Chacha Marwa who lives in Sirare as a boda boda rider. He recalled that on 26.08.2023 at 9.00 pm he was at home and heard screams at the road and went there. On reaching the road, he saw the appellant being assaulted by two people. They identified themselves as police officers. They decided to shoot in the air to scare them away. A vehicle came in and went with the appellant.
15. On cross examination he stated that the appellant had been charged with possession of cannabis, but did not know the origin of the cannabis. He stated that this happened at 9.00 pm and he was not aware of what happened at 11.00 am.
16. DW3 was Joseph Mwita Marwa, a farmer from Nyaigena village. He recalled that on 26.08.2023 at night, he heard screams, and rushed to the road. He found two people assaulting the appellant. The two people shot in the air. He was scared and moved back. The vehicle came after 30 minutes. The appellant was placed in a vehicle. When he went to the police station, he was told the appellant was in possession of bhang. He stated the appellant is a motor cycle rider.
17. On cross examination he stated that he came to testify on behalf of the appellant. He did not know what the motorcycle was carrying and did not know why the appellant was arrested.

18. The appellant was found guilty. The prosecution indicated that he was a first offender. The appellant mitigated that he had children who depended on him. He prayed for non-custodial sentence. The court sentenced the appellant to 5 years imprisonment.

Impugned Judgment

19. The court found that the evidence of PW1, PW2 and PW3 corroborated each other. The court relied on section 2 of Cap 245 and found that the facts show that the offence was committed.

Submissions

20. The appellant submitted that the mode of trafficking was not disclosed. He relied on the Court of Appeal decision in **Gabriel Odhiambo v Republic** (2007) eKLR, on what the prosecution is supposed to prove in a charge of trafficking. I am still searching for the reference. He further referred to the case of **Sigilai v Republic [2004] KEHC 1207 (KLR)**. He submitted that there was no reason why the motor cycles were not carried. He stated that he was mistaken identity. Both decisions referred to do not refer to the issues referred in the submissions.

Analysis

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind

that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336, addressed this issue as follows:-

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.

22. An appellant on a first appeal is entitled to expect that the evidence as a whole will be subjected to a fresh and

exhaustive examination, and that the appellate court will reconsider and re-evaluate the entire record in order to draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. In the case of **Okeno v Republic [1972] EA 32 at 36** the East Africa Court of Appeal stated on the duty of the court on a first appeal:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. 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, see Peters v. Sunday Post, [1958] E. A. 424.

23. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of **H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481**, comes in handy in describing the legal burden of proof in criminal matters, that;

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

24. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. **In the case of R vs. Lifchus {1997}3 SCR 320** the Supreme court of Canada explained the standard of proof as doth:-

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not

imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

25. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular

allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

26. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}**, at pages 361-64 that:-

The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

27. The offence of trafficking is punished under section 4 of the Act. The same states as follows:

Any person who traffics 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;

(b) in respect of precursor chemicals or any substance, other than a narcotic drug or psychotropic substance, which he or she represents or holds out to be a narcotic or psychotropic substance-

(i) where the person is in possession of 50 mg or more, to a fine of not less than twenty million shillings or imprisonment for life; and

(ii) where a person is in possession of 50 mg or less, to a fine of not less than ten million shillings, or to imprisonment to a term of not less than ten years, or to both such fine and imprisonment.

28. Under section 2 trafficking is provided as follows:

"Illicit traffic" in relation to narcotic drugs and psychotropic substances, means

- a. Cultivating any coca bush or gathering any portion of a coca plant;
- b. Cultivating the opium poppy or any cannabis plant;
- c. Engaging in the conveyance production, manufacture, possession, sale, purchase, transportation, ware-housing, concealment, use or consumption, importation, exportation or transshipment of narcotic drugs or psychotropic substances; or

d. Handling or letting out of any premises for the carrying on of any of the activities referred to in paragraphs (a) to (c);

29. Having evaluated the evidence, I note that the duty of the prosecution was to prove:

- a) That the substance was cannabis sativa/bhang.
- b) The same was being conveyed.
- c) That the amount is as per the charge sheet.
- d) That the perpetrator was the appellant.

30. Regarding the substance, the evidence of PW1 and PW2 stated that they arrested the appellant who was in a motor cycle. The appellant was in possession of 3 bags but the persons they were with disappeared. The appellant gave unsworn evidence and admitted to have been in the *locus in quo*. He chose to give unsworn evidence.

31. The two witnesses, DW2 and DW3 were not at the *locus in quo* at 11 pm. There was no cross examination related to the time of arrest to PW1 and PW2. The appellant was caught in possession of the cannabis. It is irrelevant that he was carrying 3 bags whereas his accomplices were carrying 3 bags. The three motor cycles were moving together. This then brings the possession within the meaning of section 4 (c) of the Act as follows:

**(c) Engaging in the conveyance, production,
... transportation, ..., importation,**

**exportation or transshipment of narcotic
drugs or psychotropic substances;**

32. The inventory confirmed that the same was 285,400 grammes. A certificate of weighing was equally issued and signed by the appellant and the weighers. The Government Analyst report showed that the 6 bags contained 49.25 Kg, 50.10 Kg, 43.10 Kg, 48.00 Kg, 49.45 Kg and 45.50 Kg. This totals to 285.4 Kg.
33. The substance was confirmed to be bhang. The appellant was in possession of this material. The defence given did not answer to the charge. The evidence was in sync with the rest of evidence, in particular as to the quantity and type of substance. The state of cannabis was that it was not for consumption. It was being conveyed on motor cycles in large amounts. The same was being moved at night from Tanzania.
34. The appellant admitted that he screamed and members of the public came and there was shooting in the air. The evidence of DW1 and DW2 does not help as they were not present when the altercation happened. The evidence was also contradictory. That is, the vehicle came after 10 minutes and another after 30 minutes. However, there was no one who saw how the bhang was collected. The timelines are also out. The evidence for the prosecution was overwhelming.
35. The appellant did not plead that the substance was for medical use. Under Section III of Evidence Act, the burden is

on the person wishing to rely on an exception under the general rule.

36. Lastly, the question on whether the appellant was the perpetrator of the offence. The evidence of prosecution and defence were consistent on how the appellant was arrested and that cannabis was there. The appellant did not protest or cross examine on any of the questions raised in the defence.

37. The evidence of the prosecution was consistent and not impeached. I therefore find that the court was right in convicting the appellant. I dismiss the appeal on conviction.

38. The appellant was properly convicted. The sentence was very light. I therefore dismiss the entire appeal.

Determination

39. The upshot of the foregoing is that I make the following orders: -

- a) The appeal on conviction and sentence is hereby dismissed.
- b) Pursuant to Section 333(2) of the Criminal Penal Code, sentence shall start on 09.06.2025 less three days, between the date of arrest on 26.08.2023 to 31.08.2023.
- c) 14 days right of appeal.
- d) File is closed.

DELIVERED, DATED and SIGNED at **NYERI** on this **10th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

Mr. Mwangi for the State

Appellant present at Kodiaga Prison

Cpl. Muniko at Kodiaga Prison

Court Assistant - Michael