

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT LODWAR
CRIMINAL APPEAL NO. E005 OF 2025

BERYL ELIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(Arising from the original conviction and sentence of Hon. (SPM) at Lodwar in Criminal Case No. E790 of 2023, delivered on the 6th day of March 2025)

JUDGEMENT

1. The Appellant was arraigned and charged before the lower court with the offence of Trafficking in Narcotic Drugs, contrary to Section 4 as read with Section 4(a)(ii) of the Narcotic Drugs and Psychotropic Substance (Control) Amendment Act No. 4 of 2022.
2. The particulars of the offence stated that on the 23rd day of December 2023, at Kanam-kemer area in Turkana Central Sub-County within Turkana County, she was found trafficking by storing narcotic drugs, namely cannabis sativa (bhang), to wit, one hundred and seventy (170) rolls with an approximate street value of Kshs. 17,200, in contravention of the said Act.
3. The Appellant pleaded not guilty to the charge on the 28th of December 2023 before Hon. V. Shivaga, RM. Consequently, the matter proceeded to full trial before Hon. E. Ngigi, SPM, who took over the proceedings after several mentions before other magistrates, including Hon. D. Orimba, SPM, and Hon. N. M. Idagwa, PM. Following the conclusion of the trial, the learned trial magistrate found that the prosecution had proved the case beyond a reasonable doubt. The Appellant was convicted of the charges and consequently sentenced to serve seven (7) years imprisonment.
4. Dissatisfied with both the conviction and the sentence, the Appellant moved this Court by way of a Memorandum of Appeal filed on the 10th of March 2025. The Appellant's appeal is premised on several grounds

including those of procedural irregularities. The trial court is faulted for having failed to observe the procedure on the transition of judicial officers under Section 200 of the CPC, the failure to call crucial witnesses, and the excessive nature of the sentence given her status as a primary caregiver.

5. The Appellant contends that the prosecution failed to call crucial witnesses, specifically the officers who allegedly conducted the arrest. She maintains that these officers did not record statements and were never called to testify, leaving a gap in the narrative of her arrest and the recovery of the drugs. She challenges the evidentiary chain of custody, stating that the officers never took an inventory of the items allegedly recovered from her house. That she was not given any document to sign acknowledging that the 170 rolls were found in her possession, a failure she claims points to the potential planting of evidence.
6. She further challenges the legality of the charge itself. She posits that even if narcotics were found in her house, the prosecution should have preferred a charge of possession rather than trafficking. She argues that the storage of 170 rolls for personal use or without proof of sale does not automatically constitute trafficking under the Act. She points to a procedural failure where the prosecution allegedly failed to furnish her with witness statements and other relevant documents before the trial commenced, thereby hindering her ability to prepare an adequate defense.
7. A major challenge concerns Section 200 of the Criminal Procedure Code. The Appellant asserts that the section was not complied with when the case moved from Hon. D. Orimba to Hon. E. Ngigi. She argues that as a succeeding magistrate, Hon. Ngigi did not inform her of her right to recall witnesses or rehear evidence already recorded, which she claims is a fatal procedural error.

Summary of the Trial Proceedings

8. During the trial, the prosecution called two witnesses: a Government Analyst (PW1) and the arresting officer (PW2). PW1, Dalmas Kibet Sang, testified as an expert witness. He is a Government Analyst based at the Kisumu Government Laboratory with over a decade of experience and holds a degree in Botanical Chemistry. He testified that on the 5th of February 2024, he received a khaki envelope marked with the case reference and the Appellant's name. Inside the envelope were 170 rolls of plant material. Upon conducting a chemical analysis, he confirmed that the material was cannabis sativa, a narcotic drug as defined under the Act. PW1 produced the analyst report (P Exhibit 2) and the exhibit memo (P Exhibit 1). His testimony was intended to conclusively identify the nature of the substance recovered from the Appellant's residence.
9. PW2, Inspector James Juma, the Officer in Charge of Crime at Lodwar Police Station, testified regarding the arrest and recovery. He stated that on the 23rd of December 2023, while on patrol, he received a tip-off from a member of the public about a notorious bhang peddler who disguised her trade as a clothing business. That together with his team, they proceeded to a rental house in Kanam-kemer where the Appellant lived. He testified that a search of the house led to the discovery of 170 rolls of bhang hidden under the bed. They arrested the Appellant and took her to Lodwar Police Station. He produced the 170 rolls of bhang (P Exhibit 3) in court as the items recovered from the Appellant's house. He clarified that he had not known the Appellant prior to the arrest and denied any malicious intent or personal grudge against her.
10. When put on her defence, the Appellant gave a sworn testimony admitting to having previously sold bhang but claiming she had reformed and that the substances found in her house on the day of the arrest were merely tea leaves. She stated that on the 23rd of December 2023, the officers who searched her house only found tea leaves, which they took away. She accused the officers of being under the impression that she

was still a seller and suggested that they swapped her tea leaves for the bhang rolls produced in court.

11. She questioned the lack of tangible evidence such as video recordings of the search conducted by the police. She argued that if she were indeed a dealer, she would not store illegal substances under her bed where they could be easily located. She also highlighted the absence of complaints from her neighbours, suggesting that if she were running a drug business, the presence of customers would have caused a nuisance that would have been reported by those living in the same plot.

The Appellant's Submissions

12. In her submissions on the appeal, the Appellant expands on her defense with a focus on perceived weaknesses in the prosecution's case. She argues that PW2 failed to present a coherent and well-documented case, particularly noting the absence of other officers involved in the raid as witnesses.
13. She challenges the logic of the arrest, stating that as a mother, she would not endanger her children by keeping illegal drugs in an easily accessible place like under her bed. She refers to this as a false coincidence created by the police to add weight to their accusations. She maintains that the only substances confiscated from her home were tea leaves and that the Investigating Officer failed to prove how the transition to bhang occurred. She argues that this implies a frame-up to fix her.
14. The Appellant further submits and underscore the lack of intelligence surrounding her alleged business. She points out that the prosecution could not locate her source of bhang, identify any regular customers, or show for how long she had supposedly been conducting the business. She characterizes the tip-offs as weapons used by enemies to suppress the weak.
15. It is argued that the prosecution failed to provide tangible evidence like video clips or photos of the search, which she believes would have

proven her innocence. She also highlights the failure of the prosecution to serve her with witness statements, which she claims is a breach of the right to information necessary for a fair trial. In closing her submissions, she prays for the conviction be quashed so she can return to care for her children, who are suffering in her absence.

Issues, Analysis and Determination

16. After a careful and anxious re-evaluation of the trial records, the grounds of appeal and the submissions of both parties, the following issues are identified for determination by the Court: -

- a) **Whether the Appellant was prejudiced by the transition between magistrates during the trial?**
- b) **Whether the charge of trafficking under Section 4 was appropriate?**
- c) **Whether the prosecution proved its case to beyond a reasonable doubt? and,**
- d) **Whether the seven-year imprisonment sentence imposed by the trial court is legal?**

Whether the Appellant was prejudiced by the transition between the magistrates during the trial?

17. The Appellant contends that the trial was a nullity because the provisions of Section 200 of the Criminal Procedure Code were not followed when Hon. E. Ngigi took over the case from previous magistrates. Section 200 provides for the conviction on evidence partly recorded by one magistrate and partly by another. Specifically, Section 200(3) of the CPC mandates that when a succeeding magistrate commences the hearing of proceedings where part of the evidence has already been recorded, they must inform the accused person of their right to have the witnesses summoned and reheard. Failure to inform the

accused of this right is generally considered a fatal procedural error as it goes to the heart of the right to a fair trial.

18. However, a perusal of the trial record in this case reveals that despite the matter having been mentioned before several magistrates including Hon. Shivaga, Hon. Orimba and Hon. Idagwa, no evidence was actually recorded by any of them. The trial proceedings, including the testimonies of PW1 and PW2, were entirely conducted and recorded by Hon. E. Ngigi, SPM, on the 28th of January 2025.
19. The court adopts the position in **Abdi Adan Mohamed vs Republic (2017) eKLR** and reiterated in **Anthony Otieno Ndonji vs Republic (2018) eKLR**, where the court clarified that Section 200 is only triggered when a succeeding magistrate acts on evidence recorded by a predecessor. In the present case, since no witnesses had testified before the predecessor magistrates, Hon. Ngigi was not a succeeding magistrate in the sense of taking over a part-heard trial. He heard the entire prosecution and defense case himself.
20. Accordingly, the court holds that there was no requirement to inform the Appellant of the right to recall witnesses under Section 200(3), as no witnesses had been heard by any other judicial officer other than Hon Ngigi, the convicting magistrate. The procedural integrity of the trial was maintained in this regard, and the appeal on this ground lacks merit and is thus dismissed.

Whether the charge of trafficking under Section 4 was appropriate?

21. The Appellant argues that the charge of trafficking was improperly preferred and that she should have, at most, been charged with possession. The distinction between possession under Section 3 and trafficking under Section 4 of the Narcotic Drugs and Psychotropic Substance (Control) Act is significant due to the disparity in penalties. The 1994 Act, as amended in 2022, defines “trafficking” broadly to include

production, manufacture, sale, purchase, transportation, warehousing, concealment, use or consumption, and storing of narcotic drugs. The Appellant was charged with trafficking by way of storing 170 rolls of bhang.

22. In **Joseph Odhiambo Opiyo vs Republic (2018) eKLR**, the court noted that for a charge of trafficking to stand, the prosecution must specify the exact conduct that constitutes trafficking. A charge sheet that merely says “trafficking” without specifying whether it was by sale, transport, or storage may be deemed defective. In the instance, however, the charge sheet was specific in alleging trafficking through storing.
23. The quantity of 170 rolls, valued at over Kshs. 17,000, is a distinguishing factor between possession for personal use and trafficking. While 170 rolls is a significant amount, the courts must still find evidence of the act of trafficking. The learned trial magistrate found that the act of storing such a volume under a bed in a rental house, combined with the Appellant’s admission of having sold bhang in the past, was sufficient to establish the offence of trafficking.
24. This court after review of the evidence thus finds that the charge was appropriately framed under the 2022 Amendment Act, which was specifically designed to enhance penalties for those involved in the distribution chain, including storage. The court holds that the storage of a large quantity of narcotic drugs in a residential house without lawful excuse falls within the expanded definition of trafficking.

Whether the prosecution proved its case to beyond a reasonable doubt?

25. The Appellant also claim that the 170 rolls were either planted or were merely tea leaves. While reviewing the prosecution’s evidence regarding the recovery and the chain of custody, the court notes that the prosecution provided the testimony of PW2, who gave a detailed account

of the tip-off, the search, and the recovery of the items from the Appellant's house.

26. PW2's testimony was direct and at no point was it shaken during the trial. He produced the actual 170 rolls in court as exhibit. The chain of custody from the point of recovery to the laboratory was documented through the exhibit memo (P Exhibit 1) produced by PW1. PW1, the Government Analyst, confirmed that the items in the khaki envelope matching the Appellant's case were analysed and found to be cannabis sativa.
27. The Appellant's claim of magic or swapping is a mere denial that was never substantiated. The direct evidence of recovery by the arresting officer and the subsequent scientific confirmation were found by the trial magistrate to be credible. While the absence of a signed inventory or photos of the search is a procedural lapse, it is not always fatal to a conviction if the primary evidence is cogent, consistent and credible. The trial court correctly noted that the Appellant solely occupied the house where the drugs were found, establishing her knowledge and control over the contraband.
28. The Appellant further argues that her right to a fair trial was violated because she was not served with witness statements. Article 50 of the Constitution of Kenya guarantees every accused person the right to be informed of the charge with sufficient detail and to be given adequate time and facilities to prepare a defense.
29. Disclosure of prosecution evidence is a mandatory requirement in Kenya's criminal procedure. However, the trial record indicates that on the 28th of December 2023, the court ordered the prosecutor to supply the charge sheet and witness statements to the Appellant. There is no record of the Appellant raising an objection or notifying the court of a failure to receive these documents when the trial commenced on the 28th of January 2025.

30. Regarding the failure to call other arresting officers, the prosecution has the discretion to determine which witnesses are necessary to prove its case. As long as the witnesses called provide sufficient evidence to meet the standard of proof, the absence of other potential witnesses is not a ground for acquittal. The testimony of the lead arresting officer (PW2) and the expert analyst (PW1) was found sufficient by the trial court.

The legality and proportionality of the seven-year imprisonment sentence imposed by the trial court.

31. Finally, the Appellant was sentenced to seven years imprisonment for trafficking in 170 rolls of bhang. The Narcotic Drugs and Psychotropic Substance (Control) Act, as amended in 2022, provides for extremely stiff penalties for trafficking, including life imprisonment and fines of not less than thirty million shillings. Section 4(a)(ii) provides that where a person is in possession of between 51 and 100 grams of a narcotic drug, they are liable to a fine of not less than thirty million shillings and imprisonment for a term of not less than twenty years.

32. Here, the Appellant was only sentenced to seven-year imprisonment by the trial court. The seven-year sentence, while more lenient than the mandatory minimums in the 2022 Act, still results in a long-term separation of the mother from her infants. In the context of the relatively small street value of the drugs Kshs. 17,200, a sentence of seven years imprisonment appears disproportionate given the specific circumstances of being the primary caregiver as under Article 53(2) of the Constitution on the “best interests of the child” principle enshrined in Article 53(2) of the Constitution.

33. Courts have repeatedly held that when sentencing a mother who is the sole provider for young children, non-custodial sentences should be prioritized to avoid the separation of the children from their primary caregiver. In **Christopher Macharia Mugo & Another vs Republic (2018) eKLR**, the court substituted a mother’s three-year custodial

sentence for trafficking with a three-year probation order because she was the primary caregiver for two minor children. The court emphasized that the welfare of the children is paramount. Here, the Appellant is a mother of three infants: a 5-year-old, a 3-year-old, and a 16-month-old.

34. In conclusion, while the appeal against conviction is determined meritless, the court finds a justification to tinker with the sentence. The appeal against conviction lacks merit and is hereby dismissed. The sentence of seven (7) years imprisonment by the trial court is hereby quashed and substituted with a Non-Custodial Sentence. The Appellant is hereby sentenced to two (2) years community service order under the supervision of the Chief, Kanam-Kemer location. During the term, the chief shall monitor and assist the appellant be weaned from trade in the narcotics.

Dated, signed and delivered virtually this 10th day of April 2026



Patrick J O Otieno

Judge