

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION
APPELLATE SECTION
CRIMINAL APPEAL NOS E034 AND E035 OF 2025

DANIEL GOR JOHN 1ST APPELLANT
HUSSEIN OTITA WAKHA YANGA..... 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being appeals from the original conviction and sentence in Criminal Case No E035 of 2023 of The Chief Magistrates Court at JKIA)

JUDGEMENT

INTRODUCTION

1. The appellants were both charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act the particulars of which were that on the 22nd day of May 2023 at around 1415 hours along Nakuru Nairobi highway at Fly Over area South Kinangop Sub county within Nyandarua County , jointly with others not before the court trafficked in narcotic drugs namely cannabis (bhang) to wit 161.75 kgs with market value of Kshs 4,852,500 by conveying in motor vehicle Registration No KCS 679 P Mark Toyota Paso white in colour in contravention of the Act .
2. In count 2 the 1st appellant faced the charge of giving false information to a person employed in the public service the particulars of which were that he informed No 87032 PC Lawrence Kiniti , a person employed in the public service as a police officer that his identity card number was 24101331 information he knew or believed to be false, intending thereby knowing to be likely that would cause No 87032 PC

Lawrence Kiniti to use his lawful power the annoyance of Godfrey Kariuki Kiai.

3. He faced a third count of failing to apply to be registered as a citizen contrary to section 14 (1) (a) CAP 107 of the registrations of persons Act, the particulars of which was that being a citizen of Kenya was found having failed to register as a Kenyan citizen after attaining the of age of 18 years in contravention of national registration of persons Act.
4. They were convicted and sentenced both on count one to serve twenty-four years in prison and to pay a fine of fifty million shillings each in default and in count 2 a sentence of 12 months from the date of first appearance in court for the second appellant and cash bail for the first appellant forfeited.
5. Being dissatisfied with the said conviction and sentence, they each filed respective appeals to this court initially at the High Court Criminal registry at Kibera for the first appellant as criminal appeal number E048 of 2024 and raised the following grounds of appeal:
 - A) The prosecution case was not proved beyond reasonable doubt
 - B) The court failed to consider the provision of section 74A (4) of the Act as regards the seizure of drugs and that the procedure set therein was not complied with
 - C) That the trial court erred in failing to consider that vital prosecution witnesses including the officer who set the market value for the drugs were not called to testify.
6. The second appellant filed his appeal as criminal appeal no E131 of 2024 and raised the following grounds of appeal:
 - a) That the trial court erred in basing the appellant's conviction without sufficient evidence of the analyst who examined the alleged substances.

- b) The court failed to considered the provisions of sections 74 and 74A (4) of the Act
- c) Vital prosecution witnesses were not called.

DIRECTIONS

- 7. Upon admission of the appeals herein directions were issued that they be heard together but separately by way of written submission for a consolidated judgement. This judgement is therefore a consolidated but independent judgement for each of the two appeals.

SUBMISSIONS

- 8. On behalf of the first appellant it was submitted that the case against him was solely based on circumstantial evidence to the effect that the appellant was found near the vehicle in which the drugs were found as there was no eye witness called to testify of having seen the appellant in possession of the narcotic drugs. That the circumstantial evidence tendered did not meet the laid down principles in the case of Abanga alias Onyango v Republic, as the only evidence tendered was that the motor vehicle in question made a u turn and the occupants thereof abandoned the same and started running and two male occupants were arrested.
- 9. It was contended that the appellant was not identified as one of the occupants and was mistakenly arrested. It was contended that no forensic evidence was tendered to link the appellant to the said motor vehicle and or drugs. Further the prosecution failed to prover any conspiracy between the 1st and 2nd appellant in form of communication or date to establish joint enterprise.
- 10. That for the prosecution did not establish conspiracy between the appellants and that the appellants were only convicted based on suspicion as per the evidence of PW3 that the two were together but without evidence in support thereof as there was no evidence to show that the appellant was the owner of the items recovered in the said

motor vehicle as per the inventory produced in court. It was contended that no evidence was tendered to connect the appellant with the subject motor vehicle as the owner confirmed ownership and that on the authority of *Gabriel Ojiambo Nambesi v Republic* [2007] KECA 499 mere presence in a motor vehicle transporting narcotics does not amount to proof of trafficking.

11. It was submitted that the appellants finger prints were submitted for verification and the appellants finger prints were not found in the data base and the identification card recovered belonged to one Shadrack Wagumba Meso and therefore the case was not proved beyond reasonable doubt.
12. It was the appellants case that the appellants defence was not considered by the court as the same was not rebutted by the prosecution and that the court was under a duty to look at the evidence as a whole as was stated in the case of *Ndege Maragwa v Republic*.
13. On behalf of the 2nd appellant it was submitted that the prosecution did not prove its case beyond any reasonable doubt and therefore the court issued a sentence which was harsh. It was contended that as per the definition of trafficking, as person charged must be in possession of the said narcotic drugs when trafficking the same through any of the means under section 2 of the Act as was stated in *Maldine Akoth Barasa & another vs Republic* [2007] eKLR 193 and that it was the duty of the prosecution to show that the appellants trafficked narcotic by conveying the same in the motor vehicle registration KCS 679P and that he was in control of the same.
14. It was submitted that the prosecution evidence was that the appellant was not arrested in the said motor vehicle thus it was for the prosecution to prove that the motor vehicle belonged to the appellant and his co-accused. There was doubt as whether the appellant was the

driver of the same as there was contradiction on the prosecution case as to how the appellants were arrested between PW1 and PW5 raising possibility of the appellant being mistakenly arrested by the police.

15. It was contended that there were no photographs taken at the scene and that the crime scene was never processed and that there was contradiction in the prosecution case which went to the root of the case in support of which the case of Sango Mohamed Sango & another v Republic [2025] KECA was tendered.
16. It was finally submitted that the appellants defence was not considered and that if the trial court had considered how the appellant was arrested against the evidenced-on record, he would have been acquitted. He was not arrested in the said motor vehicle and the scene was not processed.
17. On sentence, it was submitted that the same was harsh and excessive and that the court should be guided by the Court of Appeal case of Kabibi Kalume Katsui v Republic [2015] KLR where the court noted that the sentence was harsh and excessive and substituted the life sentence with a ten-year sentence, in **Caroline Auma Majabu versus Republic** [2014] KECA substitute with ten years.
18. The respondent filed submissions in which it was contended that the prosecution was able to prove that the appellants were arrested conveying narcotic in motor vehicle registration KCS 169P along Nakuru -Nairobi highway with the meaning provided for in Gabriel Ojiambo Nambesi v R [2007] eKLR and that the chain of custody was established by the evidence of PW1 and PW5. The Government analyst testified on the sampling and weigh of the substances which were confirmed to be narcotic-cannabis. It was submitted that the defence was considered and rejected.
19. On sentence it was submitted that as per the Act section 4(a) the sentence is Kshs 100,000,000 or three times the value whichever is

great in addition to life sentence yet the appellant was given 24 years which was lenient.

PROCEEDINGS

20. This being a first appeal, the appellants are entitled to a re-evaluation of the evidence tendered before the trial court afresh. In this cause PW1 PC Emma Gikonyo acting on intelligence motor vehicle carrying narcotic along Nairobi -Nakuru Highway, was together with other officers instructed to mount road block and search motor vehicles along the highway when the subject motor vehicle made a U-turn and started heading towards Nakuru. From outside they noticed two occupants who then abandoned the motor vehicle and ran on foot and after about 15 minutes were arrested and brought back to where they had abandoned the motor vehicle, they left the scene with them to avoid the gathering crowd and booked them at Magumu Police station where recoveries were made including mobile phones and sim cards belonging to the appellants.
21. In cross examination she stated that the appellants were alerted between 100-200 meters from the vehicle through the help of members of the public. The appellants were handed over to PW2 CI Luke Kinoti together with the seized substances whose weighing certificate he prepared and was signed by the appellants. In cross examination he stated that the weight of the items was 161.75kgs .
22. PW3 Emmy Otieno a government analyst confirmed that the substance was cannabis and the photographs were taken by PW4 CI Pauline Wanjiku Wamuya while PW5 PC Lawrence Kinoti stated that they had received information on the suspected car with drugs headed to Nairobi and were to verify the information and they laid ambush at Soko mjinga when suddenly the subject motor vehicle made a u -turn towards Naivasha and they made a chase and those in the subject car got out and started running, the driver of the car the 1st appellant was

caught some 300 meters while the 2nd appellant was arrested thereafter. They inspected the car which had what he suspected to be cannabis, they then took the appellants to the ANU at the DCI where they concluded the process.

23. He stated further that he recovered a Samsung phone belonging to the 2nd appellant and original ID card belonging to Shadrack Wamugumba MESO and the ID of one Otile Wakhayanga and the 2nd appellants ID card , his Equity Bank ATM card and a hardcover note book with his name. In cross examination he confirmed that he was the arresting officer though the first appellant was arrested by his colleagues and that they created an artificial traffic jam to enable them inspect the motor vehicles when the subject motor vehicle made a U-turn before they followed it. He confirmed that the first appellant was the driver. He stated that the 2nd appellant was arrested 300 meters away from the fly over having run away from the subject motor vehicle and that he had left his black phone in the motor vehicle.

24. PW6 CI James Njagi valued the drugs having been given the search certificate signed by both appellants together with a sampling certificate and gave the value thereof as 4,852,500 of the cannabis based on the weight. PW7 PC Boniface Mutisya received the appellants in Nairobi as ANU officers. He later wrote to NTSA to confirm the details of the registered owner of the motor vehicle which conformed that it was owned by Juma Olunga Wakhayanga who confirmed that the second appellant was his brother and that when he visited him at the police station on arrest the same told him that he had been arrested with their fathers motor vehicle while on the way to their uncles funeral , he confirmed that the motor vehicle was his and that the appellant used top traffic cannabis , the second appellants indentation card was confirmed while the 1st appellants finger prints showed no

results and that the id number that he gave belonged to someone else.

25. In cross examination he stated that he met the appellants on arrest and that the car did not belong to the 2nd appellant and that they did not have their names. He confirmed that there was id found in the car and that the first appellant was not registered as a Kenyan.

26. When put on their defences the first appellant (Daniel Gor) who was the 1st accused stated that he was in the business of selling Mtumba while living at Kariobangi in Nairobi. On 22nd may 2024 he went to Korogocho market and that since his daughter was unwell he followed her to the hospital where she had been taken and since he could not remain with her he went to his wife's business place and thereafter took public transport to Nyandarua to pick vegetables and when he alighted at soko mjinga , he met a lady who had prepared two sacks of soft maize, which she helped him carry to the main road, where he saw a crowd gathered and when he crossed the road to see what was happening, he saw people running and one person asked him his name which he gave .

27. It was his evidence that he was then arrested and forced into the motor before being taken to the vehicle and taken to the police station at Magumu leaving his sacks behind. He later found himself at the DCI HQ where he was given a paper written in English which he did not understand to sign having been told that he was mistakenly arrested and would be released and at the cell is where he got to know the second appellant. In cross examination he confirmed that he had never been registered and that he had never met the 2nd appellant before and that his wife could not testify on his behalf since he did not have fare. He denied having given false identification.

28. The second appellant (Husseini Otita) stated that he was working in Huruma as a carpenter and that on 22.5.2024 he received a call from

his brother Juma Wakanyanga that his car had broken down and needed a mechanic, at that time he was with one Paul who knew what was need to fix the car. His brother's driver gave him the details of where the car was and when he got to the area, he did not see the driver but was arrested by two people who claimed that they were police officers who took him to the car and released the mechanic. He was taken to the police station where he called his brother and informed him that he was under arrest.

29. It was his evidence that PW 5 searched him at the station and took Kshs 5000, his ID and wallet, he was then taken to the DCI headquarter where he met the 1st appellant whom he did not know. In cross examination he stated that when he was arrested, the subject motor vehicle was facing the Nakuru direction and that he signed the search certificate under duress. He stated that the motor vehicle belonged to his brother.

ANALYSIS AND DETERMINATION

30. As is the norm with most of the drug related offences , the appellants were allegedly arrested following intelligence on the activities of the same and that the suspected car was to pass through the Nairobi -Nakuru highway and acting on the said information the police created an artificial traffic jam and started inspecting motor vehicles on the said road, leading credence to the hypothesis that if the police want to eliminate the drug trafficking , they can easily do so but it seem that this is not the case.

31. In this appeal the only issues raised by both appellant for determination are whether the prosecution case was proved to the required degree on the offence of trafficking and whether the

appellant's defences were considered and properly analysed and rejected.

32. On the issue of proof of the prosecution case having analysed and re-evaluated the evidence before the trial court, I find and hold thus:

33. It was proved through the evidence on record that the recovered items were drugs within the meaning of the Act as per the evidence of pw2 who prepared and produced the notice of seizure. The appellants were in the process of conveying the said narcotic in the motor vehicle registration number KCS 169 P along Nakuru -Nairobi highway when they were intercepted and having been place at the scene, I am satisfied that the prosecution case was proved beyond any reasonable doubt.

34. That the appellants were arrested at the scene of the recovery is not in dispute. The only issue raised by both appellants is that they were mistakenly arrested. Both appellants put themselves at the scene with the 1st appellant stating that he had gone to the area to collect vegetables for his wife while the 2nd appellant had gone to assist in having the subject motor vehicle repaired on behalf of his brother.

35. The claim by the appellants that they were mistakenly arrested and charged has to be looked against the prosecution evidence on the arrest of the appellants as testified by both PW1 and PW 5 whose evidence was not challenged by the appellants and the recoveries made thereafter a finding of fact which the trial court found as follows:

“ they both gave an eye witness account of being by the road where they created a traffic jam. They gave an account of the car that they were waiting for make a u turn and return in the direction it had come from. The car a white Toyota Passo registration number KCS 679P . They both saw two men. The car pulled off the road and stopped and two men inside ran away “

36. Whereas the first appellant stated that he had gone to rescue his brother's car, the said brother gave a different account to the police. The appellant further failed to call the mechanic who had allegedly accompanied him to the scene to corroborate his account. As regards the 2nd appellant, the same also failed to call as a witness the woman from whom he was to get the maize.
37. I am therefore not persuaded by the appellant's submission that they were mistakenly arrested and find and hold that they were both in the said car and therefore had the control thereof and in possession of the drugs recovered therefrom.
38. On the 1st appellants charge of giving false information to a person employed in public service the court found as a fact that the same signed and wrote as his national identity card on the inventory which turned out to be fault and therefore find no fault with the lower court's determination on facts and his conviction thereon which I hereby affirm.
39. The appellant's conviction was therefore safe and free from error and it follows that the appeal against conviction has no merit and is dismissed.
40. On sentence, the sane remains at the sole discretion of the trial court and can only be interfered with if the trial court did not consider material facts and or acted on wrong principles. As submitted by the respondent the sentence was not harsh taking into account the provision of section 4(a) of the Act upon which the appellants were charged and count 2 in respect of the 1st appellant on the charge of giving false information under section 129(b) of the penal code.
41. In the final analysis I find no merit on the appeals herein both on conviction and sentence which I hereby dismiss. The appellants have right of appeal and it is ordered.

DATED SIGNED AND DELIVERED THIS 5th DAY OF MAY 2026

J WAKIAGA
JUDGE

In the presence of

Irene - Court Assistant

1st appellant in person

Mr. Nyamanga for the 2nd appellant

Ms. Kariuki for the prosecution

CRIMINAL APPEAL NOS E034 AND E035 OF 2025 JUDGEMENT