



**Onyango v Republic (Criminal Appeal E008 of 2023)  
[2024] KECA 1171 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1171 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL E008 OF 2023  
KI LAIBUTA, A ALI-ARONI & GV ODUNGA, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**AUGUSTINE OTIENO ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Voi  
(Mativo, J.) delivered on 6th October 2022 in HCCRA No. 035 of 2012)*

**JUDGMENT**

1. The appellant was charged before the Chief Magistrate's Court at Voi jointly with two others with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control *Act No. 4 of 1994* (the Act). The particulars of the offence were that, on 26<sup>th</sup> February 2019 at around 2030 hours at Maungu trading center within Voi Sub-County of Taita Taveta County, they were found trafficking in narcotic drugs, as they were allegedly transporting 2580 long rolls of cannabis weighing 113 Kilograms, and with a street value of Kshs. 375,000 while using vehicle Toyota Premio Registration No. KBB 231H, in contravention of the said Act. The three accused pleaded not guilty and the matter proceeded to full trial.
2. In support of the respondent's case, PW1, No. 62383 Sgt. George Otuoma of Voi Anti Narcotic Unit, who was the investigating officer, testified that on 26<sup>th</sup> February 2019 at about 8.00 pm, he received instructions from Deputy DCIO Gichuki of Voi police station to proceed to Maungu trading center where three suspects had been arrested for the offence of trafficking bhang. The suspects were arrested at a hotel in Maungu trading center, by PC Driver Feisal, Corporal Gateru, and PC Driver Ratemo of Maungu police station, having received information that the accused persons were the owners of a vehicle involved in ferrying bhang. Further, he learnt that the appellant had been found in possession of the keys to the said vehicle.



3. The witness further testified that the arresting officers handed to him motor vehicle registration No. KBB 231H with a *consignment of 2580* units of what was suspected to be rolls of bhang with a street value of Kshs. 375,000 weighing about 113 kilograms. On the same day, he took an inventory of the items which the accused persons signed. When the vehicle got to Voi police station, the scene of the crime officer PW2 took photographs of the vehicle and its contents. On interrogating the suspects, they told him that they had traveled from Homa Bay and were enroute to Mombasa.
4. PW2, No. 235243 Inspector Peter Kyalo of the Forensic Department in Voi, testified that he took 6 photographs of the front, rear, boot, and inside of the motor vehicle, at the parking at Voi police station. There were big sack bags containing bhang. They opened one of the backs and found 3 bundles of bhang. He produced 6 photographs, which were produced as exhibits, and a report dated 15<sup>th</sup> August 2019.
5. PW3, No. 67418 PC Driver Feisal Fahid of Maungu police station, testified that on 28<sup>th</sup> February 2019, he received information from OCS Kiptur Julius of Maungu police station, of a suspicious motor vehicle that was parked outside a guest house at the trading center. He proceeded to the guest house in the company of other officers. They woke up the watchman known as Amoten Mwakiwia, who described to them the occupants of the suspicious vehicle and informed them that the occupants had gone to take supper at a hotel known as Kawaida hotel. He remained in the vehicle as his colleagues went for the suspects. His colleagues returned with the three suspects and, on searching the appellant, they found him with the key to the vehicle. Upon opening the vehicle, they found the boot and the rear seat loaded with big sack bags containing what looked like rolls of bhang.
6. PW4, David Wabao, then working as an analyst at the Government Chemist in Mombasa, testified that they received from Sgt. Otuoma of DCI Voi police station a white polythene sack bag marked B, which contained 100 rolls of what was suspected to be bhang marked B1 to B100. The rolls had been sampled from 2580 rolls of what was suspected to be bhang that was being transported by the suspects. They examined 100% of the samples and confirmed them to be bhang.
7. At the close of the prosecution's case, the accused were found to have a case to answer and placed on their defence. In his defence, the appellant informed the court that he comes from Homa Bay and sells Omena; that on the material day, he had gone to Maungu market at 10.00 am to transport and sell Omena and was there till 6.30 pm; that, thereafter, he went to a hotel to eat; that, a few minutes later, the police arrested him, searched him and took away his driving licence and Kshs. 700; and they then took him to a vehicle where 2 other people came and alleged that he had the vehicle.
8. DW2, Erick Ochieng, testified that he lived with his sister in Nairobi, and had been called by his father who lives in Mombasa; that he left for Mombasa aboard a lorry from Nairobi; that, in Maungu, the driver left to buy something, and he also went to take tea at a hotel; and that, at the hotel gate, he met police officers who arrested him and took him to Maungu police station.
9. DW3, Esther Akelo Omondi, testified that she is a trader at Kongowea market. She recalled that she had gone to Maungu to look for her sister, who she was not able to find; that, while at a hotel taking a call, she was arrested and accused of having been with other people whom she did not know; and that she was later charged.
10. In a judgment delivered on 31<sup>st</sup> August 2021, the trial court held the view that the prosecution had established that the appellant was the driver of motor vehicle registration number KBB 231H as he had been found in possession of the key and his driving licence found inside the vehicle. The trial court did not find substantial evidence linking the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons with the offence as the watchman who is alleged to have seen them with the appellant was not called to testify. The 2<sup>nd</sup> and 3<sup>rd</sup> accused



were consequently acquitted of the offence while the appellant was convicted and sentenced to a fine of Kshs. 1 million and serve a prison term of 10 years.

11. Aggrieved by the judgment, the appellant appealed to the High Court contending that: the charge sheet was defective; possession of the narcotic drugs was not proved; the person who linked the appellant to the offence was not called as a witness; ownership of the motor vehicle was not established; and that the appellant's mitigation was not considered.
12. In his judgment on the first appeal, Mativo, J. (as he then was) found that the ingredients of the offence of trafficking narcotic drugs were proved to the required standard. Further, he was of the view that the link between the appellant and the drugs was the key to the vehicle that was ferrying the drugs, and which was found in the appellant's pocket. The learned judge formed the view that this fact was consistent with the hypothesis of the guilt of the appellant even without any further explanation.
13. On the issue of the alleged defect of the charge sheet, the learned judge considered the requirements of a charge sheet as set out under Section 134 of the Criminal Procedure Code and held that the same was not defective as it conformed to section 137(a) (i) & (ii) of the Criminal Procedure Code.
14. As to the ownership of the motor vehicle, the learned judge was of the view that ownership of the vehicle or the vehicle's involvement in the crime was not an issue; that what was in issue was whether the appellant was trafficking the drugs found in the vehicle; and, further, that there was evidence on record that the car key was recovered from the appellant's pocket and he did nothing to delink himself from the said vehicle.
15. On the ground that the prosecution failed to call witnesses who linked the appellant to the drugs, the judge referred to section 143 of the *Evidence Act*, which stipulates that no particular number of witnesses are required to prove a fact in the absence of a law to the contrary. The learned judge further observed that the prosecution led evidence on how the suspects were arrested, the vehicle searched, the transfer of the accused persons and the vehicle to Voi police station, the preparation of the inventory which was signed by the accused, and photographing of the exhibits. The learned judge also found no merit in the allegation that mitigation was not considered.
16. Concerning the value of the drugs, the learned judge held that compliance with section 74A of the Act is not mandatory and that the section is meant to ensure that the drugs or substances, once recovered, are not interfered with before the trial. In the end, the learned judge dismissed the appeal in its entirety.
17. The judgment of the High Court precipitated the appeal now before us. At this juncture, we must observe that the record in our possession did not contain a memorandum of appeal and we had to turn to the appellant's submission to fish for the grounds of appeal and found a summarized version of the same which we shall make do with. There are four grounds: lack of analysis of the evidence on record; lack of appreciation by the learned judge that the charge sheet was defective; and that the court erred in considering the value of the drugs yet there was no certificate of value.
18. The plenary hearing of the appeal proceeded on the GoTo meeting virtual platform by way of written submissions that were briefly highlighted by the respective counsel appearing for the parties.
19. In their submissions dated 2<sup>nd</sup> November 2023, learned counsel for the appellant submitted that the learned judge failed to critically consider the evidence on record and thereby ended up with a wrong conclusion. Learned counsel further submitted that there was no evidence before the court to suggest that the appellant had the car key; that, further, at no time did PW3 indicate that he found the car key with the appellant and that PW3 denied that he arrested the suspects. Further, the learned counsel contended that the investigating officer informed the court that he had found the motor vehicle already



- at Voi police station, meaning that the car key was already in the custody of the police. Learned counsel also took issue with the fact that the watchman who had crucial information was not called as a witness.
20. On the ground that the charge sheet was defective, learned counsel submitted that the evidence on record does not support the charge; as the charge sheet seems to suggest the conveying of the drug as the actus reus. On the other hand, the evidence on record is that the vehicle was stationary at the time of arrest.
  21. On the issue as to the lack of a valuation certificate, learned counsel contends that section 86 of the Act requires a valuation certificate, and yet the learned judge referred to section 74A of the Act, which is not relevant for purposes of sentencing as opposed to section 86; and that the value of arrested substance is relevant as it informs the fine to be meted. In this case, the value of the bhang allegedly recovered remains unknown.
  22. Learned counsel for the respondent filed submissions dated 5<sup>th</sup> November 2023. He relied on the case of *Karani v Republic* [2010] 1 KLR in submitting that the duty of this Court is confined to considering matters of law on a second appeal.
  23. On the ground that the charge sheet is defective, learned counsel referred to sections 134 to 137 of the Criminal Procedure Code, in particular, section 134, which requires every charge sheet or information to contain a statement of a specific offence or offences which the accused person is charged with, together with particulars of the offence giving necessary information on the nature of the offence. Learned counsel also cited the case of *Sigilani v Republic* [2004] 2 KLR 480, where the court stated that, in principle, an accused person should be charged with an offence known in law, and that the offence stated must be specific and clear so that an accused can be able to plead to a charge he can understand. It was learned counsel's submissions that the charge sheet herein was clear and the accused were able to understand the same.
  24. Further, learned counsel contends that the offence of trafficking encompasses more than just conveying. Further, learned counsel submits that the evidence of PW1 was that the appellant was transporting the drugs from Migori to Mombasa; and that, therefore, the vehicle could not be said to have been stationary as it was in transit to Mombasa and that, since the drugs were found in the vehicle, it was an indication that the same was being transported. Further, the fact that the appellant had the car key and his licence found in the vehicle, was an indication that the vehicle was on the move.
  25. On the issue relating to the valuation certificate, the respondent admitted that the appellant was said to be trafficking drugs worth Kshs. 375,000, but there was no valuation certificate produced. However, he submitted that failure to produce the certificate was not fatal as the valuation certificate is not mandatory. He contended that section 74A of the Act does not make it mandatory for the drugs to be valued and a certificate issued. In support of this assertion, learned counsel refers to the case of *Moses Banda Daniel v Republic* [2016] eKLR, where this Court stated that, upon seizure of drugs, only an expert opinion is needed to ascertain the nature and weight of the drug; that valuation is only meant to assist the court in sentencing; and that section 4(a) of the Act provides that any person found trafficking in any narcotic drug or psychotropic substance shall be guilty of an offence and liable to a fine of one million shillings or three times the market value of the drug whichever is greater and, in addition, to imprisonment for life.
  26. By dint of the provisions of section 361 of the Criminal Procedure Code, this Court, as the second appellate court, must confine itself to issues of law only as enunciated in the case of *Karani v R* [2010]



1 KLR 73 where the role of the second appellate court was succinctly set out. This Court expressed itself on the matter thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

27. We have revisited the record and considered the arguments set out in the submissions filed by the rival parties. In our opinion, the two issues of law raised for our consideration are:

- i. Whether the charge sheet was defective; and
- ii. Whether the court erred by failure to consider that there was no valuation certificate for the alleged drugs when fining the appellant.

28. In the case before us, the charge sheet stated:

“Charge:

Trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control [Act No.4 of 1994](#)

Particulars Of The Offence:

(1) Augustine Otieno Onyango (2) Erick Ochieng Ondieki (3) Esther Akelo Obondi, on the 26<sup>th</sup> of February 2019 at around 2030 hrs at Maungu Trading Centre within Voi Sub County at Taita Taveta County were found trafficking in narcotic drugs by transporting 2580 long rolls of cannibas to wit. 113 kilograms with a street value of Kshs. 375,000/- while using Toyota Premio registration number KBB 231H in contravention of the said Act”

29. Section 134 of the Criminal Procedure Code provides for the requirements of a charge sheet or information as follows:

134. Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

30. In addition, Section 137 of the Criminal Procedure Code at length states the rules of framing charges and information as follows:

137. The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code -

(a)(i) Mode in which offences are to be charged. — a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;



- ii. the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
  - iii. after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required.
31. In the case of *Sigalani v R* [2004] 2 KLR the court had this to say on charge sheets:
- “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”
32. Learned counsel for the appellant further takes issue with the fact that when the vehicle was arrested it was stationary, yet the appellant was charged with offence of trafficking drugs. The evidence on record is clear that the appellant was in transit from Migori to Mombasa and had stopped at Maungu trading center. At the time of arrest, the appellant had parked the vehicle and had gone for a meal in the company of others. The charge sheet and evidence adduced were not at variance with both law and fact.
33. Both the trial court and the High Court held concurrent views that the charge sheet as shown above and the evidence presented before them were not at variance, and that the prosecution’s evidence supported the charge. In paragraph 25 of this judgment, we laid out our duty as the second appellate court. We do not have the mandate, as it were, to interfere with the concurrent findings of the two courts below; we do not in any event fault the findings.
34. We find that the charge sheet was specific and clear on the charge facing the appellant and his co-accused and that the particulars were also well laid out. This enabled the appellant and his co-accused to plead, participate in the trial by cross-examining the witnesses, and mount their respective defences.
35. Learned counsel for the appellant also took issue with the fact that the valuation certificate of the substance recovered was not produced, a fact that the judge allegedly ignored while upholding the sentence and instead considered section 74A which deals with seizure and analysis of the arrested drugs, which was not relevant for purposes of sentencing.

At the time the appellant was charged section 4(a) of the Act provided that:

4. Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him 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 to a fine of one million shillings 'or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition to imprisonment for life; or  
....”



Section 86 of the Act provides that:

1. Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance, or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.
2. In this section “proper officer” means the officer authorized by the Minister by notification in the Gazette for this section.”

36. Under section 74A the certificate required is for purposes of analysis of the arrested substance and under section 86 a valuation certificate is for the value of the arrested substance. The trial court sentenced the appellant to a term of 10 years. This prison term is discretionary. However, as stipulated under section 86 of the Act, where a fine is to be imposed, there has to be a valuation certificate issued by a proper officer. In this instance, there was no valuation certificate issued on the value placed on the bhang as shown on the charge sheet. It is our view that, where a fine is to be imposed, the provision of section 86 becomes mandatory to enable the court to place a fine. We therefore fault the judge’s view that the issuance of the certificate was not mandatory, yet the fine is pegged on the value of the arrested substance. It is not clear how the trial court arrived at the sum of Kshs. 1 million fine without the valuation certificate.

37. The appeal therefore succeeds in part only to the extent that the trial court ought not to have fined the appellant without proper information by way of a valuation certificate.

38. In conclusion, we hereby uphold the appellant’s conviction and the 10-year term of imprisonment meted out on the appellant but set aside the fine of one million shillings imposed on him.

**DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2024.**

**DR. K.I. LAIBUTA, C.Arb, FCI Arb**

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**JUDGE OF APPEAL ALI-ARONI**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**Signed**

**DEPUTY REGISTRAR**

