



**Okello & another v Republic (Criminal Appeal 10 of 2015)
[2023] KECA 1154 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1154 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 10 OF 2015
F SICHALE, FA OCHIENG & LA ACHODE, JJA
SEPTEMBER 22, 2023**

BETWEEN

PATRICK BILLY OLANG 1ST APPELLANT

TOM OKELLO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of the High Court at Nakuru
(Wendoh. J) delivered on 14th March 2014) In Criminal Case No. 172 of 2010)*

JUDGMENT

1. This is an appeal by Tom Okello and Patrick Bill Olang (the 1st and 2nd appellants respectively), against the High Court judgment delivered on March 14, 2014 by Wendoh J Their first appearance was in the Magistrate’s court where they were charged with the offence of trafficking in a narcotic drug contrary to section 4(a) of the *Narcotic and Psychotropic Substance Control Act*.
2. The particulars of the charge were that on January 30, 2010 along Nakuru-Nairobi highway, in Nakuru Township, Nakuru District of the Rift Valley Province, the appellants jointly with others not before court, trafficked in a Narcotic drug to wit, 319 Kilograms of Cannabis sativa with a street value of Kshs319,000/=, by transporting it in a motor vehicle registration number KBR 841X make Toyota Corolla NZE in contravention of the Act.
3. This case went to full trial in which 8 witnesses testified for the prosecution. Each of the appellant gave unsworn in their respective defence and called no witnesses
4. Briefly stated, the prosecution’s case was that on the material date No 67122 PC John Mwiti (PW1), was on mobile patrol at 9 am with three of his colleagues, when he received a report that a vehicle registration number KBH 841X Toyota NZE grey in colour, coming from Kisumu was transporting



bhang. They laid an ambush at Gatehouse at the flyover on the Nakuru- Nairobi Road and at about 10 a.m, the subject vehicle emerged from Kisumu-Eldoret direction heading towards Nairobi. Their attempt to flag it down was futile. It only came to a halt when No 83172 P.C Reagan Kirimi (PW5), fired at its rim. Upon inspecting it, PW1 and his colleagues found the two appellants in the vehicle. The back seat of the vehicle was filled with plant material wrapped in khaki paper. They arrested the appellants and towed the vehicle to Nakuru Police Station.

5. No 51878, Corporal Habiba Chumba (PW2), one of the officers who arrested the appellants, confirmed the presence of the plant material in the vehicle that the appellants were in possession of. The material was weighed back at the police station in the presence of the appellants and found to weigh 319 kilograms. She identified the subject vehicle, the polythene papers found in the subject vehicle, the stones of plant material and the photographs that were taken of the subject vehicle.
6. Francis Ngaru Ngugi (PW3), was the owner of a car hire firm called Shalom Tours & Travel Company, from which the subject vehicle belonging to Daniel Mbugua Njau (PW4) was hired by one Charles Amollo on January 27, 2010. PW4 signed a car rental agreement for three days with Charles Amollo and retained copies of his driver's license and national identification. According to PW4, Charles was his regular customer but this time he failed to return the vehicle on expiry of the contract term and could not be reached on phone.
7. The following day, he learnt from a police officer that the vehicle was at the Nakuru Police Station. PW3 and PW4 went to the police station and were advised to report the matter to the Criminal Investigation Department (CID). It was the CID who informed them that the vehicle was impounded while carrying bhang. He denied having entered into any contract with any of the appellants and asserted that his client and the person he contracted with was one Charles Amolo.
8. No 61060 CPL David Keiru (PW6) the investigating officer found the impounded vehicle at the Divisional Anti-Narcotic Unit Headquarters yard in Nakuru. He observed that the vehicle contained stones of bhang covered with gunny bags in its boot. The back seat had also been removed to create space for more bhang which was covered in black polythene.
9. PW6 randomly picked stones of bhang from the bags and sent them to the government analyst with an accompanying memo. The report from the government analyst confirmed that the stones of plant material were cannabis sativa. He produced in evidence the memo form, car hire contract between PW3 and Charles, Charles' copy of the identification card and driver's licence, a copy of logbook for the subject vehicle, two polythene papers, 319kg of bhang contained in 12 sacks and the subject vehicle itself.
10. James Michael Welimo (PW7) the chief analyst at the government chemist department, Narcotic section, told the court that on February 10, 2010, he received two evidence polythene bags from PW6. The bags contained 12 bundles of plant material, together with three exhibit memo forms. He was required to ascertain whether the dry plant material was a narcotic drug. He conducted both physical and chemical tests on the plant material which revealed that the plant material was indeed cannabis sativa. He produced the report and the three memo forms in evidence.
11. No 231648 Chief Inspector Sambu Wafula (PW8), was the scenes of crime officer who took a total of 11 photographs of the vehicle and the bhang wrapped in khaki papers. He supervised the processing and printing of the photographs and produced them as exhibits together with his report.
12. Put on their defence, the 1st appellant (DW1) told the court that on that fateful day, he was on his way from Langalanga to Nakuru Provincial General Hospital in the company of his neighbor, the 2nd appellant. That on reaching Gatehouse, they came upon an oil tanker that had been involved in an



- accident. They joined a crowd that had gathered to see what was happening and thereafter continued on their way to the hospital. Suddenly they heard gunshots and saw people running. Two police officers caught up with the two appellants and handcuffed them accusing them of being in possession of a motor vehicle. They were taken to the police station and charged with the offence of trafficking Narcotic drugs. He denied the offence and stated that he was not in the subject vehicle and neither were any photos taken of him next to the bhang or the subject vehicle.
13. The 2nd appellant corroborated the 1st appellant's evidence. He stated that they were going to the hospital to visit the 1st appellant's sister when they heard gunshots as they approached the flyover and police officers arrested them. He also pointed out that the photos produced in court did not show him being besides the bhang or the motor vehicle in question and that the vehicle was not dusted for fingerprints. Further, that nobody connected him with the car hire agreement, as he did not hire any vehicle.
 14. The learned magistrate, W. Korir SPM (as he then was) considered the evidence before him and found the appellants guilty of the offence of trafficking in a Narcotic drug contrary to section 4(a) of the *Narcotic and Psychotropic Substance Control Act*. He heard their mitigation and sentenced each of them to life imprisonment and a fine of Kshs 1million.
 15. The appellants were dissatisfied with the judgment of the court and filed an appeal in the High Court. The learned judge considered the appeal and found that it had no merit and dismissed it. She affirmed the conviction and sentence of the lower court.
 16. Aggrieved by the judgment of the High Court, the appellants filed the instant appeal to this Court on the following grounds that:
 - I. Section 169 of the *Criminal Procedure Code* was not adhered to.
 - II. The evidence of PW1, PW2 and PW3 was untruthful and contradictory on the appellants' arrest.
 - III. The evidence of the Investigation Officer was insufficient to sustain the conviction and sentence.
 - IV. The two courts below failed to consider the legal duties of the gazetted scene of crime officer, PW8.
 - V. The two courts below failed to consider the failure to dust the motor vehicle as required by law.
 17. The appellants filed supplementary grounds of appeal and put forward three more grounds that may be summed up as follows: That the learned judge acted on the wrong principles of the law in upholding the sentence and fine imposed on the appellants without ascertaining the value of the impounded drugs and that the appellants' alibi defence was not considered.
 18. The appeal was disposed of by way of written submissions. The appellants were in person and in their undated written submissions and subsequent highlight, they dwelt on the supplementary grounds and abandoned their main grounds of appeal. Senior Principal Prosecution Counsel, Mr. Duncan Ondimu, filed submissions dated March 10, 2023 on behalf of the State.
 19. In their submissions the appellants fault the superior court for holding that the sentence imposed by section 4(a) of the *Narcotic and Psychotropic Substance Control Act* was couched in mandatory terms. In their view it is not couched in mandatory terms and the recent decisions have shown that the court has discretion to pass any other sentence.



20. The appellants contend that section 66 (1) of the *Interpretation and General Provisions Act* provides that:
- “where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed.”
21. The appellants urge that the aforementioned principle is entrenched in section 26 of the *Penal Code*, which authorizes the court to sentence the offender for a shorter term than the maximum provided by law and that it also authorizes the court to pass a sentence of a fine in addition to, or in substitution for imprisonment, except where the law provides for a minimum sentence of imprisonment.
22. The appellants also refer to section 28 (1)(a) of the *Penal Code* stating that it provides that where the court imposes a fine under any law, but the law does not expressly provide for the fine, the fine that may be imposed is unlimited but shall not be excessive. They submit that section 26 and 28 of the *Penal Code* are general provisions of law which apply not only to the offences prescribed in the *Penal Code* but also to offences under other written laws.
23. Further, that the phrase “shall be guilty of an offence and liable” in section 4 (a) of the Act does not import a mandatory sentence. They relied on the decision in *Opoya v Uganda* [1967] EA 752, where the court held as follows:
- “it seems to us beyond argument the words ‘shall be liable to’ do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”
24. They urge that the word ‘shall’ in the *Interpretation and General Provisions Act* does not mean a mandatory sentence as it provides:
- “where in a written law penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed.”
25. The appellants contend that section 86 of the Act was not complied with. That there was no evidence adduced by the prosecution as to the value of the impounded Cannabis sativa and the gazetted officer did not bring evidence of valuation to ascertain the street value of the drug. They rely on this Court’s decision in *Hamayun Khan v Republic*; Criminal Appeal No 159 of 2000, which held the sentence meted on the appellant without ascertaining the value of the Heroine to be invalid.
26. The appellants submit that both courts below failed to consider their alibi defence. They cite the decision of *Victor Mwendwa Mulinge v Republic* [2014] eKLR to argue that an alibi defence does not shift the burden of proof from the prosecution. They contend that the two courts below placed the burden on the appellants, yet it ought to have been on the prosecution. They also cite the decision of *Adedeji v State* [1971]1 ALL NLR 75 where it was held that failure by the police to investigate and check the reliability of an alibi would raise reasonable doubt in the mind of the tribunal and this led to the conviction being quashed.



27. In rebuttal, the State submits that the appellants were represented by a counsel of their choice during the trial and they did not question the quantity of the cannabis sativa. As such, they cannot raise it in this appeal.
28. The State asserts that the two courts below came to the right conclusion that the appellants were the occupants of the subject vehicle and were arrested before they alighted from the vehicle. That the trial court clearly analyzed their alibi defence and concluded that they were at the scene, on the material day. That this finding was confirmed by the appellate court and the question of alibi does not therefore arise, as they were arrested at the scene.
29. The State also notes that the appellants were charged under the old section 4(a) which has since been amended by Act No 4 of 2022. That contrary to what was held in *Kingsley Chukwu v Republic* [2010] eKLR relied on by the trial court, this Court in *Caroline Auma Majabu v Republic* [2014] eKLR clarified that the sentence in section 4 (a) of the Act is not couched in mandatory form.
30. In conclusion, the State submits that there are no contradictions or inconsistencies in the prosecution's case and even if there are, they are minor and do not go to the root of the case. They refer to this Court's decision in *Michael Saa Wambua & Anor v Republic* [2017] eKLR where it was held that, "existence of inconsistencies and contradictions do not per se, vitiate the prosecution case". They urge that the minor inconsistencies (if any), were satisfactorily explained and the record of appeal clearly reflects that the prosecution witnesses were truthful.
31. We have considered the record of appeal, the written submissions, the authorities relied on and the law. This being a second appeal, our duty is provided by Section 361 of the *Criminal Procedure Code*. It was further affirmed by this Court in *David Njoroge Macharia v Republic* [2011] eKLR as follows,
- That being so only matters of law for consideration -see section 361 of Criminal Procedure Code. As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611.
32. It was rightly pointed out by the State that the appellants were charged under the old Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994* (now repealed). The said section provided that:
- Any person who trafficks 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.
33. The appellants argue that section 86 of the Act was not complied with. In opposition, the State submits that the appellants did not argue this point in the trial court, as much as they were represented by counsel.



34. Section 86 of the repealed *Act* stipulated 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 the purposes of this section.
35. A glimpse at the record reveals that this issue was not brought before the trial court or the superior court on first appeal. It has emerged for the very first time in this appeal. Guided by the limit of our mandate, we are disinclined to determine issues that were not raised at the earliest opportunity before the High Court where it could and should have been raised for determination. On this we are fortified by the decision of this Court in *John Kariuki Gikonyo v Republic* [2019] eKLR where it was held that:
- “(17) The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic* [2010] eKLR Criminal Appeal No 203 of 2009; held as follows:
- “... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”
- (18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”
36. Having said so, the issues that fall for our consideration are:
- I. Whether the appellants’ defence was considered by the High Court, and
 - II. Whether the sentence imposed by the trial court and upheld by the High court was legal.
1. On the first issue, the appellants contend that their alibi defence was not considered by the courts below. On the contrary, the State urges that the question of alibi by the appellants does not arise, since they were caught in the act. Further, that their defence was correctly considered by the two courts below and found to be incredible.
 2. On this issue the superior court rendered itself thus:

“I also note that the trial magistrate considered the defence offered by the appellants and found it to be incredible due to, among other reasons, the fact that on cross-examination it emerged that the appellants did not know Nakuru, yet they had claimed to be resident.”
39. In their defence the appellants claim to be residents of Langalanga and that they are neighbours. It is their narrative that on the material day, they rode on one motorbike from Langalanga to Nakuru town, on their way to Nakuru Provincial General Hospital to visit the 1st appellant’s sister. That they alighted



in town and proceeded on foot towards the Hospital and after a few meters, they heard gunshot and presently the policemen came to arrest them. On cross examination, the first appellant stated that he did not know the ward that his sister was in, that he had lived in Nakuru for four years. Further, that he did not know any of his neighbours by their names.

40. The 2nd appellant told the court that he had lived in Nakuru for two and a half years before the date of the incident and he sold shoes for a living at Langalanga. On cross-examination he did not know the road leading to Langalanga, the neighboring estate or where KANU street was. Although it was his testimony that he used to buy his stock of shoes from a wholesale shop in town, he did not know the name of the said wholesale shop.
41. From the foregoing we are of the view that the two courts below considered the appellants' defence and correctly found it to be incredible.
42. On the second issue, it is the appellants' position that the sentence meted upon them was harsh and unlawful, and that Section 4 (a) of the Act was not couched in mandatory terms as was held in the two courts below. The State concedes that the said section is not couched in mandatory terms, but urges this Court to take judicial notice of the serious menace the country is facing in fighting the narcotic trade that continues to affect Kenyans, especially the youth. They pray for a sentence that is commensurate with the dangers posed by narcotic menace in the country.
43. In the decision of Caroline Auma Majabu v Republic [2014] eKLR relied on by the State, this Court held as follows:

“In our view, the word ‘shall’ is used in relation to the guilt of the offender and the word used in relation to the sentence is ‘liable’.” The Court further looked at the definition of the word liable in Black’s Law Dictionary where it was defined as: (i) responsible or answerable in law; legally obligated, or (ii) subject to or likely to incur (a fine, penalty etc.)

44. Further that:

“... In the case of section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act, the provision does not contain such clear and unambiguous language with regard to mandatory sentence. In our view, this leaves room for judicial discretion, and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion. With respect, we must depart from the finding in Kingsley Chukwu v R (supra) as the same was made per in curium. Both the trial magistrate and the learned Judge misdirected themselves in holding that the sentence was mandatory and failing to exercise their discretion by addressing the appellant’s mitigating circumstances. An error of law was thereby committed which justifies the intervention of this Court.”

45. We note that before the sentence was passed, the appellants' counsel mitigated on their behalf. Counsel told the court that the appellants were remorseful, they were family men with wives and children of tender years and were the sole breadwinners in their respective families.
46. In the result, we find no merit in the appeal against the conviction of the appellants. Accordingly, we dismiss each appellant's appeal against conviction. However, considering the appellants' mitigation and the value of the subject matter, we set aside the sentence of life imprisonment imposed by the trial court and upheld by the superior court and, in its place, order as follows:
 - i. Each appellant shall serve 25 years imprisonment.
 - ii. The sentence shall run from the date of incarceration, if they remained in remand during trial.



iii. Each appellant shall also pay a fine of Ksh 1,000,000/- (one million) and in default, shall serve an additional 3 years imprisonment.

DATED AND DELIVERED IN NAKURU THIS 22ND DAY OF SEPTEMBER 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

