



**Otieno & 2 others v Republic (Criminal Appeal E032 & E045 of 2024
(Consolidated)) [2025] KEHC 587 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E032 & E045 OF 2024 (CONSOLIDATED)**

**DR KAVEDZA, J
JANUARY 27, 2025**

BETWEEN

PAUL OCHIENG OTIENO 1ST APPELLANT

TOM OUMA AERO 2ND APPELLANT

RUTH ATIENO OUMA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered By Hon. Njeri Thuku (SPM) on 21st May 2024 and 5th June 2024 respectively at JKIA Chief Magistrate's Court Criminal case no. 37 of 2020 Republic vs Tom Ouma Aero & 3 others)

JUDGMENT

1. The appellants were jointly charged with the offence 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 particulars of the offences as per the charge sheet are that on August 14, 2020 at around 1300 hours at Gilgil Weighbridge area along the Nakuru-Nairobi highway within Nakuru Coun jointly with others not before court trafficked in narcotic drugs namely canna is (bhang) to wit 368.5 kg with a street value of Kshs. 11,055,000/=, by conveying in motor vehicle registration number KCQ xxx, make Toyota Noah contravention of the provisions of the said. Act.
2. After a full trial, the 2nd and 3rd appellants herein, were found guilty for the said offence and were each sentenced to serve twenty-five years imprisonment and to pay a fine of Kshs 33,165,000/= in default of payment of the fine, to serve one year in prison. The default sentence is to be served concurrently. On the other hand, the 1st appellant was found guilty for the said offence and was each sentenced to serve twenty-one years imprisonment and to pay a fine of Kshs 33,165,000/= in default to serve one year in prison. The default sentence is to be served concurrently.



3. Dissatisfied with the conviction and the sentence the Appellants lodged separate Appeals as follows; the 1st Appellant filed Criminal Appeal No. E032 of 2024 while the 2nd and 3rd Appellants filed Criminal Appeal No. E045 of 2024 which were later consolidated by this court.
4. The appellants argue the conviction was based on incomplete, uncorroborated circumstantial evidence and improper burden-shifting. They contend the sentence was harsh, arbitrary, and failed to consider alternatives like a fine or non-custodial measures, contrary to established legal principles.
5. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw nor heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).
6. The prosecution called fourteen (14) witnesses to prove its case. Herman Kahiga Ndana (PW1), a police officer and owner of Toyota Noah KCQ xxx, testified that he leased his car to Aroma Tours, managed by Agnes Waithira Murage (PW2), for use in her car hire business. The vehicle was initially listed on Little Cab after Betin, its previous lessee, ceased operations in Kenya. On August 14, 2020, PW1 noticed via the car's tracker that it was at the Directorate of Criminal Investigations (DCI) Headquarters. He was later informed by PW2 that the car had been detained for transporting narcotics. PW1 identified the car in court and provided its movement history from August 4 to August 14, 2020, as tracked.
7. Agnes Waithira Murage (PW2), the proprietor of Aroma Tours, confirmed leasing the vehicle from PW1. On August 4, 2020, she rented it to her long-term client, Raphael Junior Okwany (PW3), for three days at Kshs 4,000 per day. Raphael later requested an extension but delayed payments, prompting PW2 to track the car. On August 14, 2020, the vehicle was traced to the Gilgil Weighbridge and subsequently to the DCI Headquarters. PW2 called Raphael, who was evasive, and later informed PW1 about the situation. PW2 discovered Raphael had sub-leased the vehicle to a person named Paul and produced the lease agreement signed with Raphael as evidence.
8. Raphael Junior Okwany (PW3), a car broker, testified that he leased the vehicle from PW2 and sub-leased it to Paul, introduced to him by another broker, George. Paul provided identity card and police abstract in lieu of a driver's license. The agreement was for three days, with an extension requested later. PW3 forwarded Kshs 12,000 to PW2, retaining his commission. On August 16, 2020, he learned via social media about the car's detention for narcotics transport. PW3 recorded a statement at the DCI Headquarters and submitted his lease agreement with Paul and related financial transactions as evidence. He clarified he had no direct dealings with Stephen and that Paul controlled the vehicle during the rental period.
9. On 14th August 2020, officers from the Transnational Organized Crime Unit (TOCU), among them PC Peter Karanja (PW4) and Corporal Patrick Mathenge (PW5), were directed by their seniors to intercept a vehicle suspected of trafficking narcotics. The team, accompanied by traffic officers, set up a roadblock at the Gilgil Weighbridge along the Nairobi-Nakuru Highway. At approximately 1:00pm, they spotted the target vehicle, a Toyota Noah KCQ xxx. When a traffic officer attempted to stop it, the driver, later identified as Paul Otieno, sped off. A high-speed chase ensued, with the vehicle making two U-turns - first heading back towards Nakuru and then returning toward Nairobi. The officers eventually managed to block and stop the car. Inside the vehicle, they found two individuals, Paul Otieno (the 1st Appellant herein, who was the driver of the motor vehicle, and Stephen Baraza who was a passenger. During the search, officers recovered four mobile phones and nine sacks containing a green plant material suspected to be cannabis. An inventory of the recovered items was prepared by



- PW5. The team escorted the 1st Appellant herein, together with Stephen, and the vehicle drove to the DCI Headquarters in Nairobi.
10. Later that evening, the officers were directed to Utawala, where they set up an ambush at a house believed to be linked to the suspected owner of the drugs. Early the next morning, August 15, 2020, they intercepted a car leaving the premises. The driver, identified as Tom Ouma was apprehended and led the officers back to his house, where a search was conducted. PW5 oversaw the search, recovering items including Kshs. 150,998/= in cash.
 11. The nine sacks were weighed on August 16, 2020, with a total weight of 368.5 kilograms. Samples were taken by Catherine Murambi (PW6), a government analyst, who confirmed that the green plant material was cannabis, a narcotic drug. She prepared a Sampling Certificate and presented her findings in court.
 12. Inspector Ismael Oruko (PW7), who was part of the investigation team, testified that he received the suspects, vehicle, and the recovered items at the DCI Headquarters. He confirmed that the car and the sacks were linked to Paul through a police abstract found in the vehicle with his name on it. However, there was no evidence connecting the 2nd and 3rd Appellants to the items recovered at the Gilgil weighbridge.
 13. PC Mary Mwangi (PW8) and Sergeant George Murunga (PW9), police officers attached at the Transnational Organized Crime Unit, testified about the arrest of the 2nd Appellant. On September 10, 2020, at 6:00 am, under the command of Chief Inspector Murunga and with four other officers, they executed warrants of arrest issued on August 19, 2020. They arrived at the 3rd Appellant's residence in Roysambu at 8:00 am and introduced themselves as she was leaving her house. A search of the premises recovered an NHIF card, a Madison Insurance card, an Equity visa card all in Ruth's name, and Kshs. 200,000 in denominations of Kshs. 1,000. PW9 prepared a search certificate and inventory, which she signed along with the officers. The officers testified that the 3rd Appellant did not resist arrest, no offending substances were found, and she claimed the money was a contribution. PW8 stated that it was believed that the money was proceeds of crime.
 14. Corporal Derricks Kiprono (PW11), a crime scene investigator, documented the recoveries in the case. He photographed the Toyota Noah KCQ xxx and nine sacks of cannabis at DCI Headquarters on August 14, 2020. He also documented recoveries from the 3rd Appellant's house, as well as the weighing and sampling of the nine sacks. He prepared a report, signed and stamped it, and presented it with the photos.
 15. Chief Inspector Philip Langat (PW10), a proper officer under Section 86 of the [National Police Service Act](#), valued the recovered drugs weighing of 368.5kg at Kshs. 11,055,000/= and prepared a Valuation Certificate.
 16. PC Quinto Odeke (PW12), a liaison police officer attached to Safaricom PLC, testified about phone numbers, calls, and M-Pesa transactions. He confirmed that the number 0722853933 was registered in the name of Tom Ouma Aero and 0717xxxx46 to Ruth Atieno Ouma (the 2nd and 3rd Appellants herein). He also stated that the phone number 074xxxx40 is registered under one, Abe Philip Ochieng, while 0721xxxx42 under George Eanice Otieno Obondo and 076xxxx31 under Josphina Ngare Otieno. He further presented call records for the 2nd and 3rd Appellants as well as M-Pesa statements but noted that it was not possible to determine the source of the funds. In cross-examination, he confirmed he lacked details about the SIM cards and reiterated the limitations in tracing fund sources.
 17. PC Gordon Aluko (PW13), a cyber forensic analyst, testified about his analysis of phones presented by Corporal Kurgat (the investigating officer) on March 30, 2021. In Paul's phone (marked as P00-1),



Ruth's telephone number, 0717xxxx46, was saved as "Min Sammy." Tom's phone contained messages and images suggesting involvement with cannabis. A message from +2347xxxx48 asked if the "goods had arrived." On August 13, 2020, Tom sent a message to Ruth, saved as "Mikayi," and received a one-word reply, "Hakuna" (none). Images on Tom's phone showed cannabis being offloaded and spread on the floor. A video referencing marijuana was also found. During re-examination, PW13 translated a message in Dholuo sent by the 2nd to 3rd Appellant, requesting Kshs. 330,000/= for 20kg, with references to "Mama Rhoda." The quoted translation read; "Somebody is bringing to me 20 kgs and I need money cash of Kshs. 330,000/- if you can get that money for me so that I give it to the person when he arrives after weighing the 20kgs the person is an Airforce person who always gives Mama Rhoda". The SD card containing all this data was included as an exhibit. In cross-examination, PW13 explained the images and videos were retrieved from Tom's phone, marked TOA.

18. Corporal Cletty Kurgat (PW14), the Investigating Officer, summarized evidence linking the suspects through the intercepted drugs, financial transactions, and phone records. Despite no drugs being found at Ruth's residence, the investigation revealed a coordinated drug trafficking syndicate involving the suspects.
19. In their respective defence, Paul Ochieng Otieno the 1st Appellant testified that on August 13, 2020, he received a call from Stephen to fix his car in Nakuru. After completing the repair, he sought a lift back to Nairobi and negotiated a ride in a Toyota Noah for Kshs. 350. During the journey, the vehicle was stopped and searched at Gilgil, where cannabis was discovered. Paul denied any knowledge of the drugs and claimed he was assaulted at the DCI Headquarters. He alleged he was coerced into signing the weighing certificate. He refuted leasing vehicles, transporting drugs, or receiving payments. He maintained that he was an innocent passenger with no connection to the narcotics.
20. Tom Ouma Aero the 2nd Appellant testified that on August 15, 2020, he was escorting his cousin to the bus stop when officers intercepted him. They searched his house in his children's presence but found nothing illegal. He claimed he was taken to DCI Headquarters, where he saw sacks being removed from the black Toyota Noah (KCQ xxx). He acknowledged the 1st appellant as a bar customer but denied personal ties or involvement in drug trafficking. He asserted that his own car, KCX 488H, was unrelated to the case and not produced as evidence. He claimed his statement was recorded under duress and maintained he had no connection to the narcotics.
21. The third appellant Ruth Atieno Ouma recounted being startled by officers entering her bedroom on August 14, 2020. They conducted a three-hour search of her house but found nothing illegal. The 3rd appellant stated she was later arrested in October 2020 and granted bond. She admitted knowing Paul as a mechanic and sending him money but explained these were for errands involving family needs. Ruth denied sending Paul to collect drugs or engaging in trafficking. She also refuted allegations of escaping custody.
22. All three appellants denied involvement in the drug trafficking allegations, claiming innocence and coercion during the investigation.
23. This court has re-evaluated the evidence adduced before the trial court, the appellants' grounds of appeal, as well as the rival parties' submissions. The issue that falls for determination is; whether the prosecution proved its case beyond reasonable doubt against the Appellants.



24. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* (hereinafter the Act) provides as follows;
- “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;”
25. The case against the appellants was that they were found trafficking narcotic drugs, specifically cannabis sativa, contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act*. To secure a conviction under this section, the prosecution must prove the following essential elements beyond reasonable doubt:
- a. That the substance in question is a narcotic drug or psychotropic substance;
 - b. That the accused persons were involved in “trafficking” as defined under Section 2 of the Act; and
 - c. That the accused persons acted knowingly and intentionally..
26. On proof of the substance being cannabis sativa, the prosecution relied on the evidence of the Government Analyst (PW4) who conducted scientific tests on the samples taken from the seized substance. PW4 confirmed, through a detailed report produced as an exhibit, that the substance was indeed cannabis sativa, a narcotic drug as per the First Schedule of the Act.
27. The chain of custody was also important to ensure the integrity of the seized substance. Evidence showed that the exhibits were well collected, sealed, labelled, and stored before being presented for analysis. The arresting officer, PW4, testified about the circumstances under which the drugs were seized, and his testimony was corroborated by PW5, who witnessed the seizure and subsequent handling of the evidence. There were no discrepancies or irregularities in the chain of custody that would raise any doubt on the prosecution case.
28. This court is, therefore, satisfied that the prosecution proved beyond reasonable doubt that the substance seized was cannabis sativa, a narcotic drug within the meaning of the law.
29. I will now proceed to determine whether the appellants were involved in the trafficking of narcotic drugs.
30. The term “trafficking” is broadly defined under Section 2 of the Act to include: the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof.
31. To proceed with the analysis, I shall first determine the culpability or otherwise of the 1st Appellant, since he was allegedly arrested at the scene of crime, and thereafter, I shall determine the same against the 2nd and 3rd Appellants.



32. The case against the 1st Appellant was that he was arrested while driving the motor vehicle registration number KCQ xxx in which the narcotic drugs were discovered.
33. Police officers, PW4 and PW5 who were part of the team that conducted the operation, testified that they intercepted the motor vehicle at Gilgil Weighbridge following a tip-off about suspicious activities. PW4 specifically confirmed that upon interception of the said motor vehicle, the 1st appellant was in the driver's seat while Stephen was at the passenger's seat. PW5 corroborated this account during cross-examination by the 1st Appellant, and added that the vehicle was thoroughly searched at the scene, leading to discovery of the suspected narcotic drugs that were concealed in the vehicle.
34. The prosecution established that the narcotics, specifically Cannabis, as confirmed by PW6, were found in substantial quantities, packed in a manner consistent with commercial trafficking. PW5 described how the substance was packaged in nine sacks and placed on the backside of the vehicle.
35. As the individual in control of the vehicle, the 1st Appellant had immediate possession and control over its contents. This control creates a strong presumption that he was aware of the nature of the items being transported. PW6, the government analyst who was responsible for cataloguing the seized narcotics, testified that the quantity of the substance was 368.5 kilograms, which amount indicates that the drugs were most likely meant for distribution. As such, it is my view that the 1st appellant was actively involved in the transportation of the narcotics, a key element of the trafficking charge.
36. The 1st appellant's defence was that he was merely a passenger in the vehicle, having been offered a lift by the driver, and that he had no knowledge of the narcotics. However, during cross-examination, the totality of the prosecution evidence, notably the testimonies of the arresting officers, including PW4 and PW5, it emerged clearly that the 1st Appellant was the driver of the vehicle, hence, he was in control of the same. This is contrary to his assertion that he had only asked for a ride. This Court finds his explanation implausible, particularly given that he tried to drive away once he saw police officer at the road block. To my mind, the act of fleeing from police officers is evidence of complicity rather than ignorance. If indeed the 1st appellant had no knowledge of the contents in the vehicle, he would have had no reason to escape from the police. It is therefore safe to conclude that the attempted escape from the police was intended to avoid a search and consequent detection of the contents of the vehicle.
37. Additionally, the prosecution led cogent and corroborative evidence as to the chain of custody of the subject motor vehicle KCQ xxx from its owner. The owner of the motor vehicle PW 1 told the court that he leased the said motor vehicle to PW 2 Agnes to use for a car hire business. PW 2 subsequently subleased the motor vehicle to PW 3 (Raphael Okwany) who was well known to the 1st Appellant as they had engaged in previous business. PW3 was categorical that he leased the motor vehicle to the 1st appellant. The 1st Appellant did not challenge the evidence by PW 3 that he provided PW3 with a copy of his identity card and a police abstract in lieu of a driver's license. It is the said police abstract that was recovered from the 1st Appellant by the arresting officers, PW 4 and PW 5.
38. It is therefore my finding that the prosecution led overwhelming evidence against the 1st appellant who was not only at the scene of crime but also in actual control and custody of the vehicle in which the narcotics were seized. The prosecution sufficiently proved the elements of the offence, including the act of transportation and the requisite knowledge. The conviction against the 1st Appellant should, therefore, be upheld, and I accordingly uphold it.
39. Regarding the sentence, the 1st Appellant was sentenced to serve twenty-one years imprisonment and to pay a fine of Kshs 33,165,000/= in default of payment of the fine, to serve one year in prison. The default sentence is to be served concurrently. I do not see any reason to interfere with the said sentence



as the same is reasonable as provided under the *Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*.

40. On the culpability of the 2nd and 3rd appellants, it is important to note that the following material facts are not disputed:
- i. On the material date, the subject motor vehicle was intercepted at the Gilgil Weighbridge while transporting the narcotic drugs. The occupants of the motor vehicle included Paul Ochieng Otieno (2nd Accused) and Stephen Wandera Baraza (3rd Accused).
 - ii. The 2nd and 3rd appellants were not in the said vehicle at the time of arrest, and no direct evidence placed them at the scene or established that they had knowledge of the transportation of the drugs.
41. The central issue in this case therefore is whether there was sufficient evidence connecting the 2nd and 3rd appellants to the narcotics found in the motor vehicle registration number KCQxxx. It is important to note that the conviction entered by the lower court was purely based on circumstantial evidence.
42. It is trite law that in order for circumstantial evidence to be reliable, it must be inconsistent with the accused's innocence. In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, Court had this to say on circumstantial evidence:
- “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”
43. In the instant case, while it was clearly established by the prosecution that the subject vehicle transported the narcotic drugs, there was no evidence by way of direct testimony to prove that the 2nd and 3rd appellants had ownership or exercised control over the vehicle.
44. The prosecution relied on the fact that the 1st Appellant, who was found in the motor vehicle, was known to the 2nd and 3rd appellants, a fact which the 2nd and 3rd Appellants themselves admitted in their testimonies. However, it is my considered view that mere acquaintance or friendship between the 2nd and 3rd appellants and Paul (1st Appellant) cannot, in itself be a sufficient basis for inferring guilt. The evidence linking the 2nd and 3rd appellants to the seized narcotics must be clear, precise, cogent and corroborative.
45. PW14, the Investigating officer, stated in cross-examination that he interrogated the 1st Appellant who was arrested together with the subject motor vehicle, and that it was during such interrogation that the 1st Appellant informed the team that it was the 2nd and 3rd Appellants herein who sent him to pick the narcotic substances from Busia to Nairobi, and that they facilitated the movement. It is this statement that led to the arrest of the 2nd and 3rd Appellants. The investigating team had the perfect opportunity to plea bargain with the 1st appellant either for a lesser offence or treat him as a witness against the financiers of the criminal enterprise. However, PW14 did not produce the plain statement recorded



- by the 1st appellant during interrogation to confirm this fact. Had the plain statement been produced, the court would consider its admissibility and probative value in the case in view of the denial by the 1st Appellant in his oral testimony before the trial court. Furthermore, no confession was recorded from the 1st appellant hence investigators lost the perfect opportunity to nail the sharks.
46. Although the 1st appellant admitted that he was acquainted with the Appellants, he vehemently denied ever stating that he was hired to transport bhang. His strong denial is inconsistent with the testimony of PW14 who affirmed in cross-examination that indeed the 2nd and 3rd Appellants were arrested following the interrogation of the 1st Appellant. The alleged statement made at the police station can not therefore be considered as an admission within the meaning in the case of *Abamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR.
 47. Suffice to note that by the time the 2nd and 3rd Appellants were arrested, the mobile phones recovered from the 1st Appellant and Stephen (3rd Accused at the Trial Court) were yet to be forensically analysed. All the data establishing connection, from the phone records and Mpesa transactions linking the 2nd and 3rd Appellants herein to the 1st Appellant and one Abe- Phillip Ochieng, came way later after the arrest.
 48. Aside from the alleged statement by the 1st Appellant that he was instructed by the 2nd and 3rd Appellants, none of the officers who testified in Court alluded to any evidence that linked the Appellants herein to the other two Accused persons, the 1st Appellant and Stephen.
 49. The prosecution led evidence in form of the Appellants' M-Pesa Statements to suggest linkage to the 1st Appellant.
 50. For proper perspective, it is important to point out that it was alleged that the 2nd Appellant sent money to a phone number 074xxxx40 belonging to Abe Philip Ochieng on diverse dates on 2nd August 2020, 31st July 2020 and 26th July 2020 being Ksh. 2,000/=, 8,500/= and 1,000/= respectively. It is also alleged that the 3rd Appellant sent a total sum of Kshs. 116,000/= to phone number 074xxxx40 in the name of Abe Philip Ochieng. The mobile phone allegedly belonging to Abe Philip Ochieng is said to have been recovered from Paul Ochieng, the 1st Appellant at the time of arrest.
 51. At paragraph 104 of the Trial Court's judgment, the court stated as follows;

“The conclusion drawn from this is that Ruth together with Tom were Paul's financiers. Ruth managed the money and made payments whenever they were needed.”
 52. To my mind, these were serious statements by the Trial Court in the absence of clear, corroborative and cogent evidence for at least three reasons;
 - a. Firstly, save for stating that mobile phone number 074xxxx40 belonged to Abe Philip Ochieng, the said person was never called as a witness or even charged alongside the Appellants if at all the police believed that he was part and parcel of the trafficking syndicate. To this end, it cannot be said that there was no sufficient information to identify the said Abe Phillip Ochieng. PW12, a data analyst attached at Safaricom Headquarters PLC, provided all the details registered under the said phone number, including the national identification card number, which is the most reliable way of identifying an individual. Despite this, throughout the prosecution evidence, there was no mention of any effort to trace the said Abe Philip Ochieng and link him to the offence in question. This has left the Court with more questions than answers. Who was Philip? How is he linked to the substances? What role did he play in the crime? What evidence establishes that the money sent to his phone was for the recovered substances? Suffice to note



that the arresting officers, including PW4 and PW5, both testified that at the time of arrest, the 1st Appellant informed them that one of the phones in his possession belonged to a passenger who had left it behind. In view of this assertion, coupled with the fact that one of the phone numbers was registered to an individual who was not among the arrested persons, and whose Mpesa transactions connected him to the Appellants, it was incumbent upon the investigating officers to ascertain whether the alleged passenger in the vehicle was the said Abe Phillip, and/or whether he was connected to the crime. Having him as a witness or an accomplice would have served better to ascertain his connection of the crime to the Appellants herein.

- b. Secondly, the amounts of money allegedly sent to the said Abe Philip Ochieng by the 2nd Appellant herein was Kshs. 11,500/= while the said Phillip is said to have received Kshs. 116,000/= from the 3rd Appellant. When this evidence is taken together with the cash amount of Kshs. 150,998/= and Kshs. 200,000/= recovered from the 2nd and 3rd Appellants' respectively cannot be said to be proceeds of trafficking in narcotics especially when weighed against the value of the narcotics of Kshs. 11,055,000/=, the subject of the charge before the subordinate court. This court cannot infer guilt from mere financial dealings without concrete evidence linking the aforesaid transactions to the offence. To rely on such transactions as proof of guilt would be speculative.
- c. Thirdly, the prosecution did not adduce substantial evidence, whether circumstantial or direct of communication between the 2nd and 3rd Appellants and any of the co-accused persons. From the testimony of PW13, it was established from one of the phones (POO-1) obtained from the 1st Appellant that a number which belonged to the 3rd Appellant, was saved as 'Min Sammy'. Other than this, there was no evidence of communication between the Appellants herein and the other co-accused persons. The 1st Appellant nonetheless admitted to have been acquainted with the 3rd Appellant, who had engaged him before. Even so, this does not point to the connection towards the drug syndicate. I am also alive to the fact that the burden is on the prosecution, and not the accused person, to prove their case. The prosecution did not adduce substantive evidence of communication between the Appellants and the other accused persons. It was thus erroneous on the part of the subordinate court to presume that 2nd and 3rd appellants, together with 1st Appellant, engaged in the drug syndicate, only by virtue of the mobile phone, which contained a sim card registered in the name of Abe Philip Ochieng.

53. As was held by the Court of Appeal in *Joan Chebichii Sawe vs Republic* [2003] eKLR:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt... Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

54. In that case the court relied on *Mary Wanjiku Gichira vs. Republic*, Criminal Appeal No 17 of 1998, where it was held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.”



55. As such, it is my finding that the MPESA transactions coupled with the cash recovered from the Appellants cannot form a sufficient basis for convicting the 2nd and 3rd appellants on a charge of trafficking in narcotics by conveying.
56. Additionally, photos and videos recovered in the 2nd Appellant's phone, did not point to his connection to the offence. The videos contained the news concerning interception of cannabis, which was aired on Citizen TV, as per PW13's testimony. Another video referencing marijuana was also found in the very phone. However, the mere existence of videos depicting alleged illegal activity does not, in itself, prove the 2nd appellants' involvement in the specific offence before the court. Importantly, the prosecution failed to ascertain whether the videos had any direct nexus to the narcotics in question.
57. Aside from the videos, messages from the 2nd Appellant's phone were also extracted. PW13 particularly highlighted messages from a phone number, +2547xxx48, which was saved as 'Wakalia Cast'. One of the incoming messages from the said contact read, "Mali imeingia ama bado?" which this Court understands to mean, "Have the goods arrived or not yet?". Suffice to state however that the identification details registered to the said phone number were not produced in Court. It is difficult for this Court to reach a conclusion that the said message was with reference to the substances, yet no other information has been provided thereof.
58. Another message highlighted by PW13 allegedly related to the offense, was sent from the 2nd Appellant to the 3rd Appellant. The message reads; "Ngato Kelona 20kg to aduaro pesa cash Kshs. 330,000/- - Inyalo yudona mondo kaduogo to amiye kaseyudone. Enja Airforce neomiya Mama Rhoda." It is Luo language.
59. PW13 translated this text message during re-examination to mean "Somebody is bringing to me 20kgs and I need money cash of Kshs. 330,000/- if you can get that money for me so that I give it to the person when he arrives after weighing the 20kgs the person is an Airforce person who always gives mama Rhoda."
60. While PW13 testified that he understood the language, as he was Luo himself, his translation is not reliable for several reasons. First, PW13's role in the case was as a cyber-forensic expert, not a translator or linguistic expert. His expertise in analysing digital evidence does not necessarily extend to providing accurate translation of messages from Dholuo to English language. Second, no certificate of translation was tendered in court to authenticate or verify the accuracy of his interpretation. This omission is significant because it contravenes the standard evidentiary requirements for documents in "unofficial" dialects. Third, the procedure as I understand it, is that, the witness should have had the document translated from Dholuo to English and filed the original version as well as the translated version.
61. The language of the court is English and all documents filed have to be in that language and, if not, a certified translation into the English language should be filed. Short of that, the court cannot consider that document, which is not in the language of the court. Therefore, the evidence produced allegedly in Dholuo language should not have been admitted into evidence by the court or taken into account in determining the matter.
62. Lastly, the translation was only introduced during re-examination and not during the evidence-in-chief. This was a grave omission and a travesty of justice as the Appellants were denied an opportunity to cross-examine the witness on such a deposition. This, violated the right of the appellants to a fair trial under Article 50(2)(k).
63. As such, it is my finding that the trial court's reliance on the unverified and procedurally irregular translation was erroneous. Without a credible and independent translation, the content of the message



cannot be conclusively linked to the alleged offense. This casts further doubt on the sufficiency of the prosecution's evidence against the appellants.

64. In view of the foregoing, it is my considered view that the electronic evidence lifted from the mobile phones obtained from the 1st Appellant was not water tight enough to infer the involvement of 2nd and 3rd appellants in the offence of trafficking narcotic substances. There is no substantive and conclusive evidence to demonstrate that the 2nd and 3rd Appellants and the 1st Appellant operated together in the drug syndicate.
65. It is important to add that the searches conducted at both the 2nd and 3rd appellants' residences, in Utawala and Roysambu areas did not eventuate to any significant or incriminating evidence pointing to their involvement in the narcotics. In fact, PW14 in his cross examination admitted, "We did not find anything offensive in our search." This again weakens the case against them and raises serious doubt about the 2nd and 3rd appellants' alleged involvement in the offence before court. Without direct or corroborative evidence connecting the 2nd and 3rd appellants to the seized drugs, their conviction cannot stand.
66. It is evident that the case against the 2nd and 3rd appellants was based on circumstantial evidence. In *Abanga alias Onyango vs Republic*, Criminal Application No. 32 of 1990 (UR), the Court of Appeal set out the following principles:-

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused
- iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

67. Based on the foregoing analysis of the evidence presented before the trial court, I find that the prosecution failed to establish the 2nd and 3rd appellants' guilt beyond reasonable doubt. The evidence relied upon by the trial court was largely circumstantial, speculative, and insufficient to sustain a conviction. To convict the 2nd and 3rd appellants on such shaky grounds would be a miscarriage of justice.
68. Consequently, the 2nd and 3rd Appellants' appeal succeeds in its entirety. Their conviction is hereby quashed and the sentence imposed against them is hereby set aside.
69. Tom Ouma Aero and Ruth Atieno Ouma the 2nd and 3rd appellants respectively are set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JANUARY 2025

D. KAVEDZA

JUDGE

In the presence of:



Mr. Mutuma for the respondent

Mr. Oringe Waswa for the 2nd and 3rd appellants

Appellant 1- present

Appellant 2- present

Appellant 3 – present

Achode – court assistant

