



**Hamsa v Republic (Criminal Appeal E023 of 2023)
[2025] KEHC 11490 (KLR) (Crim) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E023 OF 2023
SC CHIRCHIR, J
JULY 30, 2025**

BETWEEN

SULEIMAN RAJAB HAMSA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Hon. L. Mutai in criminal case number E582 of 2023 of the Chief Magistrates Court at Isiolo delivered on 3rd September 2024)

JUDGMENT

1. The Appellant was convicted by the Trial court of the offence of Trafficking in Narcotic Drugs Contrary to Section 4 (a) (ii) of the Narcotic Drugs and Psychotropic Substances Control (Amendment) [Act No.4 of 2022](#) and sentenced to serve 15 years imprisonment.
2. The particulars of the offence are that on the 29th day of September, 2023 at Kwa Mungania trading centre along Subuiga-Isiolo road in Meru within Meru County, he was found trafficking in zero point zero eight five(0.085) kilograms of cocaine with a street value of Kenya Shillings Three Hundred and Forty Thousands (340,000/=) in motor vehicle registration number KCU 746Y a Nissan Matatu belonging to Inana Sacco, which was not medically prepared.
3. He was aggrieved by both the conviction and sentence and has proffered this Appeal.

Petition of Appeal

4. The Appellant filed two petitions . The later petition having been filed with the submissions. I have noted that the Appellant is unrepresented, and in his first petition he had indicated that he would wish



to change the grounds once he gets the proceedings. I will therefore treat the grounds filed alongside the submissions as the relevant ones. The grounds are as follows:

1. That the learned trial magistrate erred in matters of law and fact by failing to note that there was enough evidence to prove that the appellant was arrested together with another person, but he was released with(sic) unknown circumstances.
 2. That the learned trial magistrate erred in matters of law and fact by failing to note that there was no evidence adduced by the prosecution to establish the street value of the alleged narcotic drugs as stated in the charge sheet.
 3. That the learned trial magistrate erred in matters of law and fact by failing to note that the defence tendered was water -tight and eroded the prosecution case hence created doubt which ought to have been settled in favour of the appellants.
 4. That the learned trial magistrate erred in matters of law and fact by failing to note that the key witnesses were not called upon to testify.
 5. That the learned trial magistrate erred in matters of law and fact by failing to note that the sentence was harsh and excessive in the circumstances of this case.
5. The Appeal proceeded by way of written submissions

Appellant's Submissions.

6. The appellant submits that the trial magistrate failed to analyze the evidence on record and consequently drew wrong inferences from the same :that there was variance between the testimony of PW2 and PW4 and hence their evidence should have been treated with caution; that the conviction was based on unreliable circumstantial evidence and mere suspicion. It is further submitted that the prosecution did not adduce evidence to support the street value of the narcotic drug stated in the charge sheet; that there was no expert called to determine the weight of the drugs
7. It is the Appellant's further submissions that some key witnesses were not summoned.
8. The appellant also contends that the sentence meted out was harsh and excessive in the circumstances of his case.

Respondent's submissions.

9. On whether the Appellant was found transporting the drugs , the respondent submits that the evidence of PW2, PW4 PW5 and PW6 was corroborated by PW3 on the fact that the Appellant was in the subject vehicle , and was found carrying drugs and that the photographs of the drugs were taken. On whether the substance found with the Appellant were narcotics, the respondent has relied on the testimony of the government analyst whose findings were that the substance was a mixture of heroine and cocaine; that there was evidence that the drugs weighed 0.085 kilograms and that there is evidence that the Appellant had travelled from Nairobi while in possession of the drugs.
10. The respondent further submits that the value of the drugs is only relevant on sentencing. . On failure to summon the Appellant's fellow passenger(s) it is submitted that the witnesses called were sufficient to prove their case without the need for more witnesses.
11. On sentence it is submitted that the trial court took into consideration the Appellant's mitigation and the sentence of 15 years was in any event, lenient.



Analysis and determination

12. This being a first appeal, the duty of the first appellate court is as was set out in the case of - *Okeno v. R* [1972] EA where it was held: “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *Shantilal M. Ruwala v. R* [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See *Peters v. Sunday Post* [1958] EA 424”.
13. I have considered the grounds of appeal, the evidence on record, and the Appellant’s written submissions, and find that the key issues for determination are as follows:-
 - a. Whether the prosecution proved its case beyond any reasonable doubt.
 - b. Whether some crucial witnesses were left out
 - c. whether the sentence imposed on Appellant was harsh and excessive in the circumstances .

Whether the prosecution’s case was proved beyond reasonable doubt

14. The Appellant faced a charge of trafficking in Narcotic drugs contrary to section 4(a)(ii) of the Narcotic drugs and psychotropic substances control Act (The Act). The drugs were stated to have weighed 0.085 kilograms and valued at ksh. 340,000. Section 4 of the Act set out the particulars of the charge in the following terms:
 - a). Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her 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—
 - (i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;
 - (ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;.....”
15. The term “trafficking” is defined in Section 2 of the Act to mean: – “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.”
16. The high court, in the case of *Timami v Republic* [2024] KEHC 634 (KLR) expounded on the above ingredients of the charge as follows:



- a. The act of knowingly possessing, manufacturing, selling, buying, transporting, or otherwise dealing with narcotic drugs or psychotropic substances.
 - b. The Act must prohibit the substance.
 - c. The quantity must be more than for one's consumption.
 - d. The prosecution must establish that the accused intended to engage in trafficking or dealing with narcotics, or an inference of such intention may be discerned from the circumstances".
17. On the evidence , the Chief Inspector of police (PW5) testified that on 29/9/2023 at 11:00 am ,he received a call from Nairobi. He was informed that somebody had entered Inana Matatu, which was from Nairobi to Isiolo. The person in question had a grey trouser, black cap, 4 finger rings and black jacket. He was further informed that the suspect could alight at Subuiga junction. He went to the named junction but the named the vehicle passed by and took Isiolo direction. He alerted his colleagues who were ahead, and the vehicle was intercepted at Kwa Mungania Area, and a suspect who matched the description given was arrested. He joined his colleagues and escorted the two suspects to Isiolo Police Station, and recovered the drugs.
 18. PW2 testified that PW5 informed him of a suspect ferrying suspected narcotic drugs from Nairobi towards Isiolo in a Motor Vehicle Reg. No.Kcb 746Y Nissan Matatu . Together with his colleagues, they laid ambush at Subuiga and at Kwa Mungania area along Meru-Isiolo Highway. The motor vehicle approached and he stopped it. He stood by the door and the accused alighted with a bag which had 2 envelopes. One envelope had 2 packets of lizra papers and the other had a container written "matrix". They suspected the contents to be Narcotic drugs. They searched the customers and later released them. He further testified that all passengers except the accused were released, as they had nothing relevant. An inventory was prepared and was signed by PW5, the accused and another officer. The testimony of PW4 another police officer, mirrored that of Pw5.
 19. The driver of Nissan Matatu Registration No. KCU 746Y also testified.(PW6) He told the court that on 29/9/2023 upon reaching Kwa Mungania, he was stopped by police. They opened the passenger's door and two men were told to come out. He was ordered to drive the vehicle to police station which he did. At the police station a search was conducted before the motor vehicle was released. That two men were driven away in the police vehicle and one of the two was the accused before the court
 20. Thus from the evidence of PW2 and PW6 it is evident that the Appellant was found with two envelopes with substances that were later established to be Narcotics. He was in a vehicle which left Nairobi and was headed to Isiolo. The Appellant was therefore conveying the drug from Nairobi to Isiolo. The first ingredient was therefore proved.
 21. On whether the substance was a prohibited substance, the (PW1) the Government Analyst testified that on 24/10/2023 PC Nicholas Yano of Isiolo Police Station took to their laboratory 31 sachets containing powder- like substance which he was told to analyze. On testing them, he established that the substance contained heroin at 30%, and cocaine at 10%. Both substances are classified as narcotic drugs under Schedule 1 of the Act and prohibited as per section 4(a) (ii) as aforesaid. Further , the Appellant In his defense, stated that he witnessed the weighing of the alleged drugs and signed the document voluntarily
 22. PW2 told the court that the substance was weighed and found to weigh 0.085 kilograms . A weighing certificate was prepared and the Appellant signed. The Appellant has argued that there was no evidence showing the value of the drugs. However the value of the drugs , only becomes relevant at sentencing, not at conviction, and only if the fine imposed has been pegged to the market value of the drug. (see



section 86(1) of the Act) .. I find support in the court of Appeal decision in the case of Antony Mbiti Kasyula v Republic [2015] KECA 882 (KLR) where the court stated:

“...Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under section 4(a) of the Act, the value of the drugs do not constitute the ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs to wit:

23. In the present case, no fine was imposed and therefore the value of the drug became immaterial. What was material, in terms of section 4(a) (ii) was the weight of the drug, and on that , there was sufficient proof as aforesaid.
24. On whether the Appellant intended to traffic the drug, the Appellant was travelling in a Matatu from Nairobi towards Isiolo. According to PW2, the drugs were in a container written “matrix” and a sealed lizra paper . The box and lizra paper were each in an envelope. The two envelopes were then put inside a carrier bag. The thorough concealment and the fact that the Appellant was travelling from one county to another shows that the Appellant’s intention was one of trafficking .

Whether some crucial witnesses were left out

25. The Appellant has argued that the prosecution should have called a passenger that was sitting next to him to be their witness. This complaint is devoid of merit. How could a fellow passenger have known what the Appellant was carrying, particularly when one considers how the drugs were concealed as earlier stated? Such a passenger would have been of no use. Am satisfied that the witnesses called by the prosecution were sufficient to prove their case.
26. The other issue raised by the Appellant is what he calls the contradiction between the testimony of PW2 and PW4, and the contradiction referred to is whether the Appellant was arrested with one other person or not. The contradiction, did not prejudice the Appellant and did not cause any damage to the prosecution’s case in as far as their prosecution of the Appellant herein is concerned. The charge was not one of conspiracy. In other words, whether there was a co- suspect has no bearing to the Appellant’s trial and conviction, for each must carry his or her cross. This complaint too is unmerited
27. Turning to the Appellant’s case, he admitted that he was travelling from Nairobi to Isiolo on the material day. He denied that he was arrested while carrying drugs. On cross- examination however he told the court that he voluntarily signed the weighing certificate. The Appellant’s denial therefore flew in the face of his admission that he signed the weighing certificate.
28. In view of all the foregoing , am satisfied that the Appellant was rightfully convicted .

The sentence

29. On whether the sentence was excessive, the section under which the Appellant was charged provides for : “ fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;
30. In the present case the court did not impose any fine, but sentenced the Appellant to 15 years prison term. The Appellant has argued that the use of the word “liable” connotes that the court can impose a lesser sentence than that prescribed. This is the correct position. However, a sentence of 15 years against liability for up to 50 years cannot be said to be excessive, to warrant the intervention of this court.



31. In the end, the entire Appeal fails and the findings of the court below upheld.

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 30TH DAY OF JULY 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo- Court Assistant.

Suleiman Rajab- The Appellant

Mr. Ngetich for the state.

