



REPUBLIC OF KENYA



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**Ekare v Republic (Criminal Appeal E005 of 2022)
[2024] KEHC 2389 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 2389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E005 OF 2022
JN ONYIEGO, J
JANUARY 29, 2024**

BETWEEN

JULIUS NKOLONG EKARE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. C. Maundu (C.M.) and rendered on 18.01.2022 in Criminal Case No. 366 of 2020 at the Chief Magistrate's Court at Garissa)

JUDGMENT

1. The appellant was arrested and arraigned before the Chief Magistrate's Court at Garissa on 08.06.2020, charged 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 (herein "the Act").
2. The particulars of the charge were that Julius Nkolong Enkare, Adam Gituma Mugambi and Mohammed Jelle Adan on 07.06.2020 at around 0200hrs at Kambi Samaki in Benane Division within Lagdera Sub County, Garissa County were found trafficking narcotic drugs to wit 446Kg of cannabis sativa with an estimated street value of Kenya Shillings Thirteen Million, Three Hundred and Eighty Thousand Shillings (13,380,000) in a motor vehicle registration number KCL 015Y Isuzu Lorry in contravention of the said [Act](#).
3. The appellant pleaded not guilty and the case proceeded to full hearing. The prosecution case was supported by evidence of six (6) witnesses.
4. At the conclusion of the case, the trial court rendered a judgement dated 18.01.2022 stating that the prosecution had proved its case beyond reasonable doubt. The court subsequently convicted the appellant and sentenced him to serve twenty (20) years imprisonment; and in addition, a fine of Kes.40,140,000 or one-year imprisonment.



5. However, the appellant being aggrieved by the decision of the trial court appealed against the said judgment via an amended petition of appeal filed in court on 11.10.2023 citing grounds that:
 - i. The trial magistrate erred in law and in fact in convicting the appellant on defective charges.
 - ii. The trial magistrate erred in law and in fact in convicting the appellant without having regard to the credibility of the prosecution witnesses.
 - iii. The trial court erred in law and fact by holding that he was the driver of the alleged mv carrying cannabis.
 - iv. The trial magistrate erred in law and in fact in convicting the appellant and thereafter sentencing the appellant without considering his defence.
6. The appeal was disposed off vide filing of submissions which I have considered. The appellant filed his submissions on 11.10.2023 thus contending that the charge sheet with which he was charged was defective as the exact value of the alleged narcotic drugs could not be determined. That the said value was not captured on the charge sheet and the supposed place or market wherein bhang is sold so as to capture the value of the said drugs.
7. On credibility of the prosecution witnesses, the appellant urged that the witnesses could not tell exactly when he was arrested. That the inventory as produced by PW6 implied that the same was prepared well before the arrest was made. That the whole set of the prosecution evidence was contradictory and therefore unsafe to be relied on to return a conviction. He placed reliance on the case of *Ndung'u Kimanyi v Republic* (1979) KLR 282 where the court was of the view that a witness in a criminal case ought not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or do something which indicate that he is a person of doubtful integrity.
8. That evidence acquired from such a witness would thus be considered unreliable. He faulted the trial court for being eager to return a conviction without due regard to his evidence. He urged this court to consider afresh the evidence adduced before the trial court and thereafter reach a decision quashing his conviction and setting aside his sentence.
9. Mr. Kihara for the respondent filed submissions dated 25.09.2023 thus contending that the offence preferred was proved to the required standard and the same should therefore be upheld. That the sentence invoked by the trial court was not only legal but also appropriate in the given circumstances. The respondent urged this court to find that the appeal lacks merit and should thus be dismissed.
10. PW1, Mohamud Hussein Abdullahi stated that on 07.06.2020 at around 2.00 a.m., he received a call from an informer telling him that there was a lorry coming from Wajir going towards Garbatulla through Modogashe and that the same was carrying bhang. That together with his colleague, Osman Mohamed, they went to Wajir Garbatulla road where they saw a lorry registration number KCL 015Y approaching and upon signaling it to stop, the driver declined.
11. It was his evidence that the vehicle was being driven by the 1st accused person, the appellant herein while the 2nd and 3rd accused persons were passengers who were all in the cabin. He stated that when he asked them what they were carrying the trio told him that they were not carrying anything and so, upon checking inside the lorry, they found 13 bags which contained goods. That inside one bag, there were dried leaves. He testified that he called Chief Rage and informed him but the Chief told them that the substance could be bhang. That they instructed the driver of the motor vehicle to park it by



- the road side and later on, escorted the vehicle to Benane police station and thereafter to Modogashe Police Station.
12. PW2, Abdullahi Ibrahim testified that on 06.06.2020, he received information from PW1 that there was a vehicle coming from Modogashe direction heading to Gabatulla. That he joined PW1 and together laid ambush on the road till 2.00 a.m. when a lorry came by but declined to stop despite being signaled to. He stated that PW1 shot in the air thus compelling the driver to stop the MV. It was his evidence that upon checking the vehicle, they noticed that therein were 13 bags which contained wrapped polythene bags which they suspected to be bhang. That they called police from Benane Police Station who went at the scene at about 5.00 a.m. thus arresting the trio.
 13. PW3, Vivian Gacheri Mupekatho stated that she is a government chemist who upon receiving an envelope marked A1 -90 from Cpl. Talamu, examined the same with a view to establishing whether the dried leaves were bhang. That upon carrying out various tests, she reached a determination that the same was bhang. That she prepared her report dated 03.07.2020 noting that the said dry substance was bhang. She produced the envelopes having the dried leaves and her report as Pex 1 and 2 respectively.
 14. PW4, Phillip Langat testified that on 07.06.2020, he received a call from PC Talamu of DCI North Eastern Province informing him that he had arrested three suspects with bhang weighing 446Kgs. That Talamu informed him that he had wished to prepare a charge sheet for bhang valued at Kes. 12,380,000.00. That on 30.07.2020. Talamu presented him a government chemist report confirming that the said substance obtained from the motor vehicle herein was indeed bhang. He testified that being a gazetted officer vide a notice No. 9805, he prepared a valuation certificate in compliance with section 86 of *Narcotic Drugs and Psychotropic Substances Act*. He produced the valuation report and gazette notice as exhibits as Pex 5a and b respectively.
 15. On cross examination, he reiterated that after being presented with the report from the government chemist and the charge sheet, he managed to gather intelligence on the value of the bhang. That he knew how bhang is sold and produced in the market.
 16. PW5, Francis Muriuki testified that while at Benane Police Station, he received a call from Chief Rage informing him that they had intercepted a lorry with 3 occupants which had suspicious goods. He stated that they believed the same to be narcotic drugs. That together with IC Owino and Sgt Shidiye, proceeded to the scene where they found the three occupants and the subject motor vehicle. That inside the motor vehicle, were 13 sacks containing suspicious substance. According to him, they escorted the suspects to Benane Police station and thereafter to Modogashe Police Station where they booked them. That they found 90 bales weighing approximately 446Kgs of the suspicious substance.
 17. PW6, Ezekiel Talamu, the investigating officer stated that on 07.06.2020 at around 1400hrs, he received a call from chief Inspector Benson Musyoka who told him of the case herein. That he went to Modogashe Police Station where PC Muriuki and PC Owino handed over three suspects to him together with 13 sacks which were in a lorry registration No. KCL 015Y; that the appellant herein was amongst the three persons. That he weighed the 90 bales of the dried substance and found the same to be 446Kgs; thereafter, he took an inventory which he produced as Pex 8. He further stated that he recorded the statements of the witnesses and the accused persons and thereafter preferred the charge herein against the suspect.
 18. DW1 in his sworn testimony stated that on 14.04.2020, he was given a long leave by his employer and therefore, he joined Meru Lorry Transporters which is a registered Sacco where he got a job as a driver. That on 06.07.2020, he was given goods to take to Kianjae, Laare and Mau and upon offloading the goods, embarked on a journey to Modogashe where he was to deliver two motor cycles. It was his case



that upon reaching Kambi Samaki, they were stopped by people who asked them whether they were carrying liquor.

19. That the said person called the OCS and later on, they got arrested and charged with the offence herein. He stated that when they reached Benane Police station, they were locked and upon reaching 11.00 a.m. they were removed from the cells and thereafter photographed with the said bags that had previously been loaded in the lorry. He told the court that the bags were offloaded and thereafter weighed; that the weight was 445 Kgs as the bales were 90. He denied committing the offence as he pleaded with this court to note that the said bhang was planted on them.

20. I have considered the grounds of appeal, the arguments advanced herein and the materials tendered before the trial court. Issues for determination are; whether the charge sheet was defective; whether the prosecution proved its case against the appellant to the required degree; and whether the sentence was excessive.

21. On the first issue, the appellant contended that the charge sheet was defective as it used the term transportation which is not found under section 4(A) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) which states that

“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.”

22. Section 2 of the [Act](#) defines “trafficking” as:

“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, but does not include –

- a) The importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefore under this [Act](#) in accordance with the licence;
- b) The manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefore under this [Act](#) in accordance with the licence; or
- c) The selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this [Act](#), or any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or
- d) The selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist.

[Also See the case of [Said Mohamed v Republic](#) [2019] eKLR].



23. On the ground that he was charged using a defective charge sheet, the appellant's grievance is mainly related to the value of the bhang and the dates upon which arrest was made. The appellant decried that the initial value of bhang as indicated in the previous charge sheet was Kes. 1.5 million but the same was later amended to read Kes. 13,380,000. In addition to the value, he desired to know the location of the supposed bhang market where such values are obtained. I have perused the record and indeed I note that some of the prosecution witness contradicted one another in reference to the date when the arrest was made.
24. The question that I ask myself is whether the anomaly rendered the charge sheet defective? The court in *JMA v R* [2009] KLR 671 held that not all defects in a charge sheet will render a conviction thereunder invalid. The Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [AIR. 1956 Madras Weekly Notes 391], held that: -
- “Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”
25. Similarly, in the case of *Isaac Nyoro Kimita & another v R* [2014] eKLR the court stated as follows: -
- “In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?” [Emphasis added].
26. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?
27. Looking at the record and the evidence as a whole, I am convinced that the appellant did understand the nature of the charges against him. Whether the word transporting was used instead of trafficking is a question of semantics. The two words refer to the same thing hence there was no substantive defect capable of confusing anybody from understanding the charge. It is quite clear from his cross examination questions to the prosecution witnesses that he understood that he was accused of trafficking narcotic drugs and therefore I find that the same was curable under section 382 of the *CPC*. [See the Court of Appeal decision in *Benard Ombuna v Republic* [2019] eKLR].
28. Concerning the claim that the appellant was not accorded legal services nor informed of his right to seek legal representation, the same is a baseless ground as each accused person has a right to engage an advocate of his own choice at his own cost.
29. On whether the prosecution proved its case to the required standards, it is not disputed that the appellant travelled to Modogashe hence passing through Kambi Samaki in a lorry registration number KCL 015Y on 06.07.2020 or thereabouts. It is therefore not controverted that the appellant was at the scene where the alleged offence herein occurred.



30. On whether the narcotics were recovered from the motor vehicle, PW1, PW2, PW3 and PW6 testified that they searched the said motor vehicle and recovered 13 sacks containing suspicious substance. PW6 produced the inventory signed by the appellant in support of the prosecution case. In his defence the appellant stated that the officers planted the said bhang on him. He denied the narrative that bhang was recovered from the lorry he was driving.
31. I have considered the competing evidences on record and there is no evidence that the appellant was forced to sign the inventory. There is no doubt that the prosecution evidence was clear as to the recovery of the said drugs from the lorry, KCL 015Y. The evidence of the defence did not displace that of the prosecution. The evidence of prosecution witnesses is so consistent and well corroborated leaving no room for any iota of doubt. The arresting officers had no grudge with the appellant so as to look for a huge consignment of 13 bags of bhang with the intention of framing him up yet they were strangers to each other.
32. On whether the consignment and pellets found were narcotic drugs, PW3, the government chemist, told the court that she received an envelope marked A1 -90 from Cpl. Talamu. That she established that the dried leaves were bhang. From the evidence on record, I find that the bales confiscated was bhang (cannabis).
33. On his desire to know how the value of bhang was arrived at, PW4 clearly testified on how he settled on the value being contested herein as the same is supported by the law.
34. The appellant contended that the trial magistrate erred in law and in fact in convicting him when the value of the alleged narcotic drugs was not properly determined.
35. Section 86 of the [NDPSCA](#) outlines the procedure of determining the value of narcotics drugs as follows: -
- ‘Valuation of goods for penalty (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.
36. PW4 testified that upon being presented with a charge sheet and government chemist report confirming that the said substance obtained from the motor vehicle herein was indeed bhang, being a gazetted officer (vide a notice No. 9805), he prepared a valuation certificate in compliance with the provisions of the [NDPSCA](#). He reiterated that he managed to gather intelligence on the value of the bhang. That he knew how bhang is sold and produced in the market. In regards to the above therefore, the ground by the appellant that he was not aware on how the value of the bhang was reached at is found wanting as the same was clearly enumerated by the witness. The charge sheet talks of street value which is subject to estimate. Unless the appellant is asking for the specific street which is not realistic, I find the said ground of appeal baseless.
37. On whether his defence was considered, I have perused the judgment by the trial court. It is my considered view that the allegation is not true as the trial court noted that the appellant’s defence could not cast a shadow of doubt on the prosecution’s case and thus was rightly dismissed.
38. On sentence, Section 4 of [NDPSCA](#) on the penalty for trafficking in narcotic drugs, provides 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

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- (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
- (b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years.

39. The appellant was sentenced to serve twenty (20) years imprisonment and in addition, a fine of Kes. 40,140,000 or one-year imprisonment. However, taking into account the mitigation on record and the value of the narcotic drugs involved, I find the sentence meted out to be a bit excessive in the circumstances. Accordingly, the sentence of 20 years is substituted with 10 years imprisonment. In addition, Appellant to pay a fine of Kes 5,000,000 instead of Kes 40,140,000 in default serve one-year imprisonment. Sentences to run concurrently.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2024

J. N. ONYIEGO

JUDGE

