



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjiru v Republic (Criminal Appeal E051 of 2023)  
[2024] KEHC 3525 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3525 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E051 OF 2023  
DKN MAGARE, J  
MARCH 18, 2024**

**BETWEEN**

**SAMUEL GACHARA WANJIRU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with possession of Narcotic drugs contrary to Section 4(A) 1 of the Narcotic Drugs and Psychotropic Substances Control Amendment Act 2022. No such section exists. The proper section is under the Narcotic Drugs and Psychotropic Substances Control Amendment Act 1994 as amended by the Narcotic Drugs and Psychotropic Substances Control Amendment Act 2022.

However, nothing turns on this for now as it has not been raised in the Appeal. The Particulars of the charge were that: -

on 4/7/2022 at around 00300 hours at Karatina Town in Mathira East Sub-county within Nyeri County, the appellant, was found in possession of 46 rolls of bhang with a street value of Ksh 2,300/-

2. The total value of the drugs was said to be 2,300/=. This means the street value was Ksh 50 per roll. For the said offence, the court found him guilty and sentenced him to 5 years in prison on 3/8/2023. The court also made a glaring error, by noting stating that the sentence was to rum from the date of Arrest. This is in line with section 333(2) of the Criminal Procedure Code, which provides as doth: -

“ 333. Warrant in case of sentence of imprisonment

- (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued



by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

3. Taking into account is not simply having regard. It is a mathematical question. The period before sentencing is to be mathematically removed from the sentence. This was the first error on the face of the judgment.
4. The Appellant had an alternative count of preparing to commit a felony. The charges were read on 5/7/2022. The Appellant pleaded not guilty.
5. The Appellant was released on 300,000/= cash bail on 20/7/2022. On 14/9/2022 on 14/9/22 the cash bail was reduced from 300,000/= to 50,000/= and Bond of 70,000/=. On 19/10/22 the first witness testified. He stated that he was on patrol at Karatina township at Ibis Hotel near the Thioni building. He was with the OCS Christopher Ochieng PC David Ntaaban and Constable Sadia Halima.
6. He was called that 3 boys were disturbing people by snatching thing and stealing. The OCS met the 3 but one ran away. The Appellant had 46 rolls of bhang in the bag. There was a knife on the right hand side of his bag. The Appellant raise issue that the case is not for Samuel Wanchi Wanjau.
7. PW2 PC David Katinga stated that they were patrolling at 1230 am, after receiving information that people were stealing. They managed to arrest the Appellant. They recovered bhang and a knife. There were discrepancies whether they were on the right for left side. However, this depend on the side the officers were viewing the bag. The investigating officer sent the bhang to the government chemist. It had an error but covered the same exhibit and as such nothing turns on the error. The government chemist produced the report.
8. The OCS produced the letter to the government chemist. The appellant was put on his defence. The Appellant indicated that he was charged because of the grudge arising from another case by one Katinga. He did not indicate why the OCS and others were against him.

### **Analysis**

9. The question before the court was whether the Appellant was in possession of cannabis sativa contrary to Section 4 (A)1 of the Narcotic Drugs Amendment Act, 2022.
10. The appellant was searched after he was found running away at midnight in an array. There was a probable cause to search him. The bhang was found on him. The evidence of PW2 was not challenged. The challenge was why the Appellant was not charged with stealing. The second challenge was the name on the government chemist’s report.
11. CI Benson Ochieng was the officer commanding station Karatina. He was challenged over the issue of theft. The Appellant had not been charged with stealing. The cross-examination was thus irrelevant.



12. Corporal Stanley Kiplangat, testified how the Appellant was arrested. He testified on what was found. Cross-examination was on the case of Samuel Wangeci Wanjau. There were no questions relating to the bag and knife together with the contents.
13. Susan Wanjiru Ngugi works with the government chemist. She testified on the cannabis sativa. She explained the disparities in names in one of the reports. the court analyzed the evidence. Contrary to the postulation by Appeal, the evidence was cogent. There was no contradiction. The report from the government chemist was succinct that the substance was bhang. The appellant made heavy weather on the name of the accused. The exhibit memo related to the Appellant.
14. The government chemist was under no duty to indicate the accused. Her duty was to examine the substantive accompanying the exhibit memo. She duly did the purported discrepancies do not have merit. In the circumstances, the Appellant was properly convicted on count one was proved.
15. I dismiss the pale on conviction. The case against the Appellant was properly proved.
16. On sentence, the Appellant was sentenced to 5-years imprisonment. The Appellant was said to have been convicted in 4 other cases. 3 of the cases related to Public Order or suppression of Covid-19. I shall not have regard to these in considering sentences. The most crucial was possession of narcotics contrary to section 3(2)a of the Narcotic Drugs and Psychotropic Substances Control Act. He was ordered to serve 2 years probation.
17. The act places the burden of proof on the use of cannabis. This takes away the right of the Accused not to admit or incriminate himself. Section 3 (2) cannot be fulfilled unless the accused allows a breach of the right not to self-incrimination.
18. The said section stated as follows: -

“(2) A person guilty of an offence under subsection (1) shall be liable

- (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a 2 Narcotics, Drugs and Psychotropic Substances (Control) (Amendment) No.4 term of not more than five years or to a fine of not more than one hundred thousand shillings;
- (b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where a person is in possession of less than one gram, to a fine of not less than five million shillings, or to imprisonment to a term of not less than five years, or to both such fine and imprisonment; and
- (c) to, in addition to the sentences in paragraph (a) and (b) respectively, committal to appropriate court-appointed treatment programme or to voluntary submission to a rehabilitation programme for a period not less than six months, where the court deems fit.”

19. It is not a section that deals with matters within the knowledge of the Appellant. It is this section 3 (2) (a) of the narcotics, drugs, and psychotropic substances is unconstitutional to the extent it bases



sentence on the accused persons to show the use of the cannabis. It should be the other way around, the states to show it was not for personal consumption.

20. Article 49 provides as follows: -

“Rights of arrested persons (1)

An arrested person has the right— (a) to be informed promptly, in language that the person understands, of

- i. the reason for the arrest;
  - ii. the right to remain silent; and
  - iii. the consequences of not remaining silent;
- (b) to remain silent;
- (c) to communicate with an advocate and other persons whose assistance is necessary;
- (d) not to be compelled to make any confession or admission that could be used in evidence against the person;

21. The right to remain silent is inconsistent with the right to explain whether the cannabis was for sale or consumption. The appellant cannot be asked to admit the use of cannabis without admitting guilt.

22. To the extent that the act places the burden on the Appellant, the same is contrary to the right to remain silent from arrest till the conclusion of the case. This must be contrasted with section 111 of the [Evidence Act](#).

23. The said section provides as doth: -

111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

- (2) Nothing in this section shall - (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist, or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.



24. The aspect of proving the use of Narcotics is not part of the offence created. Therefore, the section is an unnecessary affront to the right to be presumed innocent. In any case, *the constitution* places the right to a lesser sentence to the accused. Therefore, in the absence of proof that the cannabis was for sale an accused person is entitled, without more to the lesser of the sentences. The burden to prove sale can easily be proved if the quantity is huge. What constitutes huge, turns on facts of a particular case.
25. The Appellant asked for pity. An accused person does not need to admit guilt for them to have lenience. Article 50 (2) p provides for courts to incline to lesser sentences. It provides as follows: -
- “to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;”
26. This also applies where there are 2 sentences provided for a particular offence as in this case. In the case of the two sentences for one offence, the court must incline towards the more lenient sentence unless the state proves that the factors for a more stiff penalty obtain.
27. The offence charged through serious, did not include trafficking. Asking for a chance for rehabilitation is an admission of a need for help. To punish a man in need of help by sentencing him to 5 years in prison is harsh. This was not a haul of a sack of cannabis but just 46 rolls.
28. The appellant has been in custody since 4/7/22 this is a period exceeding 1 year and 8 months. This period is sufficient for the amount of cannabis that he was in possession of. I therefore reduce the sentence to the period served. This means the appellant has served his full term.
29. In the circumstances I reduce the sentence to the period served. The Appellant shall be released forthwith unless otherwise lawfully held.

### **Order**

30. In the circumstances, I make the following orders: -
- a. The Appeal on conviction is dismissed.
  - b. The Appeal on sentence is allowed. The sentence is reduced to the period served. The appellant shall be released forthwith unless otherwise lawfully held.
  - c. Section 3(2)(a) of the Narcotics and Psychotropic Substances is unconstitutional to the extent that it places the burden of proof of the use of cannabis, on an accused person as it offends the constitutional protection against self-incrimination and the right to remain silent. An accused is entitled to the lesser period unless the prosecution proves the Narcotics and Psychotropic Substances were not for personal use. The burden of prove, even on use remains with the state as the possession must be presumed to be for personal use unless otherwise proved by the state.

**DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 18<sup>TH</sup> DAY OF MARCH, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Appellant present



Mr Mwakio for the state

Court Assistant – Milicent /Kimoine

