



**Matunda v Republic (Criminal Appeal E105 of 2022)
[2024] KEHC 6560 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E105 OF 2022**

LW GITARI, J

MAY 24, 2024

BETWEEN

EMMANUEL WILLIAM MATUNDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotics and Psychotropic Substances (Control) Act No.4 of 1994 and sentenced to serve 25 years imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal dated 17.08.2022.
2. The particulars of the offence being that on 3.11.2019 at around 0040 hrs. at Wamba junction along Moyale-Isiolo high-way in Samburu East Sub County within Rift Valley Region while on board a PSV motor vehicle REG. No. KBX 445M, was found trafficking by engaging in conveyance of Cannabis sativa (bhang) approximately weighing 15 kg and of approximate street value of 150,000/ contrary to the Said Act which was not in medical preparation form.
3. The grounds of appeal are that:
 1. The learned trial magistrate erred in both matters of Law and fact by failing to note that PW1, PW2 and PW3 gave contradictory evidence.
 2. That the learned trial magistrate erred in both matters of law and fact by failing to note that the sentence is harsh and excessive.
 3. That the trial magistrate flouted in matters of fact and law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt.



4. That the trial magistrate flouted in matters of fact and law by failing to note that there were no photos adduced before court to connect the appellant with this case.
5. That the trial magistrate flouted in matters of fact and law by failing to note that the incident took place at night thus the identification of the appellant was not proved beyond reasonable doubt.
6. That the trial magistrate flouted in matters of fact and law by failing to note that there was no search conducted by the conductor when the appellant boarded the alleged bus as usual.
7. That the learned trial magistrate erred in both matters of Law and facts by failing to note that there was no receipt adduced by the conductor to prove that the alleged bags(luggage) belongs to the appellant.
8. That these grounds have been highlighted without the court records and since I cannot recall everything that transpired during the trial I now beg this honourable court to furnish me with the court proceedings and judgement to draft grounds that are more cogent during the hearing of this appeal.
9. That he prayed to be present during the hearing of the appeal.
He prays that conviction be quashed and sentence be set aside and he be set at liberty.

Submissions

4. The appeal was canvassed by way of written submissions and wherein the appellant while relying on his submissions dated 14.06.2023 contended that the trial magistrate erred in matters of Law and fact by failing to note that section 207 of the CPC was not fully complied with. That the trial magistrate indicated that the appellant pleaded guilty in the case.
5. The Appellant submitted that the law is very clear under section 207 of the Criminal procedure code when the accused persons plead guilty. The Appellant relied on section 207 of the CPC.
6. It is the Appellant's submission that if it was true that the appellant pleaded guilty to the charge there was no way the trial magistrate/prosecutor continued to call the witnesses despite that he pleaded guilty to the charge.
7. The Appellant submitted that the trial magistrate erred in matters of law by recording that the appellant pleaded guilty in that charge and the Law is very clear under section 207 sub section 2.
8. The Appellant further submitted that on the trial court judgement the trial magistrate recorded again that the Appellant pleaded not guilty to the charge. The Appellant submitted that the trial magistrate was not keen when he recorded the evidence in court.
9. The Appellant submitted that the learned trial magistrate erred in matters of Law and fact by failing to find that the charge sheet is defective. That the charge sheet indicated that the drug is 15 kg but the report from the government analyst indicated that the exhibit received are three bags.
10. The Appellant submitted that the issue at hand are the clear provisions of sections 134 of the Criminal Procedure code. The Appellant further submitted that it is an established position that where a charge sheet does not allege the essential ingredient of the offence, then it is defective. The Appellant relied in the case of Sigilani vs Republic.
11. The Appellant submitted that the learned trial magistrate erred in both matters of law and fact by failing to note that there was contradiction and inconsistency in the evidence adduced by the



- prosecution witnesses. The Appellant further submitted that the trial magistrate erred in matters of Law and fact by failing to find that the prosecution witnesses gave paradoxical testimonies in the case.
12. It is the Appellant's submission that the prosecution witness shows that there were three different vehicles at the scene of crime that is KBX-104, KBS-445M and KBX 445 M.
 13. The Appellant submitted that he urged the court to note the contradictions and discrepancies which have marred the testimonies of the prosecution witnesses making the evidence doubtful and therefore, basing a conviction on the same is a grave injustice. The Appellant relied in the case of Richard Munene v Republic (2018)eKLR.
 14. It is the Appellant submission that the evidence of PW2, PW4 and PW6 properly evaluated falls in the category of what the court of Appeal described in Ndugu Kimanyi vs Republic (1979)KLR 282.
 15. The Appellant also relied in the case of Philip Muiruri Ndaruga vs Republic Cr. Appeal no.76 of 2012/2016Eklr.
 16. The Appellant submitted that the questions to be addressed is whether the testimonies adduced by the prosecution witnesses is contradictory on the occurrence of the event and whether the contradictions if any are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. The Appellant relied in the Nigerian case of David Ojeabuo vs Federal Republic of Nigeria and Kenyan cases of Leonard Kipkemoi v Republic (2018)eKLR, Thomas Kitsao alias Katiba vs R.(2015 and the Tanzanian case of Dickson Elias NsambaShapwata & Another v The Republic App No. 92 of 2007.
 17. The Appellant submitted that the learned trial magistrate erred in matters of Law and fact by failing to note that there was need of DNA to be conducted in the alleged t-shirts to prove the case beyond reasonable doubts. That failure by the prosecution to take the alleged t-shirt for DNA analysis is fatal to the prosecution case since it could assist the prosecution to connect the appellant with the alleged drugs.
 18. The Appellant submitted that in a trial if there is any doubt established then the trial should entirely rest in favor of the accused person. That the accused herein is entitled to the benefit of doubt not as a matter of grace or concession but as a matter of right.
 19. The Appellant further submitted that the defence of the appellant is corroborated and he categorically stated that the bags did not belong to him but treachery was invoked by the arresting officers to trick him and fall into the trap and secondly the police officers during the testimonies failed to reveal that there was another person arrested together with the appellant, but the prosecution took him as their witness in the case.
 20. It is the Appellant's submission that the doctrine of recent possession states that at times the burden of proof can shift to the accused under section 111 (1) of the Evidence Act thus the Appellant was candid and demonstrated to the trial court how he travelled through the alleged vehicle.
 21. The Appellant submitted that there was no cogent evidence adduced by the prosecution to connect the Appellant with the case. That there were four people who boarded the vehicle with the Appellant and the same was stated by PW2. That one of the officers was the witness in the matter and the other two were not called to clear the doubt on their side which he now submits that there was possibility of the two being the owners of the alleged drugs.
 22. It is the Appellant submission that no commendable investigation was carried out in regards to the incident. That the trial magistrate failed to scrutinize the evidence adduced before court for proper decision.



23. The Appellant submitted that the evidence tendered by the prosecution witness PW3 who is the driver of the vehicle indicated that he picked the passengers at night and since he told the court that it was a dark and he could not tell if he boarded the vehicle with bags. That it is clear that the bags were inside the bus and therefore he was not found with the alleged exhibit.
24. The Appellant further submitted that there were other passengers who were travelling with the same bus and there is no evidence tendered by the key witnesses to prove that the appellant was the owner of the bags.
25. The Appellant further submitted that the trial magistrate erred in both matters of law and fact by failing to note that the key witnesses were not called upon to testify. That according to the prosecution witnesses they told the court that there was a co-passenger who sat next to the accused who confirmed that the bags belonged to him, but he/she was not called to support the prosecution case.
26. The Appellant submitted that his conviction was peculiar since the trial court magistrate convicted him only basing his argument on evidence of PW2, PW4 and PW6 testimonies which are contradictory and paradoxical. The Appellant relied in the case of *Martin Ndegwa Kabocho vs Republic Criminal Appeal No.163 of 2014eKLR*.
27. It is the Appellant's submission that the question then is what happens where there is no certificate produced to prove the market value of the narcotic drug. The Appellant relied in the case of *Priscilla Jemutai Kolongei v Republic (2005)eKLR*.
28. The Appellant submitted that it was alleged to have been found with 15 kgs of bhang valued at Kshs.150,000/- and the market value given was Kshs 150,000/- That would mean that the value per kilo was Kshs 10,000/-. That the investigating officer only stated that he had experience in investigating drug cases but tendered no evidence in support thereof.
29. The Appellant submitted that the Appellant was alleged to have been found with 15 kgs of bhang valued at Kshs.150,000/. That would mean that the value per kilo is ksh 10,000. That the investigating officer only stated that he had experience in investigating drug cases but tendered no evidence in support thereof. It is trite law that the burden of proof in criminal cases is on the prosecution. The expression burden of proof is the obligation placed by the law on the prosecution to adduce evidence on a particular fact or issue. In criminal cases the prosecution bears the burden of proving the charge beyond any reasonable doubts. This incidence of burden of proof is stated under Sections 107, 108 & 109 of the *Evidence Act*, Cap 80 Laws of Kenya. The prosecution bears the burden to discharge both legal and evidential burden of proof and the burden never shifts. See 462 & *Miller- v- Minister of Pension (1947) All E.R.* The principle is that the prosecution must establish the guilt of the accused beyond any reasonable doubts. I have considered the evidence tendered by the prosecution. I find that the prosecution did discharge the legal and evidential burden to prove the charge against the accused beyond any reasonable doubts. The prosecution tendered evidence to prove that the accused was trafficking in a narcotic drug which was proved to be *cannibas sativas* as per the government analyst report exhibit 1 (a). The appellant had himself signed an inventory, exhibit 8 confirming the exhibits recovered from him.
30. The Appellant submitted that he had no obligation to prove his innocence and the burden of proof lies with the prosecution.
31. It is the Appellant's submission that failure to consider his defence is contrary to natural justice. The Appellant relies on the supreme court of Canada decision in *Rvslifchus(1997) 3 CSR*.



32. Mr. Mwaniki, the prosecution counsel on the other hand submitted while relying on his submissions dated 26.06.2023 that the evidence adduced by the prosecution witnesses was enough to convict the appellant with the current offence as all the ingredients were established. On sentence, it was submitted that the sentence imposed by the trial magistrate was lenient and was to act as a deterrence. He thus urged this court to find that the appeal lacks merit and thus ought to be dismissed.

Analysis And Determination

33. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify. [See *Okeno v Republic (1972) EA 32*].
34. PW1, E Akaeli Otieno, testified as a government analyst at the government chemist. He testified that he had a report from the government chemist which was authored by Nelius Njeru Maingi. That he knew Nelius Maingi since he had worked with him for 9 years and he was conversant with his work, her handwriting and signature. That he had identified the said signature in the report. That she was attending another assignment at Loitoitok and he produced the report on her behalf.
35. PW1 testified that on 16th December, 2019 police officer corporal Amaryami force No.83 878 submitted an exhibit to the government chemist Nairobi and they were 3 bags marked A,B and C Wamba Police station. That the exhibits were accompanied by an exhibit memo and it is before court.
36. PW1 avers that the government chemist was to ascertain whether A,B and C were cannabis. PW1 further avers that Nelius Njeru Maingi undertook the analysis of the exhibit submitted and found it was cannabis which is listed in the Narcotics Drugs and Psychotropic substances (Control) Act. That the exhibits were marked GCK 3283/19NNMJ for identification. That Nelius Maingi completed her analysis on 20th December 2019 and wrote a report on the same and which was before the court and bears her signature which she has identified. He produced the report marked Pex 1a. and the exhibit memo marked Pex1b.
37. PW2 testified as Salesa Abdubs Karaiyo . He stated that he is from Moyale and he is a bus inspector.
38. PW2 testified further that on 3rd November 2019 they left Moyale and reached Marsabit and it was 7.00 pm past Marsabit barrier. That ABC bus was inspected by the police officers. That the officer had then requested that they carry their counterpart aboard their somali bus. That he gave the officers a lift and they paid 600 each for the four officers to Nairobi.
39. PW2 states that amongst the four passengers was the appellant herein. That he then issued each a receipt. PW2 produced the receipt for Matunda marked PMF1-3. That they then reached Archers and found the Multi Agency team. That the vehicle was stopped and passengers searched.
40. PW2 testified that around 11-12 am. The officer identified as Matunda had 3 bags. That one jungle bag and 2 black bags found with bang. That the officers had previously inspected the accused bags in Moyale and he did not suspect that they were carrying bhang.
41. PW2 identified the bags marked PMF1 1-2.
42. PW2 testified that the accused had a jungle military T-shirt marked PMF1-4. PW2 further testified that the officers then took them to Archers Police station and they recorded their statements.
43. PW2 states that they were stopped and every body was told to alight with his bag and the accused alighted with his 3 bags and was searched.



44. PW2 was cross examined by the appellant and he testified that he came to know the accused from that day of the incident. That he has been an inspector but he could not remember the exact years but it almost 3 years.
45. PW2 reiterated that his work entails inspecting everything including passengers and he also issued receipts.
46. PW2 states that when they arrived at the barrier of Marsabit around 7.00 pm-8.00 pm. PW2 reiterated that the passengers at the barrier were only the four of them. That everyone had their own bags and the appellant had 3 bags when he entered the bus.
47. PW2 states that they were requested to give a lift to the officers. That his colleague requested they give him a lift on the assumption that he was a police officer.
48. PW2 testified that he did not search them and he recorded their names in the effects and he did not have to see the appellant police card. PW2 further testified that the bags could not be his and the accused was found with those bags.
49. PW2 states that they were searched between 200-300 kilometers from the part of his origin. That the 3 bags had cannabis sativa and you could see that the items were bhang.
50. PW2 was re examined and he reiterated that he saw the accused entering the motor vehicle with 3 bags and he saw him for the first time on that date.
51. PW3 testified as JAMES KANJA. He testified that he lives in Nairobi and he is the driver of the Isuzu bus Registration No. KBX 104. That on 2nd November 2019 he was coming from Moyale having left Moyale at 2.00 p.m. got a puncture at Sololo and he arrived at Marsabit KBC Police barrier at around 8.00 pm.
52. PW3 stated that he stopped and alighted and all of them were searched. That all customers were inspected and just after passing the barrier he parked for some time to allow the passengers to alight.
53. PW3 testified that he saw a torch directed at him and a police officer came and requested him to assist carry fellow passengers. That he followed him to the conductor and he saw from the side corner passengers entering the bus. That it was dark and he could not tell if they had luggage. That he reached Marsabit and carried more passengers and at 12.00 a.m they arrived at Wamba junction and again they had to stop at the barrier.
54. PW3 stated that everybody was told to alight with their luggage and everybody alighted and he was informed that one passenger had been found with the bhang in the bags marked PMF1-1-2 and it was said that the accused had them and also the appellant was wearing the shirt marked PMF1-5.
55. PW3 testified that as a driver he stays in the car. That the appellant alighted with his bags.
56. PW3 was cross examined and he reiterated that he is a bus driver. That at KBC barrier he saw a torch that pointed at him and he stopped the bus after the barrier. PW3 testified that when the appellant was entering the bus he saw the four passengers through the side mirror entering the bus and he did not bother to see what the passengers were carrying.
57. PW4 testified as Joshua Gathenge Kiiru. He testified that he is currently stationed at RDU Mandera. That on 2nd November 2019 he was attached at Marsabit RDU Camp.
58. PW4 testified that on 2nd November 2019 he was going home from Marsabit going to Ngong Kajiado. That he went to the barrier to take the bus at 6.00 pm. That he found another officer waiting for the bus



- identified as William Matunda. That they waited for a bus and at 8.00 pm a bus came and they talked with the officers at the barrier to get them a bus with Matunda and two other officers beside them.
59. PW4 testified that at 8.00 pm the officers at the barrier sought for a lift for them and bargained for them and they were charged Kshs .600. That they were given a receipt and they continued with the journey. That at Wamba junction they found a barrier and every one was told to alight with their luggage.
 60. PW4 stated that he was at the back of the bus with the appellant. That he alighted with his bag and went to the civilian line. That he then saw the appellant who had gone to talk with the officer. That he then heard the officers asking whose luggage was left there and he stated that it was the accused bags.
 61. PW4 testified that the officers inspected the bags and when they opened he saw one bundle. PW4 further testified that the appellant was wearing the ground sheet when they alighted. That they were directed to go to Archers post police station.
 62. PW4 identified the two black T-Shirt and a jungle T-shirt marked PMF 16. PW4 also identified the bags the appellant had marked PMF1-2ab c.
 63. PW5 was PC Josephat Rukwaro from Archers post police station at crime branch.
 64. PW5 testified that on 3rd November, 2019 at around 0200 hours the multi-Agency team who were manning the road block along Isiolo-Moyale Highway came to the station escorting the appellant and also in possession of 3 bags, two black bags and a green one. That inside the two bags were plant material wrapped in cello tape and were cannabis sativa.
 65. PW5 states that in one bag there was a green military ground shirt and one green military T-shirt and a black T-shirt. PW5 further states that the accused had a pass leave document that was original.
 66. PW5 testified that the cannabis sativa was approximately 15 kgs with a street value of 150,000 and he was booked and charged with that offence.
 67. PW5 produced the 1st black bag marked PMF21, the jungle green bag was marked PMF1-2c and the 2nd black bag there were plant material suspected to be cannabis sativa. That the jungle green t-shirt, two black t- shirt and ground canvas were marked PMF4,5 and 6. He also had a pass marked PMF1-7.
 68. PW5 was cross examined by the accused wherein he stated that he did not know the appellant. That he was not the one who arrested him. He confirmed that he received the exhibits when they were brought at the police station.
 69. PW6, Erick Odinga stated that on 3rd November, 2019 at around 12.30 am when manning a Multi-Agency Team road block at Learata area, together with his colleague they stopped a public service bus of Somali Sacco KBS 445 M. That they ordered everyone to alight and they began their search and before they could start searching the passengers they noted some bags left inside the motor vehicle and they were 3 in number. That the two bags were under the chair and one was on the chair. That they called the conductor who told the owner of the bags to pick the bags for the search and no one came out to pick the bags.
 70. PW6 testified that the conductor identified the person who was sited in the chair and his ticket read the name of "Matunda". He was called out and he said that the bags were not his and the conductor insisted having seen the appellant board the bus at Marsabit.
 71. PW6 further testified that similarly, there was a passenger who was sited next to Matunda who confirmed that the bags belonged to the appellant. That he was arrested and they took him to Archers post police station for further investigations. PW6 states that when they looked inside the bag they had



- bundles which were suspected to be cannabis and the other bag had clothing's identified the exhibits as PMF1-3a, PMF1 2b and PMF1-2C and PMF1-5
72. PW6 further stated that inside the bag was a green T-shirt for AP Officer and a Military T-shirt PMF-4 and there was also a black t-shirt marked PMF1-6. PW6 also identified the receipt marked PMF1-5. PW6 also identified the receipt marked PMF1-6.
 73. PW6 was cross examined by the accused and he testified that the bags were inside the motor vehicle, that he arrested the appellant at the line of search and he did not find him with anything at the line of search. That the bus had many people.
 74. PW7, Derrick Sang testified that on 3rd November 2019 at 0045 hours at Learata area they had stopped a Somali company bus Registration No. KBX 445 M. That they ordered everyone to alight and they conducted a search on the people. That they then went inside the bus and upon search they found a jungle bag and 2 black bags. PW7 testified that inside the bag they found suspect bhang material in brown cello tape. They continued to look further and they found some writings.
 75. PW7 stated that they called the conductor and he began to look for the owner of the bags from the T-shirt and also in the bags there was an A-P T-shirt. PW7 testified that the conductor identified the appellant as the person who was sited with the bags. They also confirmed the name from the receipt. Further the conductor also confirmed the appellant had boarded the bus with the bags.
 76. PW7 further testified that a co-passenger next to the appellant confirmed the bags belonged to him. That when they arrested him they took him to Archest post police station. PW7 identified the bags as a t-shirt marked PMF1-4, a black t-shirt 6 and there were ground sheet inside the bag marked PMF1-5 and the jungle army bag marked PMF1-2C and a black bag marked PMF1-2b.
 77. PW7 stated that the bags in each contained bhang wrapped in a seal tape. PW7 identified the receipt as PMF1-3. PW7 testified that he had not known the accused before.
 78. PW7 was cross examined by the appellant and he testified that they found the bags inside the bus. That he could not count the passengers, but it had many passengers.
 79. PW7 reiterated that at the time of search, he did not have anything. PW7 reiterated that the bags were the accused since the conductor confirmed he boarded the bus with the bags and he did not bother to ask if he had conducted a search while they were entering.
 80. PW8, PC OUMA DANIEL testified that he was the investigating officer in the matter. PW8 testified that on 6th November, 2018 3 days after the appellant had been arrested at Archers police station for the offence of drug trafficking. He was given instructions by the then DC1 PC Obiko to take over investigations due to the high level of arrogance exhibited by the accused to the officers handling the matter. That he went and took over the matter.
 81. PW8 testified that upon interrogating the witnesses and the appellant he established that the appellant was a police officer attached to R.D.U Marsabit. He later established that the officer was not on official duty but off duty vide a pass leave dated 3rd November 2019 which he produced as ptx7.
 82. PW8 stated that investigations revealed that on 2nd November 2019 at around 1800 hours the suspect approached a nearby road block erected along Isiolo Moyale highway in possession of bags and requested the officer who they are familiar to him to assist him board a Nairobi bound bus. That as he was still waiting another fellow police officer from the same command Joshua Kathengi joined him and also requested to board a Nairobi based PSV motor vehicle. That after a short duration a motor vehicle KBX 445M approached from Moyale towards Isiolo direction and upon being stopped by the



- officers at the road block, the two said police officers entered the said motor vehicle but the officers manning the road block did not search the appellant and the other officers luggage as they were familiar with each other.
83. PW8 testified that the driver and the conductor who had given evidence witnessed the appellant carry his luggage. That the accused was then issued with a bus ticket No.781 dated 7th November 2019 and he produced the same as Pex 3.
 84. PW8 further testified that when they reached Wamba junction, they encountered a team of Multi Agency personnel who were manning a road block and the appellant was then arrested with his 3 bags and taken to Archers police station. That the inventory was recorded and the suspect signed the same which he produced as Pex 8.
 85. PW8 further testified that he then prepared the exhibit memo full of suspected bhang and were forwarded to the government chemist Nairobi to ascertain whether it was cannabis sativa which the report confirmed to be cannabis sativa. He produced the report marked Pex1a & b. That one military brown sheet which is a government store was recovered jointly with one military shirt. He identified the military sheet and produced it as Pex5 and a jungle military t-shirt marked Pex 4.
 86. PW8 stated that he prepared another government memo and subjected the two T- shirt for forensic analysis but the same was not undertaken as the suspected blood samples of the suspect could not be get since the suspect was out on bond. He produced the 2 t-shirts marked pex 6a & b.
 87. PW8 testified that the motor vehicle used by the appellant could not be detained since it was a PSV vehicle and other passengers would suffer inconveniences. That he recorded the statements of the driver and the conductor of the bus.PW8 further testified that the estimated total weight of the bhang to be 15 kg and the approximate value of the bhang is Ksh 150,000.That the jungle green bag containing cannabis was produced as pex 2c.There were two black bags with cannabis sativa which he produced as Pex 21 and b.
 88. PW8 testified that from the testimony of the witnesses the accused had left 3 bags next to his seat when they were ordered to alight. That when the officers were asked who the luggage was for his fellow police officers confirmed it was for the appellant who was holding the 3 bags. That the conductor and the driver also confirmed that the appellant entered the bus carrying the 3 bags.
 89. Via a ruling delivered on 23.02.2022, the trial court found that a prima facie case had been established against the appellant thus placing him on his defence.
 90. DW1, Emmanuel Matunda APC in his sworn defence denied committing the offence herein and he further alleged that he was being framed for that charge. On cross examination, he reiterated that he was being framed.
 91. The term “trafficking” is defined in Section 2 of the *Narcotic Drugs and Psychotropic Substances (Control) 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.”
 92. On whether the prosecution proved its case to the required standards, it is not disputed that the appellant was arrested at Wamba junction along Moyale-Isiolo high way on 3.11.2019, the scene where the offence occurred.



93. I have considered the competing evidences on record and there is no doubt that the prosecution evidence was clear as there was no doubt that the said drugs were recovered from the appellant. The evidence of the accused was a mere denial.
94. On whether the consignment and pellets found were narcotic drugs, PW1, produced the government chemist report which established that the plant material examined was found to be cannabis which was listed under the Narcotic Drugs and Psychotropic Substances Act 1994.
95. On the ground that trial magistrate erred in both matters of Law and fact by failing to note that PW1, PW2 and PW3 gave contradictory evidence. I opine that their evidence was not contradictory for reasons that PW1 E Akaeli Otieno testified that on the 16th December, 2019 the police officer corporal Amaryami submitted the exhibit to the government chemist and Nelius Njeru Maingi took the analysis of the exhibit and found it was cannabis which is listed as a Narcotic Drug and Psychotropic drug and the exhibit was marked as GCK 32 83/19 NNM for identification. That Nelius Maingi completed her analysis on 20th December 2019 and wrote a report which was produced as Pex 1a.
96. PW2 testified as Abduba Karaiyo and he was a bus inspector. He testified that on 3rd November 2019 when they left Moyale and reached Marsabit. The officers had requested they carry their counterpart aboard their Somali bus. That amongst the four passengers was the appellant. That he issued each with a receipt. That when they reached Archers they found a Multi Agency team. The vehicle was stopped and passengers searched. That the appellant was found with his 3 bags and 2 of the bags contained drugs.
97. PW3 also testified that at 12.00 am when they arrived at Wamba junction they were stopped at the barrier and everybody was told to alight with their luggage and he was told that one of the passengers had been found with drugs.
98. I humbly opine that the evidence of PW1, PW2 and PW3 was very consistent. On contradictions, the court has a duty to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that they raise doubts as to the truthfulness of the testimonies of witnesses. This is because, contradictions and inconsistencies where they are on material particulars, the court may reject the evidence. In the case of Twehangane Alfred –v- Uganda, Court of Appeal Uganda, (2003) UGCA 6. The court state that-

“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but no necessarily lead the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to a deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.

The appellant in his submissions pointed out the evidence of PW2 and PW3. The evidence is not contradictory. Furthermore the fact that the appellant had the three bags is corroborated by the testimony of PW4 who was with the appellant when they boarded the bus and the drugs were recovered from the said bags. The appellant in his defence stated that he works with National Police Service. The bags recovered from him are items which are used by police officers. PW6 testified that the conductor identified the appellant as the one who was sitting on the seat where the bags were. The prosecution produced the Bus ticket from Somali Bus Services Limited with the name of appellant and seat number. The evidence point to the fact that the three bags belonged to the appellant. The inconsistencies pointed out are minor and do not tend to show that the witnesses had deliberately told lies in court. Such contradictions and inconsistencies are at best ignored. On the contention that there were three buses at the scene, my view is that the issue could be typing errors and could not have been an attempt



to mislead the court. The minor contradictions do not go to the root of the evidence and are at best ignored. The issue at hand is whether the bags belonged to the appellant. Looking at the testimonies of PW2, 3 & 6 and the defence of the appellant, it confirms the evidence of the prosecution. This rules out the possibility of witnesses telling deliberate untruths. There is no doubt that the bags belonged to the appellant.

99. The appellant has contended that a plea of guilty was entered by the court. I had the benefit of looking at the handwritten notes of the learned trial magistrate. He entered a "P.N.G.E" to mean plea of not guilty entered and the trial proceeded to its logical conclusion. The Judgment of the learned trial magistrate states that, the "accused had pleaded not guilty". I find that it is clear that there is a typing error on the proceedings. The appellant was not prejudiced in any way as he participated in the trial after the trial magistrate entered the plea. The appellant did not object to the proceedings. No prejudice was occasioned. Section 382 of the Criminal Procedure Code provides as follows:-

"Subject to the provisions hereinbefore contained, no finding,

sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or

irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The ground is without merits.

100. On the ground that the trial magistrate flouted in matters of fact and law by convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubt. I have perused the judgment by the trial court and weighed the evidence tendered by the prosecution. The charges were proved beyond any reasonable doubts. The learned trial magistrate considered the defence of the appellant and gave cogent reasons for rejecting it. The defence was properly rejected, see page 15 of 16 of the record.
101. The prosecution tendered evidence of eight (8) witnesses which were very consistent. It is trite that he who alleges must always prove. [See section 107 of the [Evidence Act](#)].
102. On the ground that the sentence was harsh and excessive. Section 4(a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) provides as follows:
- 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; or...
103. The appellant was sentenced 25 years' imprisonment. Which in my opinion is lenient and should serve as a deterrent. In my view therefore, nothing has been demonstrated to show that the sentence by the trial court was harsh or severe in the given circumstances.



104. On the ground that the incident took place at night thus the identification of the appellant was not proved beyond reasonable doubt. It is not disputed that the Appellant was in the bus Reg.No KBX 445 M and several witnesses confirmed that they saw him therefore his identification cannot be doubted.
105. On the ground that magistrate flouted in matters of fact and law by failing to note that there were no photos adduced before court to connect the appellant with this case. It is not disputed that the Appellant was on board the PSV vehicle wherein he was found with the bhang. The Appellant was at the scene of crime and he was in possession of the bhang based on the evidence of the bus inspector, the conductor and the investigation officer.
106. The investigation officer confirmed that the accused was with his colleagues in the bus and further the other passengers also confirmed that fact and there was no need for photos to confirm that.
107. On the ground that the learned trial magistrate erred in both matters of Law and facts by failing to note that there was no receipt adduced by the conductor to prove that the alleged bags (luggage) belongs to the appellant. This ground is neither here or there. Not all instances passengers are given receipts by the bus companies. Further several witnesses confirmed that the luggage was his.
108. I find therefore that the conviction and sentence meted out by the trial magistrate was appropriate.
109. I therefore dismiss the appeal herein.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

24/5/2024

