Case Number:	Criminal Appeal E117 of 2021
Date Delivered:	21 Dec 2021
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Patrick J. Okwaro Otieno
Citation:	Daniel Kilta Dame v Republic [2022] eKLR
Advocates:	Mr. Jarso for the appellant Mr. Maina for the respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E117 OF 2021

DANIEL KILTA DAME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged tried and subsequently convicted of the offence of trafficking of some 23 kgs of narcotic drugs namely, cannabis sativa, valued at Kshs 260,000. The particulars of the offence were given to be that on the 20th day of May 2020, at Wamba Junction, along Isiolo Marsabit road, within Samburu county, was found trafficking the drugs.

2. In the judgment now challenged in that appeal, the trial court found that the prosecution had proved its case to the requisite standards. That finding is now challenged on the basis that the evidence adduced was insufficient, that no *mens rea* was proved, that the appellant's right to a fair trial was contravened, that undue consideration was given to extraneous matters and due consideration of material matters disregarded, that the exhibits produced had no evidentiary value for not being in tandem with the law and lastly that there was no nexus established between the crime and the appellant. It was equally contended and argued that there was misapprehension of the facts and application of wrong principles to the prejudice of the applicant and very lastly that the sentence imposed was harsh, excessive and untenable on the face of the mitigation offered.

3. In the judgment judgment subject to this appeal the trial court having reviewed the evidence led, isolated two issues for determination being the nature weight and value of the substance and whether the accused was in the course of trafficking same. Having done so he proceeded to find and hold that the substance was *cannabis sativa* as defined by the act; that the government analysts report was properly produced pursuant to section 77 of the evidence accused and section 67 (2) of the Narcotic drugs and psychotropic substances Act then concluded that the substance was indeed *cannabis sativa* weighing 23 kgs with a street value of kshs 460,000 and not in medical preparation. On the second issue the court found and held that the appellant having been the person in control and the only person aboard the motor vehicle in which the substance was found was trafficking by conveyance and that he did so knowingly hence he was the trafficker.

4. I take cognizance of my duty as a first appellate to reevaluate and reexamine the evidence in full and come to our conclusion[1] and on that basis I have perused the record of the trial court together with the memorandum of appeal and come to the conclusion that the following four issues isolate themselves for determination of this appeal-:

I. Whether the Government analyst report was properly admitted in evince (ground 7)

II. Whether the trial conducted without legal counsel violated the rights of the appellant to a fair trial (ground 5)

III. Whether the charge and its ingredients were proved to connect the appellant and the offence beyond reasonable doubt (grounds 1,2,3,4,6,8 and 9).

IV. Whether the sentence meted out was harsh and excessive (ground 10).

Was The Government Analysts Report Legally Produced.

5. The challenge mounted against the government analyst report (henceforth PExh 2) is set on two grounds – that it was prepared and produced in non -compliance with the law. In making such assertion the appellant relies on the provisions of section 74.

6. In his submissions counsel for the appellant put adorable submissions based on the dictates of section 74 A of narcotic drugs and Psychotropic substances control Act and urged the court that the handling and weighing of the drug was done outside the mandatory requirements of the law and was thus any analysis consequent thereto was not admissible. To the appellant the presence of the appellant, a designated analyst and analysts appointed by the accused is necessary at the time of taking samples for analysis. That position however forcefully taken is unfortunately untrue. Untrue because the law says that be done where practicable. I find the requirement of presence to be a desirable and the ideal but not an imperative. In coming to the conclusion of relying on the analysts report, the trial court indeed delved insightfully and took guidance on the decision in **Samson Thuo Muthomi Vs republic (2019 eKLR** and I find that finding and conclusion to be in tandem with the law for which no fault can be founded and visited upon the trial court as to merit an interference with its conclusion.

7. Even on production of the report I do find no reason to interfere. The record show that when PW1 sought to produce the analyst's report, the court put a question to the appellant if he had any objection and his answer was a decisive No. He then took the witness through what I consider an in-depth cross examination. While the appellant tacitly concedes that the provisions of section 77 Evidence Act as well as section 67(2) of the Narcotic Drugs and Psychotropic substances (Control) Act permits production of the analyst's report by a person other than the maker, a position taken is that it is desirable that the maker attends court to produce the report unless his attendance cannot be procured without unreasonable delay and expense. I see those to be the operative words of section 33 of the Evidence Act. I consider that provision to stipulate for the general production of documents generally while section 77, Evidence Act and 67 of the Narcotic Drugs and psychotropic Substances (Control) Act are specific to production of the Government Analyst's report. I do consider and find that ExhP4 when produces without objection from the appellant and after his position was sought was properly and legally done hence the fault on that account is improperly taken and pursued. In coming to this conclusion I have taken due regard to the cited cases by the appellants and been guided by the court of appeal decision in **Sibo Makovo vs R (1997)eklr** that some seriousness need to be employed in the production of P3 forms in accordance with section 33 of the Evidence Act. I also not that that decision was limited to the application of section 33 Evidence act and never considered section 77 of the same Act just as much as it never considered section 67 of the the Narcotics and Psychotropic Substances (Control) Act. I however find persuasion in **Mary Wamuhu Thairu v Republic [2011] Eklr** where the court held:

"**Also, in respect to the prosecutions or proceedings under the Act Section 67 thereof provides a special regime for admissibility of reports by duly qualified analyst…So whether under Section 77 of The Evidence Act or Section 67 of the Act, the Government Analyst report was properly admitted into evidence".**

8. I find that both section 77 Evidence Act and 67 of the Narcotics and Psychotropic Substances (Control) Act are not subject to the strict application of section 33 of the former Act and are applicable independently. Accordingly, I find no merit on that entire ground of appeal on the analysts report and do dismiss same.

Was the rights of the appellant to a fair trial violated on the basis that he proceeded without legal counsel

9. On this attack of the decision leading to conviction and sentence, the appellant relies on the provisions of article 50(2) of the Constitution to guarantee the the right of the accused to be informed of the evidence the prosecution has against him, to be given access to such evidence and the right to adduce evidence in challenge thereof. The decisions in civil cases of **Rosemary Wanjiru vs Elijah Githinji (2014) eklr and Kenya Breweries Ltd vs Abraham Lain** and **Musee Joseph Musyoka Vs Republic (2014)Ekl**r were cited for the proposition that denial to call witnesses and opportunity to cross examine witnesses greatly reduces the weight of the defence and thus ability to offer credible case. While the respondent denied any denial without citing any decision or commenting on the cited decisions, the law must be read and understood from the stand point that the court must remain an uninterested arbiter without being seen to take up the defence on behalf of the accused. The accused as the person vested with the right has a part to play in the enjoyment of the constitutional right. In the context of a trial of other than murder, it is desirable to let the accused make a choice whether he needs representation and if the costs of such be met by him or at the expense of the state. The record here show that at the commencement of the trial the appellant was represented by a counsel who sought to be supplied with the statements and the court made an order for the provision of such statements. After two witnesses had testified, there appear to have been a complaint raised that the statements were never produced and the court reiterated that same be supplied forthwith with liberty to the appellant to seek the recall of the witnesses. No other complaint was made thereafter justifying the inference that the same were indeed supplied. Based on the record of the proceedings I find no denial of the rights under article 50(2) j and k.

10. In addition even the right of the accused to a counsel of his own choice is not an absolute one. There are instances that that right maybe limited in order that interest of substantial justice may be served like in the case where the engagement of an advocate would put him to the dangers of conflict of interests. See **Delphis Bank Ltd Vs Chatt & 6 Others [2005] 1Eklr** and **Maina Njenga v Republic [2017] Eklr**

whether the charge and its ingredients were proved to connect the appellant and the offence beyond reasonable doubt

11. Once the substance was found to have been cannabis sativa not in medical preparation the onus of the prosecution was then to prove that the same was found in possession or control of the appellant while being trafficked. The fact of possession was not really in contention. While the aggregate of the evidence by the prosecution was that the appellant was found while alone in the motor vehicle at a round block being in control, as the driver, of motor vehicle Reg. No. KBY 983R in which the substance was found, the appellant did not deny that fact in his evidence but asserted that he was merely the driver of the lorry ferrying 140 goats whose minder, one Guyo Halake, was at the back of the lorry with goats but could not be found when the police stopped the lorry. I discern the defence to have been that even though the appellant was the driver he was unaware that aboard the lorry was the substance later proved to have been bhang.

12. In his analysis of the evidence, the trial court posed to itself the question of whether the appellant had transported the substance deliberately, unlawfully and with knowledge or if the same was planted there by the person assigned to mind the goats as he drove. In his finding, the court discounted and disbelieved the presence of any other person in the motor vehicle while holding that the appellant was all alone in the motor vehicle.

13. The duty of the trial court is to fully analyse the facts and weigh same to establish if the case against the accused is proved beyond reasonable doubt. The trial court is the master of facts having recorded the evidence first hand and observed the witnesses testify. It is therefore a matter for a very strong case for an appellate court to interfere with findings of fact by the trial court. In **James Mwebia M'irware v Republic [2016] eKLR the court of Appeal was very emphatic that 'an appellate court should not interfere with findings of the trial court which are based on the credibility of witnesses unless no reasonable tribunal could have made such a finding or it was shown that there existed errors of law'.**

14. In my findings upon re-examination and reappraisal of the record, I do find that the findings of fact and conclusions drawn from such findings were not only reasonable but were equally sound. I do find that there was evidence which left no reasonable doubt that the appellant was found trafficking the narcotic drugs with knowledge the same were indeed a forbidden substance and without any right to do so.

15. On the last ground on the severity and harshness of the sentence, the court has paid due regard to the reasons put forth by the trial court in meting out the sentence including the mitigation advanced and the fact that the statutory sentence given is life imprisonment over and above a fine. He also appreciated that he was not bound to impose the minimum sentence but to exercise a discretion. In doing so, he imposed an imprison term of only 15 years. I find that to be a very lenient sentence indeed and the kind that would be enhance had the prosecution pursued that route.

16. The upshot is that the entire appeal lacks merit and is dismissed.

DATED AND DELIVERED THIS 21ST DAY OF DECEMBER, 2021

PATRICK J O OTIENO

JUDGE

In presence of

Mr. Jarso for appellant

Mr. Maina for the respondent

PATRICK J O OTIENO

JUDGE