

KENYA / JUDGMENT

Thuranira v Republic

[2026] KEHC 13683 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Criminal Appeal E001 of 2026

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REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT MARALAL CRIMINAL APPEAL E001
OF 2026 FRANCIS THURANIRA.....APPELLANT -VERSUS-
REPUBLIC.....RESPONDENT

JUDGMENT

1. Francis Thuranira, the Appellant, was jointly charged with another for the offence of Being in possession of narcotic drugs contrary to Section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Act of 1994.
2. Particulars of the offence thereof were that on the 23rd day of November 2021, at Maralal Town within Samburu Central Sub-County in Samburu County, were found being in possession of 2060 rolls suspected to be cannabis sativa which was not in medical preparation.
3. He denied the charges, was taken through full trial and convicted. In the result he was sentenced to serve two (2) years under probation supervision. HCCRA E001 OF 2026 (JUDG.) Page 1 of 19
4. Aggrieved, the Appellant preferred an appeal on grounds that; 1)The learned trial Magistrate erred in law and fact by failing to judiciously consider the evidence, the defence evidence, law and facts of the lower court case in making the impugned decision thereof. 2)The learned trial Magistrate erred in law and fact by failing to find that the Appellant was falsely charged with the offence of being in possession of Narcotic Drugs contrary to section 3(2)(a) of the Narcotic drugs and psychotropic substances Act 1994. 3)The learned trial Magistrate erred in law and fact in rendering unfair and unjust judgment on 22nd June, 2022 and a sentence on 6th July, 2022 at the Senior Principal Magistrate's Court at Maralal without reasonable evidence that meets the legal standards of beyond reasonable doubts. HCCRA E001 OF 2026 (JUDG.) Page 2 of 19 4)The learned trial Magistrate erred in law and fact placing the Appellant on two (2) years' probation without proper evidence though the Appellant has served and completed the probation sentence thereof. 5)The learned trial

Magistrate erred in law and fact by failing to find that the prosecution abused legal and court process because when the matter came up for hearing on 14th December, 2021, the matter was withdrawn against the second accused person under section 87 (a) of the criminal Procedure Code. 6)The learned trial Magistrate erred in law and fact by failing to find that the second accused was the one who was in possession of the said substance. The Respondent was obligated to carry out proper investigations and pursue the second accused person thereof. 7)The learned trial Magistrate erred in law and fact by failing to find that the prosecution did not HCCRA E001 OF 2026 (JUDG.) Page 3 of 19 supply the Appellant with all witness statements and copies of documentary evidence and reasonable time to enable him prepare for his Defence hereof. 8)Under Article 165 (6) of the Constitution provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court. 9)The rights of the Appellant as provided under Article 50 of the constitution were gravely violated by the prosecution during the trial thereof. 10)The learned trial Magistrate erred in law and fact by holding that there was no evidence to prove that the Kiosk in which the said substance was found belonged to the Appellant and that the second suspect who operated the Kiosk was not brought before the trial court to shed light thereof. HCCRA E001 OF 2026 (JUDG.) Page 4 of 19 11)The trial court erred in law and fact in accepting the evidence of the prosecution witnesses on the allegations that the substance was found in the house the applicant stayed and not in his actual possession. The Prosecution failed to prove that the house belonged and was exclusively lived by the Applicant thereof. 12)The trial court failed to consider or analyze the evidence of the Appellant and therefore arrived at the wrong decision thereof. 13)The Honourable Courts, in arriving at their decisions, are guided by law, cogent evidence, proved facts, credible, valid and sound grounds. However, in this case, the Trial Court made the impugned decision based on suspicion, hearsay, assumptions, speculations, opinions, imaginations and surmising thus prejudicing the Applicant and violating his legal and constitutional rights. HCCRA E001 OF 2026 (JUDG.) Page 5 of 19 14)The learned trial Magistrate erred in law and fact in failing to consider the Appellant's evidence on record. 15)The Appellant avers that the law clothes this Honourable Court with jurisdiction to hear appeals from decisions of the Lower Court 16)The learned trial magistrate erred in law and fact in acting bias against the Appellant and such bias occasioned miscarriage of justice and grave prejudice against the Appellant thereof.

5. Facts of the case were that on 31st October, 2021, the exhibit store at the police station where cannabis used to be kept was broken into and some exhibit stolen. Then on 23rd November, 2021 acting on information received, PW1 No. 231528 CIP Felix Mutua and PW2 No. 236153 CIP Samuel Miyo moved to a kiosk where they found a young man at the counter. They conducted a search and recovered some 210 rolls of plant materials rolled and placed in cigarette packets. The young man stated he was an employee at the kiosk. That the Appellant appeared and introduced himself as a HCCRA E001 OF 2026 (JUDG.) Page 6 of 19 police officer and owner of the kiosk in question. They arrested him and proceeded to his house where a further search was carried out and some 37 bundles of 50 sticks each of the plant

material were recovered which were inside a pink box. Also recovered were two (2) plastic containers with some green material. In addition, Kshs.2,870/- in denominations of 50/, 20/- and 10/- was recovered. An inventory of recovery was made and signed. Investigations were conducted by PW3 NO. 95199 CPL Samuel Waithaka and the two (2) suspects were charged.

6. Upon being placed on his defence the Appellant stated that on 23rd November, 2021 he was under interdiction following prisoners' escape. That he had gone to collect money from his Co-Accused who used to sell for him miraa. That he was arrested and taken to his house at the police line which was not closed. A search was conducted and nothing was recovered. Then he was taken to the police station and given a document to sign which he did. He acknowledged the signature on the inventory. HCCRA E001 OF 2026 (JUDG.) Page 7 of 19
7. The trial court considered evidence tendered and reached a finding that evidence adduced didn't establish ownership of the shop by the Appellant. However, on the question of the substance found at the house admitted to belong to the Appellant at the police line, it was proved that he was liable hence the conviction.
8. The appeal was canvassed through written submissions. It is urged by the Appellant that the prosecution failed to prove exclusive possession of the alleged 2060 rolls of bhang. That the prosecution was not entitled to rely on circumstantial and suspicious evidence to prove the case. That the second suspect who operated a kiosk was not availed to shed light on the issue.
9. That the Respondent withdrew the case against the 2nd Accused who was in possession of the substance under Section 87(a) of the Criminal Procedure Code hence failed to supply the Appellant with witness statements and copies of documentary evidence and he was not granted reasonable time to prepare for his defence. HCCRA E001 OF 2026 (JUDG.) Page 8 of 19 10. That the Appellant went into depression and developed psychiatric challenges after his arrest and conviction as proved by a medical report dated 24th April, 2025. 11. In response thereto, the Respondent opposing the appeal submits that the Appellant who was present throughout trial was granted sufficient time to prepare for trial. That the Appellant never raised any issue regarding supply of statements and or any documents. 12. That sufficient, relevant and admissible evidence was adduced at trial and correctly applied as the cannabis was recovered at the Appellant's house within the police quarters for which he could not account. On sentence it is argued that the court exercised discretion after the Appellant was granted the opportunity to mitigate. 13. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of HCCRA E001 OF 2026 (JUDG.) Page 9 of 19 seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno v Republic* [1972] EA 32 as follows: "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 HCCRA E001 OF 2026 (JUDG.) Page 10 of 19 hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424". 14. The Appellant was stated to have contravened Section 3(2) of the Narcotic Drugs and Psychotropic Substances Act which provides thus;

- (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 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 HCCRA E001 OF 2026 (JUDG.) Page 11 of 19 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. 15. Notably, the Appellant and another were stated to have contravened the provisions of the law that created the penalty that would require the court to consider whether the cannabis was for consumption or some other case. Ordinarily, the charge would be framed to indicate that the suspect contravened Section 3(2) of the Act which created the offence of possession that would be read with Section 3(2)(a) of the Act, that guided the court on sentencing. 16. Looking at the particulars of the offence it states thus; "On the 23rd day of November, 2021, at Maralal Town within Samburu central Sub-County in HCCRA E001 OF 2026 (JUDG.) Page 12 of 19 Samburu County, were found being in possession of 2060 rolls suspected to be cannabis sativa which was not in medical preparation." 17. As to the evidence adduced some plant material was at the outset found at the kiosk where the 2nd suspect was the attendant. These were 210 rolls put in ordinary cigarette packets. The kiosk was stated to be owned by the Appellant, a police officer. An inventory of recovery was prepared for the same and signed by Paul Michubu at 13.00 hours within Maralal Town on 23rd January, 2021. It was not in regard of the instant Appellant. Ownership of the kiosk by the Appellant was not proved and the trial court rightly found that there was no evidence to prove the fact of ownership of the kiosk. 18. Later, as investigations progressed, 30 minutes later at 1.30pm some other plant material was recovered at the police quarters (lines) at the Appellant's house. He signed an inventory of recovery of 37 bundles of cannabis sativa each containing some 50 sticks (rolls); Two (2) small containers HCCRA E001 OF 2026 (JUDG.) Page 13 of 19 with the plant material, one red carton, one polythene bag and cash Kshs.2,970/-. 19. The second transaction did not involve the Shop

Attendant (2nd Accused) and the recovery was made at a different location from the kiosk, and at a different stage in the course of investigations. These should have been identified separately. The two (2) suspects were charged in one Count. The stated Count did not state whether or not they were in joint possession of the cannabis. There was no clarity as to what each individual was alleged to have possessed. The trial court having correctly questioned ownership of the kiosk (shop) and reached a verdict of no proof of ownership, ideally, meant that he was not guilty in as far as the cannabis found at the kiosk was concerned. Had the charge been correctly framed, the Appellant would have been acquitted of that particular Count.

20. On the plant material found at the house, it is admitted the house was owned by the Appellant. The question lingering would be whether there was evidence of joint possession? The other suspect was not an occupant of the house. HCCRA E001 OF 2026 (JUDG.) Page 14 of 19 Particulars of the offence should have stated what each suspect was in possession of, calling for separate charges. The Appellant should have faced a separate charge of possession and/or trafficking by storing which would have obligated the prosecution to call evidence connecting the money/denomination to the narcotics. In as much as an inference could be drawn that money represented proceeds of transactions that were numerous the prosecution was duty bound to prove that fact. 21. To prove the offence the prosecution was obligated to prove that the plant material was cannabis. In this regard, the prosecution purported to rely on chemical/forensic analysis done at the government chemist. The trial court in its judgment stated thus; "...The investigating officer forwarded the sample to the government chemist who confirmed that the substance was indeed cannabis. The investigating officer produced the report in place of the government analyst as there was no objection from the accused." HCCRA E001 OF 2026 (JUDG.) Page 15 of 19 22. That being the case, the prosecution was required to adduce evidence of how the plant material was collected, sealed. Stored and taken to the laboratory at the government chemist. Indeed, pursuant to the exhibit memo from the plant material was escorted to the government chemist and received on 15/12/2021. A report thereof is signed by S. M. Tukei, a government Analyst. 23. In *Lucas Okinyi Soki v Republic* [2004] KECA 134 (KLR) the Court of Appeal stated that; "Before we allow this appeal, as we must do, we need to comment on the manner PW3 (Exh 1) was produced and the way it was dealt with by the trial court and the superior court. Section 77(1) allows any document purporting to be a report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in HCCRA E001 OF 2026 (JUDG.) Page 16 of 19 this case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he

could seek to cross examine the maker of P3 if he so wished. That was not done but we make haste to add that in our view, nothing turns on that omission as in any case the ingredients of the offence of robbery were satisfied even if injuries were not proved.”

24. Section 77 (1) of the Evidence Act Provides thus: In criminal proceedings any document purporting to be a report under the hand of a Government HCCRA E001 OF 2026 (JUDG.) Page 17 of 19 analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. 25. It is presumed that the Government analyst report was adduced in evidence pursuant to the Provisions of Section 77(1) of the Evidence Act. To adduce a document purporting to have been made by a maker who cannot be in court is not done automatically. It was requirement for the prosecution to lay a foundation giving reasons as to why the maker could not reasonably be present to testify. The process would enable the court to form the opinion that the signature appended to the document was genuine or that the maker held the position at the time.
26. Further, the Appellant who was unrepresented was required to be asked and the confirmation recorded that he had no objection to the document being adduced in evidence by a witness who was not the maker. The Appellant was hence not made aware of the consequences of the document being produced by a police officer instead of the expert which was HCCRA E001 OF 2026 (JUDG.) Page 18 of 19 prejudicial to the Appellant as the content of the document and the process to arrive at the results was not explained to the Appellant hence the probative value of the same was questionable.
27. From the elaborate analysis of the trial court decision, I reach a finding that there was misdirection in fact and law. Therefore, I allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be at liberty.
28. It is so ordered. Dated, signed and delivered virtually this 18 th September, 2026.
..... L.N. MUTENDE JUDGE HCCRA E001 OF 2026 (JUDG.) Page 19 of 19

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Prepared on 28 October 2026 · Esheria