



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Musanda v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 9830 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E020 OF 2023
DR KAVEDZA, J
JULY 30, 2024**

BETWEEN

ROSE MONYANI MUSANDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C.M Njagi (P.M) on 24th August 2023 at JKIA Chief Magistrate's
Court Criminal Case no. 88 of 2019 Republic vs Rose Monyani Musanda)*

JUDGMENT

1. The appellant was charged with three counts of trafficking in Narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994*. After a full trial, she was convicted on one count and acquitted on the other two counts. The particulars of the offence were that on 14th June 2019 at around 1400 Hrs at a residential house in the Kinoo area within Kiambu County, was found trafficking narcotic drugs namely heroin by storing to wit 412.54 grams with a market value of Ksh.1,237,620 in contravention of the said Act. The appellant was sentenced to pay a fine of Kshs. 3,712,860 in default to serve one (1) year imprisonment. In addition, she was sentenced to serve two (2) years imprisonment.
2. Aggrieved, the appellant filed the present appeal, challenging her conviction and sentence. In her petition of appeal dated 12th December 2023, the appellant raised seven grounds which have been coalized as follows: She challenged the totality of the prosecution's evidence against which she was convicted. She urged the court to quash the conviction and set aside the sentence imposed.
3. As this is a first appeal, I am enjoined to consider all the evidence and reach an independent decision whether or not to uphold the judgment. In so doing, it is necessary to set out the facts as they emerged before the trial court. See *Okeno vs. Republic* [1972] E.A 32.



4. The prosecution called eight witnesses in support of their case. PW1 Gabriel Kairu Ngure was the caretaker of the house that had been recently searched. He had known the people living there since 2010/2011. Among them was a woman he referred to as Mama Anne, the appellant herein who lived in House 1. He told the court that the appellant would typically pay her rent either in cash or via M-Pesa. On the material day in question, PW1 saw many police vehicles in the compound. He did not know their purpose and was not sure if the appellant had been arrested and the accusations against her.
5. PW2, Corporal Caroline Karemba, recounted the events of 21st June 2019, when she and her team returned to the appellant's house to conduct a second search following a court order. This was prompted by a previous search that had uncovered narcotics. Accompanied by Mr. Nyaberi, who represented the appellant they began the search.
6. In the sitting room, PW2 found three brooms of dry plant material in the left-hand corner. In the appellant's bedroom, she discovered three packages of a powdery substance and Kshs. 25,000/= in a lockable drawer. Additionally, they found 31 boosters. Moving to the second bedroom, they recovered a box labelled "lab chemicals," which contained ten black-and-white containers filled with a powdery substance on the table.
7. After concluding the search, they returned to the sitting room to complete the inventory and the search certificate. She testified that they gained access to the house when an unidentified officer opened the padlock on the door. She was unsure if the windows were open and confirmed that the house had not been broken into. Other officers, who were not part of the ANU, possessed keys to the house but did not identify themselves.
8. In addition, the suspected cannabis was recovered in the sitting room while the other narcotics and cash were found in the bedroom. She maintained that the appellant was present during the search. However, she was never asked to sign the search certificates or the inventory. In addition, photographs of the recoveries were taken during the second search.
9. PW3, Corporal Dominic Muli, testified that they received information about illegal activities occurring at a house in Kinoo. On 14th June, 2019, his team was the first to arrive at the accused's house at 6:00 a.m., guided by an informant who pointed out the house. They knocked on the door, and the appellant opened it. The officers identified themselves and informed her that they were waiting for additional officers. The ANU team was then notified and arrived at 2:00 p.m.
10. During this time, PW3 and his team secured the area but did not search the house. He noted that a man was present inside. The appellant called the man to where they were, and they all stayed in the sitting room. PW3 along with PC Keter and PC Menza, entered the house but did not conduct any search.
11. PW5, Inspector Kiptoo Kisorio, an officer with the ANU, recalled being informed of an operation at the appellant's house on 14th June, 2019. Upon arrival, they joined officers from the Special Crimes Unit. Corporal Nyakundi began searching the house, starting in the sitting room and moving to the bedroom. They recovered cash amounting to Kshs. 42,245 in coins. In the kitchen, underneath a table and wrapped in khaki paper, they found a powdery substance. No other significant recoveries were made from the other rooms.
12. They also seized the appellant's passport, two phones, a weighing scale, and some exercise books, documenting all the items in an inventory. PW5 was present for the weighing and sampling of the powdery substance, which weighed 412.54 grams. A second search on June 21, 2019, led to additional recoveries.



13. He further told the court that there was no court order for the first search, and no photographs were taken during it. The house was locked after this search, and the appellant was in custody. He produced the exhibit memos for forwarding the samples for analysis, the substance recovered, and the inventory of drugs seized.
14. PW6, Chief Inspector Philip Langat, testified about the events of 14th June 2019. Upon arriving at the appellant's house, he found other officers present and instructed PW5 and Corporal Nyakundi to search. No recoveries were made in the sitting room, but in the bedroom, they found coins totalling Kshs. 42,245. A search certificate was completed, and a powdery substance was recovered in the kitchen.
15. On 15th June, 2019, PW6 oversaw the weighing and sampling of the powdery substance, which weighed 412.54 grams. He produced the weighing certificate. Following further intelligence about narcotics in the house, they filed a miscellaneous application, number 33 of 2019-20, seeking orders for a second search. During the second search, they found cannabis and another powdery substance, for which he prepared the search certificate and inventory, producing them as prosecution exhibits.
16. PW7, Corporal Nemuel Nyakundi, searched on 14th June, 2019. During this first search, they recovered money in the sitting room and a powdery substance under a table in the kitchen. PW7 was also present for the second search, during which they recovered additional items. In the first search, the only recovery from the sitting room was the money found in a hot pot. The second search led to the discovery of three brooms in the sitting room and a powdery substance in a drawer in the bedroom. The second set of money was also found in the bedroom.
17. PW7 testified that the second search was prompted by further intelligence and mentioned he was unsure if anyone else had accessed the house after 14th June 2019. He produced the exhibit memo, a bank deposit slip, photocopies of deposited notes, and the search certificate.
18. Corporal Derrick Kiprono, a scene of crime officer gazetted under notice number 407 on 18th June 2010, took photographs on 15th June 2019, and produced them along with his report and certificate.
19. PW4, Dennis Owino Onyango, a designated government analyst provided his expert testimony. He analysed a creamish powdery substance and identified it as heroin, presenting his report dated July 11, 2019. He also conducted the sampling of this substance on June 15, 2019, and produced the certificate of sampling.
20. On June 24, 2019, he participated in sampling another creamish powdery substance and produced the certificate of sampling for that date. After analysis, he again identified the substance as heroin and produced his government analyst report. Additionally, PW4 analysed a plant material that was presented to him and identified it as Cannabis Sativa, presenting his report dated July 25, 2019.
21. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on her defence. She gave sworn evidence and testified that she was involved in the matatu business at the time of her arrest. She lived in a two-bedroom house since 2010. On the day of the arrest, there was a man named Thomas in her house. At around 10:00 am, two female officers with bags entered the house and went to the kitchen, staying for about 20 minutes before leaving. Later, around 2:30 pm, the ANU team arrived and began the search.
22. The appellant stated that after the recovery was made in the kitchen, she fainted and was subsequently taken to the bedroom, where the money was found. She was then arrested and taken to the police station, where she handed over her house keys. During the second search, a padlock had been placed



on the door, which the police opened. She narrated that at the time of the second search, police officers were the ones who had access to her house. She maintained that she had been framed and was innocent.

23. In her appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. This court has re-evaluated the evidence adduced before the trial court, the Appellant's grounds of appeal as well as the rival parties' submission. 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;”

24. The term trafficking is defined in Section 2 of the Act 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...”

25. In *Gabriel Ojiambo Nambesi vs Republic*, [2007] eKLR, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs. The court stated thus:

“It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.”

26. The case against the appellant was that on 14th June, 2019, police responded to a narcotics tip-off at Kinoo in Kiambu County. They raided the appellant's house and searched her premises. The search unearthed suspected narcotic substances. This was a powdery substance wrapped in khaki paper in the kitchen. The appellant was at the time renting the premises where the seized narcotics were recovered. This was confirmed by PW1 who was the caretaker of the premises.

27. The appellant was subsequently arrested and the scene was documented. The suspected package was weighed at 412.54 grams, witnessed by the appellant, PW5, and the government analyst. The government valuer PW6 provided a valuation of the 412.54 grams at Kshs. 1,237,620/= based on the charge sheet, weighing certificate, and government analyst's report.

28. The chain of custody for the substances recovered in the case against the appellant is well documented through the testimonies of various witnesses. The investigating officer detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the appellant as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered from the



appellant's premises on 14th June 2019. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.

29. On whether the substance recovered on 14th June 2019 was narcotic, the government analyst testified that she conducted a preliminary test of the substance recovered from the appellant's premises. The test confirmed that the substance contained heroin. He conducted a sampling exercise and determined the purity of diacetylmorphine in the creamish powder. The prosecution adduced evidence that established that the substance found in the appellant's premises was a narcotic substance within the meaning ascribed to the term by Section 2(1) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* and the 1st Schedule thereof.
30. In her defence, the appellant denied knowing the existence of the heroin in her premises. She argued that she was likely framed by the anti-narcotic unit. The court considered her defence and found it to be incredible. Given the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating herself from the offence.
31. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind the prosecution proved beyond reasonable doubt the offence charged in count I.
32. Regarding the acquittal on counts II and III, it is pertinent to observe that there is an ambiguity concerning the failure of the police officer to recover the narcotics that were subsequently found during a second search. Despite the assertion that the second search revealed narcotic substances in the sitting room and bedroom, the appellant was already in custody at that time, and the police had control over the premises from 14th June 2019 to 21st June 2019 which was considered a crime scene. Consequently, the prosecution did not adequately establish the credibility of the second search conducted at the appellant's residence and the associated recoveries. This failure introduced reasonable doubt as to the legitimacy of the alleged recoveries at the relevant time. As such, the trial court's acquittal of the appellant on Counts II and III was both justified and appropriate.
33. On the sentence, the appellant was sentenced to serve two (2) years imprisonment. In addition to pay a fine of Kshs. 3,712,860 in default to serve 12 months imprisonment. In the sentencing proceedings, the trial court considered that the appellant was not a first offender, her mitigation, and pre-sentence report, and that she was of advanced age before imposing the sentence.
34. From the pre-sentence report on record, I take cognizance of the fact that the appellant is suffering from HIV/AIDS and has developed health complications while in custody. She is also 63 years old. The sentencing policy guideline 2023, provides as follows:

3.3.4

When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.

3.3.5

Non-custodial sentences – or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.



35. The appellant falls under this category. Due to her health, age, and the conditions in prison, she is prone to opportunistic infections. I therefore find it appropriate to substitute the sentence imposed by the trial court and order as follows:
- i. The fine of Kshs. 3,712,860 in default to serve one (1) year imprisonment is maintained.
 - ii. The sentence of two (2) years imprisonment is substituted with a probation order for a period of three (3) years.
 - iii. Additionally, the appellant shall be subject to police supervision by the Anti-Narcotics Unit during the period under probation.
 - iv. In the event the appellant commits a related offence, she shall be re-arrested and required to complete the original sentence imposed by the trial court.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Ogutu for the Applicant

Mr. Mong'are for the Respondent

Nelson Court Assistant

