



REPUBLIC OF KENYA



**Namunyu v Republic (Criminal Appeal E002 of 2024)  
[2024] KEHC 11509 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E002 OF 2024  
DR KAVEDZA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**SCOLA IMBITI NAMUNYU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. N. Thuku (SPM) on 18th December 2023 at JKIA Chief Magistrate's  
Court Criminal Case No. 85 of 2019 Republic vs Scola Imbiti Namunyu)*

**JUDGMENT**

1. Scola Imbiti Namunyu the appellant herein was charged with the offence of trafficking in Narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* Act No. 4 of 1994. The facts are that on 12<sup>th</sup> June, 2019 around 1705 Hrs, at Buscar Booking Office along Nairobi Mombasa High Way within Nairobi County jointly with others not before court, was found trafficking in Narcotic Drugs, 20,03 grams of cocaine with a market value of Kshs. 80,120 by delivering in contravention of the said Act. She pleaded not guilty and after a full trial convicted and sentenced to serve fifteen (15) years imprisonment in addition to payment of a fine of Kshs. 1,000,000 in default to serve 12 months imprisonment.
2. Being aggrieved, the appellant challenged her conviction and sentence on appeal. In the petition of appeal dated 19<sup>th</sup> January 2024, she challenged the totality of the prosecution's evidence against which she was convicted. The appellant argued that the offence was not proved beyond reasonable doubt. In addition, section 200 of the *Criminal Procedure Code* was not complied with. Furthermore, her defence was not considered by the trial court. The appellant urged the court to quash her conviction and set aside the sentence imposed.



3. In rebuttal, the respondent in their grounds of opposition dated 24<sup>th</sup> May 2024 contended that the prosecution proved their case beyond reasonable doubt and as such, the conviction and sentence were proper.
4. The appeal was canvassed by way of written submissions, with both parties making their respective arguments. These submissions have been duly considered and there is no need to rehash them herein.
5. Before delving into the specific re-evaluation of the evidence on record, I will deal with the preliminary issue raised by the appellant thus: failure to comply with Section 200 of the *Criminal Procedure Code*. Section 200 of the CPC, Sub-Section (3) thereof provides;

“200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right”

6. This provision has been interpreted in several decisions of this court some of which I highlight as follows; in *Ndegwa v Republic* [1985] KLR at 534 the Court of Appeal stated: -

“Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial.”

7. The Court of Appeal was of the view that Section 200 (3) *CPC* should sparingly be applied. The application of Section 200 (3) *CPC* in my view is commonly abused especially where the application is made with a view to defeat the ends of justices and especially where the accused knows the witnesses cannot be traced or are dead or where the case has been pending for long period without being determined, such applications for witnesses to be recalled in my view should not be granted especially where the accused has had the opportunity to cross-examine witnesses and specifically where the matter had been pending for a long time. This is because by granting such an application, the court may be acting contrary to Articles 47, 50 (2) (e), and 159 (2) (d) of the *Constitution* which demands that justice shall not be delayed, and trial should be concluded without unreasonable delay and lastly everyone has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
8. Looking at the record in this matter, Hon Thuku took over the conduct of the matter from Hon Onyina who was on transfer. Subsequent proceedings show that on 14<sup>th</sup> February 2023, 3<sup>rd</sup> April 2023, and 6<sup>th</sup> June 2023 the matter came up to confirm the status of an application before the High Court. On 17<sup>th</sup> July 2023, the matter came up again in the presence of defence counsel who confirmed that the High Court had dismissed their application. He urged the trial court to issue a hearing date and the matter was fixed for a defence hearing.
9. My perusal of the record shows that counsel did not raise the issue of failure to comply with Section 200 of the *CPC*. If counsel deemed the directions issued on 17<sup>th</sup> July 2023 as unfavourable, an application to that court would have sufficed. However, counsel did not raise any issue with the directions issued at the time and has raised the complainant on appeal.
10. In the circumstances, I find that the directions issued on the said 17<sup>th</sup> July 2023 were not a violation of the appellant’s right to a fair trial. I thus reject this line of argument and that ground of appeal.



11. 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.
12. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* provides as following;

“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;”
13. On 12<sup>th</sup> June 2019, a pivotal drug trafficking operation unfolded involving the appellant. Kelvin Kaloki Mutua (PW1), a booking clerk at Buscar, identified the appellant in court as the person who presented a parcel at 3:30 PM, for which he issued a receipt. The parcel was addressed to Noel Mbekure from Rose Asiko. PW1 told the court that it was the first time he had interacted with the appellant and he recognised her by her distinctive headgear and face.
14. Meanwhile, Sergeant Feisal Hassan (PW2) of the Special Crime Prevention Unit received a tip-off about a woman in possession of narcotics. At approximately 15:20hrs, he intercepted the appellant’s silver Mercedes Benz (registration KBN 675J) on Mombasa Road. Following protocol, he instructed the appellant to remain in the vehicle while he awaited the Anti-Narcotics Unit (ANU) officers. Despite conducting a thorough search of the car, no narcotics were recovered, prompting the appellant to direct the officers to the Buscar office, where she retrieved the parcel she had delivered earlier.
15. Chief Inspector Agnes Tune (PW7), formerly in charge of the ANU, joined the operation shortly thereafter. She was among the officers who conducted a search of the appellant’s vehicle, recovering Kshs 255,000, two rolls of tape, and a Delivery Note Book. Following this search, PW7 and her team proceeded to the appellant’s apartment in Herman Heights, where they discovered digital scales and assorted items, which were inventoried. The appellant was present during the search, which included two children and a house help.
16. On 13 June 2019, the parcel was opened at Kasarani Police Station under the supervision of Michael Kamau (PW6), who documented the entire process in the appellant’s presence. The parcel’s contents were revealed to be suspected narcotic substances.
17. Bernard Nyolei (PW8), the investigating officer, testified about the recovery of evidence and the preparation of inventories for all items seized, including money and electronic devices. He confirmed that the substance was secured in a safe box at the police station, accessible only to Chief Inspector Tune. Michael Kamau documented the weighing and sampling of a substance at the Government Chemist. He took photographs of the process and the markings on the envelope and receipt, presenting these as evidence alongside his report dated 15 October 2019. During the unwrapping of the parcel, which was conducted by Chief Inspector Agnes Tune, PC Nyolei, and PC Kirui,
18. 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. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.

19. On whether the substance recovered was narcotic, the government analyst Dennis Owino testified that she conducted a preliminary test of the substance recovered and later conducted a comprehensive test. The test confirmed that the substance contained cocaine. He conducted a sampling exercise and determined the whitish substance to be cocaine with 50 percent purity. The prosecution adduced evidence that established that the substance recovered 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.
20. In her defence, the appellant testified that she is a 50-year-old freelance designer and single mother of three. She recounted her experience of 12<sup>th</sup> June 2019. While driving, she was confronted by armed individuals, including one named Mutua, who demanded her phones and identification. After an hour of waiting, the appellant was approached by officers, including PW7, who searched her car and took Kshs 255,000 from her bag. Following the search, she was taken to the Buscar office and then to her flat, where no narcotics were found despite a thorough search.
21. The appellant maintained her innocence disputing her involvement with the items recovered and insisted that nothing incriminating was found in her possession.
22. The trial court considered her defence, coupled with the evidence of Vincent Chelongo (PW4) a forensic examiner at the DCI Headquarters presented his analysis regarding the handwriting of the appellant. He told the court that he received Exhibit Memo from PW7, along with three documents: the first, marked "A," contained a message addressed to Noel Mbekure from Rose Asiko; the second, marked "B," was a specimen of the appellant's handwriting; and the third, marked "C," was classified as her known handwriting.
23. He was tasked with comparing the handwriting to identify whether they were authored by the same person. His findings confirmed that the handwriting on documents "A," "B," and "C" originated from the same individual. He elaborated on his analytical methods, which included scrutinising the letter formations and strokes used in the writings.
24. PW4's analysis directly linked her handwriting to a parcel where the narcotic drugs were recovered. His analysis confirmed that the handwriting on all three documents was from the same individual, which implicates the appellant in the context of the parcel addressed to Noel Mbekure. This directly contradicts her claim of innocence and her insistence that she had no connection to the items recovered.
25. This forensic evidence undermines the credibility of the appellant's defence and supports the prosecution's assertion of her complicity in the alleged crime. Through the testimonies of these witnesses, the prosecution established a clear link between the appellant and the recovered items, forming a strong case against the appellant's involvement in drug trafficking.
26. After my own independent appraisal of the evidence on record, I find that the PW2, PW7, and PW8 were consistent in their evidence regarding how the narcotics were recovered. In addition, the evidence of PW1 collaborated by the forensic analysis PW4 confirmed narcotics were delivered by the appellant. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating herself from the offence.
27. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.



28. On the sentence, the appellant was convicted to serve 10 years imprisonment. In addition to paying a fine of Kshs. 1,000,000 in default to serve 12 months imprisonment. In the sentencing proceedings, the trial court considered that the appellant was a first offender, the presentencing report before imposing the sentence.
29. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find that the sentence meted out was lawful and in accordance with trial magistrate discretion.
30. In the case of *Wagude v R* (1983) KLR 569 Kneller, Hancox JJA. & Chesoni, Ag. JA. held that:
- “The Court may interfere with the sentence only if it is shown that it was manifestly excessive....”
31. Guided by the above decision it is my view that although the sentence imposed was legal, it was excessive. Consequently, the appeal on the sentence succeeds. The sentence of 15 years imprisonment is hereby substituted with a sentence of 7 years imprisonment. The additional sentence of payment of a fine of Kshs. 1,000,000, in default to serve 12 months imprisonment is upheld. Consequently, the sentence is as follows:
- i. The appellant Scola Imbiti Namunyu is sentenced to pay a fine of Kshs.1,000,000 in default to serve 12 months imprisonment in accordance with section 28(2) of the *Penal Code*, Cap 63 Laws of Kenya.
  - ii. In addition to the sentence in (i) above, the appellant Scola Imbiti Namunyu is sentenced to serve seven (7) years imprisonment with effect from the date of her conviction.
  - iii. The sentences imposed shall run consecutively.
- Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Karoki for the Appellant

Maroro for the Respondent

Achode Court Assistant

