



REPUBLIC OF KENYA



**Shomari v Republic (Criminal Appeal 12 of 2023)
[2024] KEHC 11333 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 12 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

ABDALLAH MOHAMED SHOMARI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. C.M Njagi (PM) on 5th December 2022 at JKIA Chief Magistrate's Court Criminal Case No. 107 of 2019 Republic vs Abdallah Mohamed Shomari)

JUDGMENT

1. Abdallah Mohamed Shomari 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 as per the charge sheet are that on the 26th day of June, 2019 at Jomo Kenyatta International Airport, in Nairobi County, jointly with others not before Court, trafficked in narcotic drugs namely hereon to wit 3,948.44 grams with a market value of Kshs. 11,845,320/= by conveying in a brownish travelling bag concealed in the false bottom and sides of the said bag in contravention of the said Act. He pleaded not guilty and after a full trial convicted and sentenced to serve thirty (30) years imprisonment in addition to payment of a fine of Kshs. 35,535,960 in default to serve 12 months imprisonment.
2. Being aggrieved, the appellant challenged his conviction and sentence on appeal. In the petition of appeal dated 7th June 2024, the appellant challenged the totality of the prosecution's evidence against which he was conviction. He argued that his identity was not conclusively proven as the owner of the bag where the alleged narcotics were recovered. In addition, the sentence meted out was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.
3. 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.



4. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
5. 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;”
6. The prosecution’s evidence was that on 26th June 2019, the investigation commenced with PC Purity W. Kariuki (PW1), who was alerted by Sergeant Fatuma Shame regarding a suspicious passenger, Abdallah Mohamed Shomari, was intercepted at Terminal 1C. The appellant was carrying a brown travel bag and passport AB558344 and was escorted to the Anti-Narcotics Unit (ANU) at JKIA, where a search was conducted on his luggage and (PW1 prepared an inventory of the recovered items. Corporal Njeru Michuki (PW2) confirmed the presence of false sides and a false bottom in the bag.
7. Assistant Superintendent of Police Sophia Mukiri (PW4) testified that following the Kenya Airports Authority (KAA) alert, the appellant and his bag were searched at the ANU office, revealing suspicious substances. On 27th June 2019, she weighed and sampled the substances, producing the weighing certificate and various exhibits, including the bag, false sides, and the appellant's passport. The total weight of the substances was confirmed as 3,948.44 grams. She told the court that at the time, the appellant did not dispute ownership of the bag.
8. Corporal Derrick Kiprono (PW5) documented the scene on 27th June 2019, producing a report and photographs, noting the absence of an ownership tag on the bag and that he did not photograph the appellant during the search. PC Fred Makoha (PW8) escorted samples to the government chemist, producing an exhibit memo dated 1st July 2019.
9. The Government analyst Joseph Gitonga (PW3) confirmed receipt of the exhibits, stating that testing revealed the powdery substance contained heroin with a purity of 35%. He produced a report dated 24th July 2019 and the certificate of sampling, noting that the total weight of the samples was 1.28 grams.
10. Chief Inspector Elizabeth Lumumba (PW11) provided the valuation of the recovered drugs, relying on the weighing certificate and other reports, valuing the heroin at Kshs. 11,845,320/=. She produced the valuation report and her gazette notice as evidence.
11. Finally, Teddy Kiara (PW6), responsible for CCTV operations at KAA, testified that he extracted footage from Terminal 1C on 26th June 2019, which was securely stored without modification and passed to the ANU team. Corporal Joseph Mutie (PW9) analysed the footage, producing a DVD and photographs, noting that the CCTV did not capture the time or date, with a typing error indicating 2009 instead of 2019. However, there was no footage of the appellant placing the bag on the scanner.
12. 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.

13. On whether the substance recovered was narcotic, the government analyst (PW3 testified that she conducted a preliminary test of the substance recovered. The test confirmed that the substance contained heroin. He conducted a sampling exercise and determined the creamish substance to be heroin with 35 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.
14. In his defence, the appellant testified that he engaged in casual business in Dar es Salaam and Dodoma. On 26th June 2019, while at JKIA Terminal 1C, he was stopped due to an issue with his luggage and was later arrested. He asserted that the bag presented in court was not his, despite its similarity to his own, and maintained that he was headed to India to sell minerals. He claimed his bag only contained personal items and lacked a tag. He further stated that it was the officers who opened the bag in question and not him.
15. After my own independent appraisal of the evidence on record, I find that the testimonies of (PW1, (PW2, (PW4, and (PW8 were consistent regarding the recovery of the narcotics from the appellant's luggage. Furthermore, (PW1's evidence, corroborated by the inventory of items produced, confirmed that personal documents belonging to the appellant were retrieved from the luggage containing the narcotic substances. Although the luggage lacked a tag, the presence of the appellant's personal effects, including vaccination certificate, and Etihad Airways Ticket among others substantiate that the bag was indeed his. Moreover, he had sole control over the luggage before the search and seizure. Consequently, I believe the appellant's defence was appropriately dismissed by the trial court as an afterthought intended to absolve him of the offence.
16. 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.
17. On the sentence, the appellant was convicted to serve 30 years imprisonment. In addition, he was fined Kshs. 35,535,960 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, and the period spent in remand custody since his arrest before imposing the sentence.
18. 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 the trial magistrate's discretion. I am guided by the decision in [Wagude v R](#) [1983] KLR 569 where 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...."
19. Although the sentence imposed by the trial court was lawful, I find that it was excessive and ought to be set aside. Consequently, the appeal on the sentence succeeds. The sentence of 30 years imprisonment is hereby substituted with a sentence of 15 years imprisonment. The additional sentence of payment of a fine of Kshs. Kshs. 35,535,960, in default to serve 12 months imprisonment is upheld. Consequently, the sentence is as follows:



- i. The appellant Abdallah Mohammed Shomari is sentenced to pay a fine of Kshs.35,535,960 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 (1) above, the appellant Abdallah Mohammed Shomari is sentenced to serve fifteen (15) years imprisonment with effect from 28th June 2019, the date of his arrest.
- iii. The sentences imposed shall run consecutively.
- iv. Upon service of the sentence, the appellant shall be repatriated to his country of origin by the Immigration Department.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Nandwa for the Appellant

Maroro for the Respondent

Achode Court Assistant

