



REPUBLIC OF KENYA



**Wanjiku alias Adebayo v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 13440 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E012 OF 2023
DR KAVEDZA, J
OCTOBER 29, 2024**

BETWEEN

JAMES KIMANI WANJIKU ALIAS ADEBAYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. Njeri Thuku on 12th October 2023 at JKIA Chief Magistrate's Court
Criminal Case No. E025 of 2022 Republic vs James Kimani Wanjiku)*

JUDGMENT

1. The appellant James Kimani Wanjiku alias Adebayo 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 4th day of March 2022 at Mathare sub-county within Nairobi County, was found in trafficking in narcotic drugs namely heroine to wit 120 sachets weighing 2.4 grams with a market value of Kshs. 7,200 by transporting while concealed on his body clothes in contravention of the provisions of the said Act. He pleaded not guilty and after a full trial convicted and sentenced to serve ten (10) years imprisonment in addition to payment of a fine of Kshs. 1,000,000 in default to serve 12 months imprisonment. The default sentence was to be served concurrently.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that his rights to a fair trial were curtailed by the delay in his arraignment. On sentence, that the trial court failed to consider his mitigation and the time spent in remand custody. He urged the court to quash his conviction and set aside the sentence imposed.



3. The appeal was canvassed by way of written submissions which 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 vs 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 case was that on the night of 4th March 2022, PC Oliver Obala Echenje (PW1) and his colleagues from Pangani Police Station were on patrol in the Mathare Valley View area. During their rounds, the officers received a tip-off about narcotics being sold in the area. Acting promptly, they set up an ambush at the location, where they encountered five men. Upon seeing the officers, the men fled, but PW1 managed to capture one of them, the appellant.
7. PW1 conducted a search on the appellant and discovered 120 sachets of a white powdery substance hidden beneath the appellant’s belly and above his genitals. The appellant was then taken to Pangani Police Station, where PW1 prepared a Search Certificate, though the appellant refused to sign it. PW1 also compiled an inventory of the recovered sachets. In court, PW1 acknowledged that there was a typo in his last name on some documents but confirmed that the sachets presented in court were the same ones recovered during the arrest. PW1 explained that the Search Certificate was prepared at the station rather than on-site, as he did not carry such forms during patrols. He further stated that he had no knowledge of the appellant’s claim that he was at the station to report a missing motorcycle.
8. PC Ann Ekasi (PW3), the initial investigating officer, told the court that she reported for duty on 5th March 2022, when the Officer-Commanding Station assigned her the case. On 7th March, 2022, she obtained court orders to escort the appellant for weighing and sampling of the seized narcotics. The initial weighing indicated 3.6 grams, valued at Kshs 10,800/-. On 4th April, 2022, PW3 handed over the case file and the sachets to Sergeant Nyabera of the Anti-Narcotics Unit. She clarified that she was not involved in the arrest and was unaware of any motorcycle-related complaint by the appellant.
9. Corporal Wilfred Omboga (PW4), who led the patrol team, confirmed that the appellant was arrested at 9:23 pm on 4th March 2022, following a public tip about drug activity. PW4 stated that a Search Certificate and inventory were prepared, but the appellant refused to sign them. He noted that the Search Certificate contained varying times, recorded as 2150 hours to 2230 hours on one page and 2330 hours on the other. PW4 confirmed that he had no knowledge of the appellant’s alleged visit to the station to report a missing motorcycle.
10. The analysis of the seized substance was conducted by Denis Owino Onyango (PW5), a government analyst at the Government Chemist. PW5 testified that the weighing and sampling took place on 6th April 2022, in the presence of the appellant, his advocate, and Corporal Michael Awiti. From the 120



- sachets, grouped in sets of ten, PW5 extracted a sample weighing 0.24 grams. The total weight of the substance was 2.4 grams. PW5 confirmed the substance was heroin with a purity of 35%.
11. Sergeant Francis Mjomba (PW2), a gazetted valuing officer under the *National Police Service Act*, testified next. He presented a Certificate of Valuation of Narcotic Drugs dated 12th April, 2022, confirming that the substance seized from the appellant was heroin weighing 2.4 grams, valued at Kshs 7,200/-.
 12. Sergeant Josiah Nyabera (PW6), the investigating officer, testified that he was assigned the case by his superior, Chief Inspector Elizabeth Lumumba, and took over from the Officer-Commanding Station at Pangani. PW6 attended the weighing and sampling process alongside the appellant and his lawyer. He prepared the Weighing Certificate, Notice of Seizure, and Record of Custody of Seized Substances, all of which were duly witnessed and presented in court. PW6 also produced the Exhibit Memo and Notice of Intention to Tender Records. He confirmed that the 120 sachets, grouped into 12 sets of ten, were the same ones seized from the appellant. Although the Notice of Seizure was undated, PW6 affirmed that the seized heroin belonged to the appellant.
 13. 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.
 14. 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 heroin. He conducted a sampling exercise and determined the whitish substance to be cocaine 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.
 15. In his sworn defence, the appellant testified that he was a former ‘boda boda’ rider turned religious teacher and lives in Mathare with his wife and three children. On 4th March, 2022, after work, he attended a funeral vigil, which was disrupted around 8:00 pm by five men in civilian clothes wielding batons. James and three others were arrested and taken in a Probox, but only James was held at Pangani Police Station, arriving at 1:00 am. His belongings, including Kshs 12,300/-, were confiscated, though the officers who arrested him did not testify in court.
 16. Rachel Ngina Muriuki (DW2), a snack vendor at Mathare View Bus Stop, testified that she saw five men disrupt a vigil but could not confirm the details of the appellant’s arrest. Anastacia Mbathia Malili (DW3) aged 50, said she saw a vehicle arrive and men take someone resembling the appellant. She described him as trustworthy. Ann Wanjiku Kimani (DW4) the appellant’s mother, testified that she witnessed her son being placed in the boot of a Probox during the disruption. Concerned, she went to Pangani Police Station and found the appellant detained. She affirmed that the appellant had no history of misconduct, having worked as a ‘boda boda’ rider before becoming a religious teacher.
 17. The trial court considered his defence and found it to be incredible. In view of 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 himself from the offence.



18. In his submissions, the appellant argued that his constitutional rights were violated by the failure to arraign him within 24 hours of arrest. He claimed that he was arrested on 5th March 2022 but was not arraigned until 7th March 2022, thereby contravening his constitutional entitlement.
19. *The Constitution* guarantees that a person arrested must be presented before a court within 24 hours. Where the 24-hour period ends outside ordinary court hours or on a non-court day, the individual must be arraigned no later than the next court day.
20. The evidence however indicates that the appellant was arrested during the night of 4th to 5th March 2022, between Friday and Saturday, both of which are non-court days. Accordingly, he was duly arraigned on Monday, 7th March 2022, the next available court day. As such, there was no violation of his constitutional right under Article 49. This ground of appeal is therefore dismissed.
21. 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.
22. The appellant was sentenced to serve ten (10) years imprisonment in addition to payment of a fine of Kshs. 1,000,000 in default to serve 12 months imprisonment. The default sentence was to be served concurrently. In the sentencing proceedings, the trial court considered that the appellant was a first offender, his mitigation, and the presentencing report before imposing the sentence. The sentence imposed was lawful and appropriate in the circumstance.
23. The appellant contended that the time spent in remand custody was not considered during sentencing. From the record, the appellant was arrested on 5th March 2022 and was released on bond on 28th April 2022. He therefore spent 1 month and 23 days in remand custody. From the record, the period was not factored in during his sentencing.
24. Guided by the law, the court is of the view that this period ought to be considered, as failure to do so would amount to denying the appellant a right due to the failure of the court to discharge an obligation bestowed upon it by law.
25. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety. However, the sentence imposed by the trial court shall be computed less by one (1) month and twenty-three (23) days.

Orders.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Ongombe for the Appellant

Ms. Omurokho for the Respondent

Achode Court Assistant

