



REPUBLIC OF KENYA



KENYA LAW
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**Musanda v Republic (Criminal Appeal E010 of 2023)
[2024] KEHC 15993 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E010 OF 2023
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

MERCY UYWELI MUSANDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C.M Njagi on 24th August 2023 at JKIA Chief Magistrate's
Court Criminal case no. 87 of 2019 Republic vs Mercy Uyweli Musanda)*

RULING

1. The applicant was charged and after a full trial convicted for the offence of Trafficking in narcotic drugs contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* no. 4 of 1994. She was sentenced to pay a fine of Kshs. 1 million in default to serve one (1) imprisonment. In addition, she was sentenced to serve one (1) year imprisonment. Dissatisfied with the decision, she filed a petition of appeal challenging her conviction and sentence.
2. In her appeal, she challenged the totality of the prosecution's evidence against which she was convicted. The appellant argued that the ingredients of the offence charged were not proved beyond reasonable doubt. She urged the court to quash her 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 v Republic* [1972] E.A 32.
4. The prosecution's case was as follows: On 14th June 2019, Sergeant Feisal Abdirahman Hassan (PW1) received intelligence and proceeded with the Anti-Narcotics Unit (ANU) to the appellant's house. They secured the sitting room, and the appellant's child left for school without their bag being searched. The appellant did not resist. PC Kiptoo Kisorio (PW3) found 34 boosters, each containing



- 10 sachets of a brownish substance, on the bed in the appellant's bedroom. PW1 mentioned that no female officers participated.
5. PC Kiptoo Kisorio (PW3) detailed that upon entering the house, he found three officers, the appellant, and her house help. Inspector Langat explained the purpose of their visit. During the search, PW3 found the 34 boosters on the appellant's bed, wrapped in a bedsheet. He also recovered a passport and a tenancy agreement. The search inventory, certificates, and records of the seized substances were produced. PW3 noted there were six male officers, and the search occurred in the presence of the appellant and her house help.
 6. PC Kibet Rodgers Samoi (PW4) corroborated PW1's testimony. He confirmed that the house was secured while waiting for the ANU team, who took over the search. The appellant's son left for school, and no other rooms were searched.
 7. Joseph Karanja (PW2), a property agent, confirmed that the appellant, identified as Mercy, was the tenant of the house managed by his agency on behalf of Samuel Njoroge.
 8. Dennis Owino Onyango (PW5), a government analyst gazetted on 12th July 2007, weighed the substance at 18.36 grams and confirmed it as heroin. He prepared the sampling certificate and the analyst report. He stated the analysis machines were in good working condition and noted discrepancies in signatures on the weighing certificate.
 9. Chief Inspector Phillip Langat (PW6) testified that he and other officers conducted the search, recovering 34 boosters containing 10 sachets each. The items were weighed on 15th June 2019, totalling 18.36 grams, with a street value of Kshs 55,080. He produced the weighing certificate and valuation certificate.
 10. Corporal Derricks Kiprono (PW7), the scene-of-crime officer, took 11 photographs of the weighing and sampling process, which were produced as exhibits along with his certificate.
 11. Corporal Michael Awiti (PW8), the investigating officer, confirmed the sequence of events: the intelligence report, search, seizure, weighing, and analysis. He produced records of custody, the tenancy agreement, and other exhibits. He stated that the drugs were found on the bed in the appellant's bedroom and denied any evidence of planting.
 12. In her defence, the appellant, the appellant testified that she is a businesswoman dealing in liquor. On the day in question, her house help informed her of two women claiming to know her who had already entered the house. The woman asked about ivory, rhino horn, or drugs, which she denied having. She later encountered five men in the sitting room and presented her liquor licence before preparing her son for school.
 13. She claimed the two women entered her bedroom with handbags, which she did not search. During the search, she was detained while people moved around the house. She alleged that the women planted the drugs. The ANU team then arrived, conducted a search, and made the recoveries. She denied possessing narcotics, stating she shared the bed with her son where the drugs were found. She also mentioned being taken to her sister's and mother's homes, where further recoveries were claimed.
 14. 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;”

15. 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...”

16. In *Gabriel Ojiambo Nambesi v 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.”

17. 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 necrotic substances. This was a powdery substance wrapped in a bedsheet in the bedroom. The appellant was at the time renting the premises where the seized narcotics were recovered. This was confirmed by PW2 who was the property agent.

18. The appellant was subsequently arrested and the scene was documented. The suspected package was weighed 18.36 grams, witnessed by the appellant, PW6, and the government analyst. The government valuer PW6 provided a valuation of the 18.36 grams at Kshs. 55,080/= based on the charge sheet, weighing certificate, and government analyst's report.

19. 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.

20. 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.

21. 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.
22. 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. The conviction of the trial court is affirmed.
23. The appellant was sentenced to pay a fine of Kshs. 1 million in default to serve one (1) year imprisonment. In addition, she was sentenced to serve one (1) year imprisonment. During the sentencing proceedings, the court considered the appellant's mitigation, the pre-sentence report, and the fact that she was a first offender.
24. 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.
25. The sentencing policy guideline 2023, provides as follows:
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.
26. Upon careful review and consideration of the pre-sentence report, it is evident that the appellant stands to benefit more from a rehabilitative approach rather than a custodial sentence. While a term of one (1) year imprisonment may reflect the seriousness of the offenses for which the appellant was convicted, it is my considered view that probation would serve a dual purpose. It would facilitate the appellant's rehabilitation by providing structured support and supervision while simultaneously addressing the need to deter future offending. Such an order aligns with the principles of restorative justice and the long-term interests of both the appellant and society.
27. I therefore find it appropriate to substitute the sentence imposed by the trial court and order as follows:
 - i. The fine of Kshs. 1,000,000 in default to serve one (1) year imprisonment is maintained.
 - ii. The sentence of one (1) year 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 20TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Momanyi h/b for Ogutu for the Appellant

Mburugu for the Respondent

Achode Court Assistant

