



**Diana v Republic (Criminal Appeal E009 of 2021)
[2023] KEHC 236 (KLR) (Crim) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E009 OF 2021

DO OGEMBO, J

JANUARY 24, 2023

BETWEEN

ABIGAEI DIANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in Makadara Chief Magistrate's Court in Criminal Case Number 2015 of 2015, by Hon. H. M. Nyaga Chief Magistrate dated 31.1.2017)

JUDGMENT

1. The appellant, Abigail Diana, was charged before the lower court with the offence of Trafficking narcotic drugs contrary to section 4 of the *Narcotic Drugs and Psychotropic Substances Control Act*, No 4 of 1994. That on 7.7.2015 at Industrial Area Prison in Industrial area, within Nairobi county, she was found trafficking narcotic drugs, namely heroine, to wit 50 sachets of street value of Ksh.5000/= which was not in medical preparation.
2. Upon full hearing of the case, the appellant was convicted as charged. On January 30, 2017, she was sentenced to serve 10 years imprisonment. In addition, she was fined Ksh 1,000,000/= and in default to serve 3 years imprisonment. The sentences were ordered to run consecutively.
3. The appellant has appealed to this court. The following grounds of appeal have been listed and filed herein on February 10, 2021.
 1. That the learned judge erred in law in overlooking the valuation of goods for penalty purposes under section 86(1) of the *Narcotic drugs and psychotropic substances (Control) Act*, 1994.
 2. That the learned Judge erred in law in giving fine and default hence contradicting section 28 of the penal code.



3. That the learned Judge erred on matters relating to chain of custody of the drugs Act.
 4. That the learned Judge's finding on "trafficking" did not meet the required legal standards, thus there was no evidence linking the appellant herein to the charge.
 5. That the learned Judge erred in law by failing to properly evaluate and analyse the evidence on record and relied on insufficient, uncorroborated and incredible evidence and come to the wrong decision that the appellant was involved in the alleged drugs trafficking.
4. The appellant pleads that this appeal be allowed, the conviction be quashed and the sentence be set aside and that she be set free. The Respondent has opposed this appeal.
 5. This appeal was canvassed by way of written submissions by consent of the 2 sides. Both sides duly complied and filed their set of submissions.
 6. On the appellant's side, it was submitted that the appellant was not accorded his right to fair hearing i.e the right to be informed in advance of the evidence of the prosecution and access to the same she relied on *Joseph Ndungu Kagiri Versus Republic* (2016)eKLR.
 7. It was also submitted that the weight of the evidence did not support a conviction. She cited section 74A(1) of the Act relating to weighing of the exhibit. The appellant also challenged the chain of custody of the exhibits and that from the record, it is not clear between PW2, 3 and 4 signed the inventory of the seized substances.
 8. It was also submitted that the prosecution's case had material contradictions, in consistencies and irregularities. That first, it was said to be cocaine only for the same to be determined 5 months later to be a narcotic drug without stating which one. The appellant also maintained that the sentence was harsh and excessive, and that the default of 3 years was in error. He relied on *Henry O Edwin Versus Republic* (2015)eKLR, that;

... the value of the drug is given as Kshs 3,545,600/= and so the fine which ought to have been imposed ought to be 3 times the sum that is 10 million shillings which was proper, but in default, the Act is silent so one would then fall back on section 28 of the penal code on sentencing principles and I concur that is default, the sentence ought to have been 12 months. To that extent, I set aside the imprisonment term imposed of 5 years and substitute it with a 12 months sentence to take effect from the date of conviction."
 9. For the Respondent, it was submitted the PW1 confirmed that the drug was in fact heroin. That PW2, 3 and 4 confirmed the recovery of the drugs from the appellant at Industrial Area prison. And that appellant was accorded fair trial.
 10. It was also submitted that the sentence was neither harsh nor excessive and within the law. He lied on *Kabibi Kalume Versus Republic* (2015)eKLR, that;

In the premises, we shall state without tiring , that the Narcotic Drugs and Psychotropic substances Control Act sentence is still discretionary. We are of course not suggesting that under this Act that the court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous...."



11. These, basically were the submissions of the parties. Being a 1st appellate court, it is the duty of this court to analyse and evaluate the evidence that was before the lower court and to come to its conclusion (see *Okeno versus Republic* (1972)EA 32)
12. From the record of proceedings, the case of the prosecution commenced with the evidence of PW1, Marion Chege, a Government Analyst. That she received the exhibits from PC Musyoka and on examining same found same to be a narcotic drug heroin. In court, she produced her report (Exh-2). PW2 PC Patrick Musyoka of Industrial Area police station is the one who received the appellant and the exhibits at the police station. He then took the same to the Government Chemist for examination.
13. PW3 PC Anne Kimani, a warder at Industrial Area Prison recalled that on 7.7.2015, the appellant had gone to visit a remandee. That on searching the appellant in her bra, the witness recovered a piece of paper containing satchels of powder (Exh.-3). She duly arrested and appellant. And PW4 Senior Sergeant James Njiuma Timothy also of Industrial Area Prison, received the appellant and the exhibits from PW3. He proceeded to hand over the appellant to the police station.
14. When the appellant was put to her own defence, she gave a sworn defence that her deceased sister had sent her to Industrial Area police station over a motor cycle she had sold to someone. That as they queued to be inspected, a lady next her asked her to hand over paper bay she had to an officer on her behalf, John Musyoka. That she was handed 500/= to hand over. Then she was searched. The lady was gone. She saw some substance on the table. That the officers asked her for Kshs 20,000/= which she did not have. She was then taken away in a vehicle where the police again demanded Kshs 50,000/=. She denied the charges.
15. This basically is the evidence as it came up before the court. From the prosecution, side, at least 3 witnesses, PW1, PW2 and PW3 gave a well corroborated evidence on how the appellant who had gone for a visit at the Industrial Area prison was subjected to a routine search when PW3 recovered the exhibits from her body. These witnesses did not have any prior knowledge or acquaintance with the appellant. This court in the circumstances, is convinced that these witnesses were truthful in their evidence that indeed the exhibits were recovered while in possession of the appellant.
16. As to the identity of the recovered exhibits, PW1 confirmed examining the same at the Government chemist and that she confirmed the same to be heroin, a narcotic drug under the Act. This witness duly produced her report of the examination as an exhibit. There is therefore no doubt that the exhibit (material) recovered from the appellant is heroin, a narcotic drug.
17. The evidence of the prosecution therefore clearly proved 2 material facts. That the exhibits were recovered from the appellant and that the exhibits were indeed heroin, a narcotic drug.
18. Section 2 of the Act defines trafficking to mean;

Importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution of any person or making an offer in respect thereof.”
19. The evidence of the prosecution was that the exhibits were recovered from the body of the appellant, specifically hidden in her breasts. To me, this confirms that this was a case of trafficking in narcotic drugs by storing and conveyance.
20. When the appellant was put to her own defence, she denied the charges and maintained that she had been handed the exhibits by an unnamed lady who then disappeared. With respect I do not believe this defence in view of the fact that at no time did the appellant ever raise the defence with the prosecution



witnesses who testified in court. It is worth noting that this recovery took place in a guarded prison facility. It is therefore inconceivable that the alleged lady mentioned by the appellant would give the exhibits to the appellant and simply walk away unnoticed. Obviously, the lady would have been noticed by the prison guards. As it were there is no evidence that any prison warder ever got sight of this lady. This court is not convinced that this defence was truthful. I dismiss it.

21. As to the allegations made by the appellants regarding demands of money made to her both by the prison officers and the police officers remained totally unproved.
22. The sum total is that the defence raised by the appellant totally lacked in merit and I dismiss the same.
23. It is incumbent on the prosecution to prove the case against the deceased (appellant) beyond any reasonable doubt (see *Woolmington Versus Dee* (1935)AC 462) and *Miller Versus Minister of Pensions* (1947)2ALLER 372). This court, considering the circumstances and evidence, is convinced that the prosecution discharged its burden and proved the case against the appellant beyond any reasonable doubt as required by the law.
24. Lastly, is the issue of sentence. The appellant was charged with the offence of trafficking in a narcotic Drug and Psychological. Substances (Control) Act, No 4 of 1994. Section 4 of the Act states.

Any person who traffick's 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 1 million shillings or 3 times the market value of the narcotic drug or psychotropic substance, whichever is greater and in addition, to imprisonment for life.”
25. In sentencing, trial magistrate relied on several superior court decisions confirming that the sentence provided for in the Act are not necessarily mandatory. The cases relied on are;-
 - i. [*Kingsley Chukwu Versus Republic*](#), Criminal Appeal No 257/2007
 - ii. [*Priscilla Jemutai Kolongei Versus republic*](#) (2005)KLR 7
 - iii. [*Gathara Versus Republic*](#) (2005)2KLR, 58.
 - iv. [*Carolynne Anna Majabu Versus Republic*](#), Criminal Appeal No 65 of 2014.
 - v. [*Anthony Mbiti Kyasulu Versus Republic*](#), Criminal Appeal No 134 of 2012.
 26. The court proceeded to sentence the appellant to 10 years' imprisonment. And in addition to pay a fine of Ksh 1million and in default to serve 3 years' imprisonment. The sentences were ordered to run consecutively.
 27. The court gets guidance on this issue of sentence from the Court of Appeal decision in [*Benard Kimani Gacheru Versus Republic*](#) (2002)eKLR, that;

...it is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence, unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factors, or took into account, some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed the sentence, those



alone might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated in shown to exists.”

28. In this case, the sentence of the court was legal and proper. No reason has been shown to this court to enable this court to otherwise interfere with the sentence of the court.
29. In view of the above observations, this court is not convinced that the appeal of the appellant has any merits. The appeal of the appellant, Abigael Diana, filed herein on February 10, 2021 is accordingly wholly dismissed. Orders accordingly.

HON D O OGEMBO

JUDGE

24TH JANUARY, 2023.

Court:

JUDGMENT READ OUT IN OPEN COURT IN PRESENCE OF THE APPELLANT (LANGATA WOMEN) AND MS ODUOR FOR STATE.

HON D O OGEMBO

JUDGE

24TH JANUARY, 2023

