**Ishikael v Republic (Criminal Appeal 1 of 2020)**
**[2023] KEHC 3050 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3050 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CRIMINAL APPEAL 1 OF 2020**

**A. ONG'INJO, J**

**MARCH 31, 2023**

**BETWEEN**

**CHRISTINE NJERI ISHIKAEL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the decision of Hon. J. M. Omido (PM) delivered on 18th December 2019 in Kwale Criminal Case No. 449 of 2014, Republic v Christine Njeri Ishikael)***

**JUDGMENT**

## Background

1. The Appellant, Christine Njeri Ishikael was charged with 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.

2. Particulars were that Christine Njeri Ishikael on the April 16, 2014 at Lunga Lunga Border in Kwale County within the Coastal Region was found trafficking in narcotic drugs by transporting 36 grams of heroin valued at Kshs 108,000.

3. The evidence supporting this charge was given by PW1, Zaitun Mohammed, a police officer at Lunga Lunga police station. She said she was on duty at the border post station when the appellant arrived from Tanzania aboard Simba Coach bus Reg No KBU 186A and Corporal Samoei told her to search her as she was suspected of trafficking in narcotic drugs. PW1 said that she recovered a substance in a polythene paper covered in tissue in the appellant's pants. When PW1 initially testified on November 24, 2014, she identified and marked the substance as MFI-1.

4. PW2, PC Stanley Salamba, testified on August 21, 2015 that he was with CPL Samoei on April 16, 2014 at about 5.15 pm when CPL Samoei told him that he had information of a person traveling from Daresalam to Mombasa carrying narcotic drugs. He said he was with PC Zaituni and a security

guard called Nancy when the bus arrived for inspection. That they were shown the suspect who is the appellant herein and PC Zaituni and the security guard called Nancy searched her and recovered brown powder substance. PW2 identified the powder and it was marked MFI-P1. He also identified a temporary permit to travel as MFI-P2.

5. PW3, CPL Christopher Samoei, testified that he had information that the appellant was to go to Daresalam on April 15, 2014 to bring some drugs. On 16th, he waited for the appellant at the immigration office and when the bus Reg No KBU 186A arrived, he arrested the appellant and on being searched by PC Zaituni and Nancy Katana a security guard, a powdery substance was recovered wrapped in a polythene bag hid under her pant. She was arrested and taken to the police station and on 17th April, the substance was taken to the government chemist Mombasa where it was weighed and found to be 36 grams. The substance was examined and found to be heroine.

6. PW3 testified that he called a gazetted officer Chief Inspector Mutiso to value the substance. That he told him the colour, weight and texture of the drugs and the same was valued at Kshs 108,000. That the said valuation officer gave a valuation report in respect of the valued substance and the appellant was charged. The brown substance was produced at ExP-1, the temporary travel was produced as ExP-2 and the copy of bus ticket was not produced as the appellant objected to its production saying she did not know about it. PW3 said that they recovered the original bus ticked but did not know where it is. The Exhibit Memo Form was produced as ExP-4 but the production of the government analyst report by PW3 was objected to by the appellant.

7. On September 24, 2015, Mr Omuya Advocate came on record for the appellant and said that he intended to recall witnesses who had testified for the purpose of cross examination. On April 11, 2016, the court ordered for recalling of PW1 to PW3 for further cross examination by the advocate for the appellant. On September 5, 2016, it was indicated that the prosecution indicated that they wanted PW1 to PW3 to testify afresh before they could be cross examined by the defence counsel.

8. On May 30, 2017, the 6th magistrate to handle the matter made an order for it to start de novo. PW2 was recalled and cross examined. He said that he did not search the appellant and relied on the evidence PW2 and Nancy. He said that the appellant was searched by a lady officer and he stood outside while the search was going on. PW3, CPL Samoei testified again on December 14, 2017 and reiterated his testimony in court. His attempt to produce the government analyst report was objected to by the defence counsel. The court indicated that the documents had already been produced before the court and the witness was in court for further cross-examination. In cross examination, PW3 testified that he had a copy of the bus ticket and not an original. The substance was allegedly valued by Chief Inspector Mutiso and the valuation report was prepared and signed by Chief Inspector Onduso and none testified in court. PW3 said he did not take any statements of the driver, the conductor or any of the passengers of the bus that the appellant was travelling in. PW3 admitted that the copy of the bus ticket was not clear and one could not tell what the number of the bus was. He also admitted that he did not prepare an inventory or a search certificate and that the consignment was not sent to Chief Inspector Mutiso for valuation.

9. PW4, Yaya Hamisi Mailu Yaya, produced the government analyst report prepared by John Njenga, a government analyst at Mombasa. On July 31, 2018, the EO at the Kwale law courts testified and confirmed that the substance that was allegedly recovered from the appellant was produced as an exhibit but that it was not traced because the quantity was small and that it was possible it was destroyed by rodents.

10. PW1 also was recalled for further cross examination and she said what was recovered from the accused was brown in colour and was wrapped in a tissue paper.

11. The accused was placed on her defence and she gave unsworn statemet and she denied having been found with the heroine. She said she was shocked when she was arrested and brought to court and she said she was not in possession of the narcotic drugs.

12. Based on the evidence by the prosecution and the appellant's unsworn statement, the trial magistrate found the appellant guilty and she was convicted and fined Kshs 1,000,000 in default to serve 10 years imprisonment.

13. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -

    1. That the Learned Trial Magistrate erred in both law and fact in failing to appreciate that the evidence in totality adduced by the prosecution could not sustain the conviction of the Appellant.

    2. That the Learned Trial Magistrate erred in both law and fact relied on insufficient evidence of the prosecution witnesses and not making a substantive finding that the prosecution had not proved their case beyond any reasonable doubt.

    3. That the Learned Trial Magistrate erred in both law and fact in convicting the Appellant on the evidence of PW7, PW8, PW12 and PW13 whose evidence was different and amounted to contradictions.

    4. That the learned trial magistrate erred in both law in not finding that the appellant did not have exclusive control of the circumstances leading up and consequent to charges being preferred.

    5. That the learned trial magistrate erred in both law and fact in convicting the appellant when a seizure notice, valuer report adduced in evidence was made out by an incompetent officer, with due consideration of the strict requirement of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994.

    6. That the learned trial magistrate erred in both law and fact in not giving the appellant the benefit of doubt the evidence adduced having directly implicated the presence of other persons as reflected on the charge sheet as jointly with others not before court.

    7. That the learned trial magistrate erred in both law and fact in treating the appellant's defence perfunctorily.

    8. That the learned trial magistrate erred in both law in sentencing the appellant to 20 years, a sentence which was extremely excessive in the circumstances.

    9. That the learned trial magistrate erred in both law and fact in passing an illegal sentence.

    10. That the Learned Trial Magistrate erred in both law and fact in convicting the Appellant without the evidence of a proper officer in lieu of the provision of Section 86 (1) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994.

    11. That the learned trial magistrate erred in law in convicting the appellant of the offence of trafficking – conveying yet the charge sheet particularized the offence of trafficking vide – storing.

14. This appeal herein was canvassed by way of written submissions.

**Appellant's Submissions**

15. The appellant in submitting states that a certificate of sampling and a certificate of weighing were never presented as evidence in the trial as against the appellant, and all the items recovered from the appellant were never reduced into an inventory and duly signed by the anti-narcotics unit police officers and the appellant. That the appellant was never served with a seizure notice and neither was it presented in evidence in the trial court which leads to the conclusion that no drugs were seized from the appellant. That failure to present certificate of weighing and certificate of sampling contravened Section 74A of the *Narcotic Drugs and Psychotropic Substances Control Act*.

16. The Appellant contends Section 86 (1) of the *Narcotic Drugs and Psychotropic Substances Control Act* was severely trampled upon as none of the police officers who testified was a gazetted proper officer. The Appellant submits that PW3 who was the arresting officer and one who in his testimony as captured on page 24 line 10 of the Record of Appeal casually took the said controlled substance to the Government Chemist is not a gazetted proper officer and that no proper officer ever presented any evidence nor testified against the Appellant.

17. The Appellant in the submissions state that the case against the Appellant commenced on April 15, 2014 where in the testimony of PW3 that information was received by police officers from an alleged informant that the Appellant travelled to Tanzania through the same border post, there was no evidence presented of travel through the border post of Lunga Lunga and back through the same border post between 15th and April 16, 2014, and the mode of travel, either by public service vehicle or private means. The Appellant submits that the sentence stems from a wrongful conviction and it would be considerate that she be set at liberty forthwith.

**Respondent's submissions**

18. The Respondent states that the prosecution sufficiently proved the existence of the narcotics drugs. That the procedure was followed whereby the weighing of the substance was done and the substance analysed and the government chemist officer confirmed that it was heroine. The Respondent submits that the entire process was done by competent officers who testified before court, and the weighing and the government analyst report produced as exhibits. However, the respondent admits that destruction of the exhibits without the proper procedure being followed was a procedural flow and the appellant has not demonstrated any prejudice suffered as a result of failure to comply with the procedure.

19. On the sentence, the Respondent cites Section 4 of the *Narcotic Drugs and Psychotropic Substances Control Act* which prescribes 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. The Respondent contends that the court therefore meted a very lenient sentence but should instead be enhanced to meet requirements of the law. That the prosecution proved its case beyond reasonable doubt and the conviction and sentence were safe. They prayed that the appeal be dismissed.

**Analysis and determination**

20. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same

conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

21. After considering the grounds of appeal, records of the trial court and submissions, the issue for determination is whether the prosecution proved their case beyond all reasonable doubt against the Appellant to sustain a conviction.

22. Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994 provides: -

> Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her 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-
>
> i. where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;
>
> ii. where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;

23. It was the prosecution's evidence that PW1, PC Zaituni and a security guard known as Nancy searched the Appellant and recovered a narcotic drug in her pant. It is only PW1 who testified as to the recovery of the substance which was later analysed and found to be heroine. The second person who assisted PW1 to search the Appellant did not testify and PW1 did not prepare an inventory or seizure notice to prove that the substance was indeed recovered from the Appellant.

24. PW3, the Investigating Officer failed to follow any of the procedures in the regulations under *Act No 4 of 1994* as to seizure notice, inventory, weighing, sampling and photography of the recovered substance by the scenes of crime officer as well as valuation of the substance. He said that he placed a call to Chief Inspector Mutiso to give him the value of the substance over the phone and that Chief Inspector Onduso is the one who signed the said report. However, a perusal of the proceedings in the lower court that there was any such valuation report signed by either of the officers.

25. PW3 did not consider the presence of the Appellant as important as he was processing the substance that was allegedly recovered from her. This court is therefore of the view that the flaws in the arrest, investigations and prosecution of the Appellant cannot sustain a conviction. The appeal is allowed, conviction quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,**

**THIS 31TH DAY OF MARCH 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Ms. Anyumba h/b for Mr. Ngiri for the Respondent

Mr. Egunza Advocate for the Appellant – No appearance

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**