



**Xiaoting & another v Republic & another (Criminal Appeal E029 of 2021)  
[2023] KEHC 18116 (KLR) (Crim) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E029 OF 2021  
LN MUTENDE, J  
MAY 29, 2023**

**BETWEEN**

**QIU XIAOTING ..... 1<sup>ST</sup> APPELLANT**

**QIU XIAOTING ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**REPUBLIC ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal against the original conviction and sentence in Criminal Case No. 89 of 2018 at the Chief Magistrate's Court JKIA by Hon. L.O. Onyina - on 10th October, 2019)*

**JUDGMENT**

1. Qiu Xiaoting, the Appellant, was charged with the offence of Trafficking in psychotropic substances contrary to *Narcotics and Psychotropic Substances (control) Act* No 42 1994.(Act) Particulars of the offence being that on the 4<sup>th</sup> day of July, 2018, at Jomo Kenyatta International Airport transit lounge area, gate 10, within Nairobi County, jointly with others not before court, she unlawfully trafficked by conveying 2520 grams of psychotropic substance namely, Methamphetamine, with a market value of Ksh 20,160,000/-concealed in false bottom of her black bag that was checked in, in contravention of the stated Act.
2. Upon being taken through full trial, she was convicted and sentenced to pay a fine of Kenya shillings Forty Million (Ksh 40,000,000/-) and, in default to serve a sentence of one (1) year imprisonment; and, in addition to serve a term of eighteen (18) years imprisonment.
3. Aggrieved by the conviction and sentence, through the firm of Swaka Advocates, the appellant proffered the instant appeal on grounds that: there was no evidence to sustain a conviction; ingredients



- of the charge were not established; evidence adduced was at variance with the particulars of the charge sheet; the charge was incurably defective; the appellant's right to a fair trial was contravened; the defence evidence that was verifiable unlike that of the prosecution that was incredible was disregarded; exhibits tendered lacked evidentiary value to the prosecution's case; the burden of proof of beyond reasonable doubt was not proved; and; that, the sentence imposed was harsh, excessive and untenable.
4. Subsequently, the appellant prosecuted the appeal in person. On the 3<sup>rd</sup> November, 2022, the appellant made an oral application seeking to abandon the appeal against the conviction and only pursued the appeal against sentence. The appeal was canvassed through written submissions.
  5. On the question of interference with the sentence, reliance was made on the case of *Makela v the State* (135/11) ZASCA 166, where the Supreme Court of Appeal of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”
  6. Based on the decision, while appreciating that sentencing was solely the discretion of the sentencing court, the appellant urged that the appellate court could interfere with the sentence if there were factors not considered or if the trial court erred in applying set principles as stated in the case of *Ogola s/o Owour v Republic* (1954) EACA 270.
  7. It is urged that the trial court erred in failing to comply with Section 333(2) of the *Criminal Procedure Code*(CPC) by not taking into account time spent in custody. In this respect reliance was placed on the case of *Abamad Abolfathi Mohammed v Republic* (2018) eKLR.
  8. This, according to the appellant was a violation of fair trial. That according to Article 50(2)(p) of the *Constitution* and Article 29 (a) of the *Constitution*, an accused person is entitled to the benefit of the least severe of prescribed punishments of an offence hence the trial court should not have deprived the appellant of her right to a least severe punishment.
  9. That mitigating factors put forward by the appellant was not considered by the trial court.
  10. The Respondent through Prosecution Counsel, Ms. Edna Ntabo urged that in meting out the sentence the trial court exercised the sentencing discretion judiciously and within the confines of the law. Relying on the case of *Bernard Kimani Gacheru v Republic*(2002)eklr, she urged that the appellant had not demonstrated reasons why this appellate court would interfere with the sentencing discretion of the trial court.
  11. With regard to Section 333(2) of the *CPC* it was noted that the appellant having been in custody during the entire period of trial, the trial court failed to state from which date the sentence would run. The respondent however called upon the court to uphold the decision of the trial court.
  12. The duty of this court at the appellate stage must review and re-assess the decision of the trial court so as to come up with an independent conclusion. (See *Gabriel Njoroge Kamau v Republic* (1987) LLR99).
  13. Looking at the back ground of the matter for purposes of considering circumstances in which the offence was committed, the appellant who was travelling from Kenya to China was intercepted at the Jomo Kenyatta International Airport. The police complied with Section 76 of the Act by weighing and sampling of the substance and certificates thereto were duly issued. The substance in issue was found concealed in a makeshift yellow black bag, luggage that belonged to the appellant. The substance was



analyzed and proved to be methamphetamine, a psychotropic substance listed in the second schedule of the [Narcotic drugs and Psychotropic substances control Act](#) (1994).

14. Section 4(a) of the [Narcotic drugs and Psychotropic substances \(control\) Act](#) No 4 of 1994, revised edition 2012, provides thus:

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. It is hackneyed that the appellate court can only interfere with the sentence meted out by the trial court if it acted on wrong principles or where the sentence was manifestly excessive. In the case of [Bernard Kimani Gacheru v Republic](#) (2002) eKLR the Court of Appeal clearly expressed itself thus:

“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 sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, 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 that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

16. The court has been faulted for not complying with Section 333(2) of the [CPC](#) which provides thus:

Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

17. The [Judiciary sentencing Policy Guidelines](#) Provide that:

“The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”



18. The appellant was arrested on July 4, 2018. The trial proceeded and concluded on October 15, 2019. In meting out the sentence, trial court delivered itself thus:

“I have taken into consideration the mitigation made on behalf of the accused person by her advocate namely Mr. Ogutu the indication by the Prosecution Counsel that the accused person (now convict) is a first offender, the nature of the offence she committed and the sentences provided for the same, the youthful age of the convict the quantity and value of the psychotropic substance in question and the fact that she was on her way conveying 2520 grams of methamphetamine from Nairobi to China, thus making the offence transnational in nature. The convict had travelled from China to Kenya and was on her way back to China with psychotropic substance. The advocate for the accused (convict) did indicate that the convict will be twenty four (24) years old in one month’s time. That too is a relevant consideration, as is the rest of the mitigation. Although Mr. Ogutu indicated that the convict prays for a non-custodial sentence all the relevant considerations as authored herein above and in a number authorities including the Court of Appeal case Mohammed Farmau Bakari v Republic (2016) EKLK mitigating is the same in this case. The methamphetamine in question is valued at Kshs 20,160,000/- and that too is a relevant consideration because the composite sentence under section 4(a) of the Narcotic drugs and psychotropic substance (control) Act is partly determined by the value of the psychotropic substance. The convict being a youthful person, the court is also of the view that the sentence to be imposed should not be that which will completely destroy her life. I have also perused the pre-bail report presented. In the circumstances for the following sentence reasonable...”

19. It is apparent that the court did not take into account time spent in custody. Taking into account time spent in remand custody is an obligation. Failure to comply with the law is an infraction of the law which should not be condoned as it contravenes the accused person’s constitutional rights.
20. Looking at the fine imposed, it is less commutation of three times the total value of the substance recovered. Having been trafficking a substance valued at Ksh 20,160,000/- The court would have been expected to impose a fine of Ksh 60,480,000/- However, the respondent did not file a cross appeal for enhancement of the sentence.
21. Before passing sentence the trial court received evidence from the appellant which made it come up with an informed sentence. Looking at the value of the substance, the court would have meted out a life imprisonment but it opted to mete out a definite custodial sentence.
22. The transitional nature of the offence in issue called for a stringent sentence despite the age of the appellant which the court noted and was persuaded not to consider sentencing her to life imprisonment which would destroy her life.
23. The upshot of the above, is that the sentence meted out was not excessive. Therefore, I affirm the sentence save that it will be effective from the date of arrest, the 4<sup>th</sup> day of July, 2018; having considered time spent in remand custody.
24. And, after serving the sentence she will be repatriated to her country of origin.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 29<sup>TH</sup> DAY OF MAY, 2023.**

**L. N. MUTENDE**



**JUDGE**

**IN THE PRESENCE:**

Appellant

Ms Chege – ODPP

Court Assistant- Mutai

