



**Ajayi & another v Republic (Criminal Appeal E003 of 2023)
[2023] KEHC 21408 (KLR) (Crim) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E003 OF 2023
DR KAVEDZA, J
JULY 28, 2023**

BETWEEN

HARUNA MATAIRU AJAYI 1ST APPELLANT

RAHEEM YUSUF OWOLABI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. C.M Njagi SRM, on 16th December, 2022 in JKIA Magistrate's Court Criminal case no. E005 OF 2021 Republic vs Haruna Matairu & Raheem Yusuf)

JUDGMENT

1. The appellants were charged and after a full trial convicted for two counts of offences. In count I, they were 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. They were each sentenced to pay a fine of Kshs. 4,572,000/= in default to serve one-year imprisonment in addition to serving a term of ten (10) year imprisonment. In count II, they were each convicted for the offence of being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the [Kenya Citizenship and Immigration Act](#) No. 12 of 2011. They were also sentenced to serve 6 months imprisonment each.
2. Being aggrieved by the decision of the trial court, the appellants filed a memorandum of appeal dated 23rd December 2023 challenging their conviction and sentence. In their appeal, the raised 27 grounds. The main grounds raised are that the appellants challenged the totality of the prosecution's evidence against which they were convicted. The appellants complained that the prosecution's witnesses failed to comply with procedures immediately after the seizure. The prosecution failed to call a key witness to the case. The trial court erred by convicting the appellants for the offence of trafficking by conveyance



as opposed to trafficking by storing, the offence which the appellants were charged with. The trial court failed to consider the sworn defence and submissions of the defence.

3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
4. The prosecution called eight (8) witnesses in support of their case. No. 87058 Corporal Richard Mwadime (PW 1) of DCI Anti-Narcotics Unit testified that he was performing investigation duties on 13/10/2021. He told the court that he received intelligence that house no. C03 at Pecvine Heights Apartment was being used to store narcotic drugs. He in the company of other officers went to the premises. They found the appellants in the premises. They conducted a search in the one-bedroom apartment. From the search, several items were recovered which were indicated in the inventory. A whitish powdery substance was also recovered in a white shopping bag wrapped in cellotape. They prepared a search certificate that was produced in court. He told the court that he witnessed the weighing and sampling processes.
5. On cross-examination, he indicated the 1st appellant gave them access to the house although they did not have a search warrant. He maintained that the search which began in the bedroom was not premeditated. In addition, there he did not have any document to show the movement from the apartment to the police station.
6. No. 88901 PC Timothy Maiyo (PW 2) testified that he accompanied PW 1 to the appellant's house. He reiterated the testimony of PW 1 and indicated that he prepared the inventory of the items recovered from the house. He produced the same as exhibits in court.
7. Dennis Owino Onyango (PW 3) an analyst at the Government Chemist Department testified that he received a sample of a powder material. The weighing was done on 15th September 2021. The appellants refused to sign the certificate of weighing. He also prepared a certificate of sampling which the appellants refused to sign. He produced the certificate of sampling. He told the court that he did the analysis and identified the substance as heroin. He produced the report dated 2nd November 2021. He indicated that it was a creamish powdery substance.
8. Peris Mbuu (PW 4) an officer at the immigration department testified that he was asked by the DCI to confirm the immigration status of the appellants who had Nigerian passports. He told the court that he found that both their immigration status had expired. She produced the travel Pices report, the letter from the DCI, and the certificate under Sections 65 (8) and 106B of the *Evidence Act*.
9. No. 236120 Chief Inspector Philip Langat (PW 5) gave evidence that he was requested to give the pricing of 508 grams of heroin for purposes of drawing a charge sheet. He gave the value at Kshs. 1,5,24,000 and prepared a valuation certificate. He testified that the purity of the product did not affect the value of the substance.
10. Peter Githumbi Nderitu (PW 6) a caretaker at Pecvin Heights told the court that the 1st appellant came to look for a house on 25th December 2020. C03 was available and the premises was let to him for a monthly rent of Kshs. 41,900. He produced the receipts and invoices issued to him. He testified that he was not present when the police came to the 1st appellant's house.



11. No. 79969 Sergeant Hudson Henry Masaka (PW 7) testified that he documented the weighing and sampling processes on 15th October 2021. He produced the report and photographs of the same. On cross-examination, he indicated that the photographs did not need to have a time stamp.
12. No. 83720 Sergeant Sheila Kipsoi (PW 8) the investigating officer testified and reiterated the evidence of how the search on the premises was conducted. That the appellants were arrested and booked at Muthaiga Police Station. On 15th October 2021, she proceeded to the Government Chemist with the appellants in the company of the other two officers for weighing and sampling of the recovered substance. It was weighed at 508 grams and she prepared a weighing certificate which she produced in court. She also prepared and produced the exhibit memo which was used to deliver the sample to the government chemist. In addition, she produced the notice to tender records into evidence and the records of the seized substances. She charged the appellant with another, not before this court.
13. After the close of the prosecution's case, the appellants were found to have a case to answer and was put on their respective defences. In his defence, 1st appellant he gave sworn testimony and stated that he is a Nigerian Citizen currently in Kenya as a crypto trader. He told the court that on the material day, he was in the house when police officers came to his house and did a search. That they only recovered his mobile phones. He complained that the officers demanded a bribe which he refused to pay. As a result, he was arrested and charged. He denied committing the offence he was convicted of.
14. The 2nd appellant also gave sworn testimony. He testified that he is also a crypto currency. He told the court that he came to Kenya to visit the 1st appellant at his apartment. On the material day, police officers came to the premises and requested to see their identification. As their visas had expired, the police demanded Kshs. 200,000 which they did not have. They were subsequently arrested and charged. He denied being aware that there was any illegal substance in the house.
15. The court found the appellants guilty and convicted him accordingly.

Analysis and determination.

16. In this case, the prosecution case is that in the course of an intelligence-led operation, PW 1 and PW 2 recovered from the 1st appellant's house a whitish powdery substance in a white shopping bag which was scientifically analysed and found to be heroin which was listed as a narcotic drug in the First Schedule of the *Narcotic Drugs and Psychotropic Substances (Control) Act*.
17. 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...”
18. 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 clearly 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.”

19. For the offence of trafficking in narcotic drugs to be proved, the prosecution must establish to the required standard that the person accused of the offence had actual possession or had knowledge of the existence of the narcotic drugs in the means of storing in question. In the appeal, the appellants challenged the totality of the prosecution’s evidence against which they were convicted. They challenged the evidence of the government analyst who prepared the certificate of sampling. They claimed that the certificate failed to indicate the substance he claimed to be heroin. In addition, the colour was unknown since two different colours were given in its identification. They maintained that his evidence was a biased opinion and his credibility questionable. The appellants further complained that the prosecution failed to prove that he stored the narcotic drugs. By failing to subject the substance to forensic examination, the prosecution’s case was not proved beyond reasonable doubt.
20. They also submitted that the testimonies of the two officers who allegedly conducted the search were full of contradictions. Further, the prosecution failed to call an independent witness to give evidence. Their evidence was therefore uncorroborated.
21. After my own independent appraisal of the evidence on record, I find that PW 1 and PW 2 were consistent in their evidence of how they recovered the whitish substance in the 1st appellant’s premises. The substance was later confirmed to be heroin. From the evidence of PW 6, the 1st appellant was paying rent at the premises and was the rightful tenant. Before the recovery of the narcotic substance, he was on the premises in the company of the 2nd appellant.
22. There is no evidence that anybody else accessed the premises other than the appellants. In my view, the prosecution’s evidence is overwhelmingly consistent. I must come to the conclusion on the fact that the 1st appellant, was the lawful tenant of the premises in lang’ata that was the locus in quo, and that he was well aware of the things kept in that house – including the narcotic drugs in question. In my view, the circumstances under which the narcotic drugs were recovered from the 1st appellant’s premises pointed to a plot of which the 1st appellant was well aware of but is feigning ignorance to exonerate himself from the offence. I, therefore find no merit in the contention that the prosecution did not establish the necessary mens rea on the part of the 1st appellant.
23. However, in the case for the 2nd appellant, no direct evidence was produced by the prosecution linking him to the narcotic drugs. From the evidence he had visited his cousin at his premises. No nexus was established between him and the narcotic drugs. He did not own or rent the premises in which the narcotic substances were allegedly recovered. He did not lead the police during the search of the premises. In addition, he is not the one who opened the door for the police. The inference I can make from this chain of events is that the 2nd appellant was a visitor in that house. The prosecution did not even attempt to lay a basis why he was charged with the offence in count I. In the premises, the 2nd appellant had no connection with the narcotic substances recovered. As such, he is acquitted on count I of the charge.
24. The appellants complained that the prosecution’s witnesses failed to comply with procedures immediately after the seizure. In their submissions, they alleged that they were not present during weighing as alleged by the prosecution witnesses which violated section 74 A of the *Act*. In addition, they argued that the prosecution evidence as being inadmissible. They contended that the prosecution failed to serve the defence with a copy of the record of seized substances contrary to section 77 of the *regulations*. They maintained that in admitting the evidence, the trial court occasioned a miscarriage of justice.



25. Section 74A (1) of the [NDPSCA](#) outlines the procedure of handling seized narcotic drugs and it states that: -
- (1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorised officers”) shall, where practicable in the presence of —
 - a) the person intended to be charged in relation to the drugs (in this section referred to as “the accused person”);
 - b) a designated analyst;
 - c) the advocate (if any) representing the accused person; and
 - d) the analyst, if any, appointed by the accused person (in this section referred to as “the other analyst”), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.
26. From my understating of the above section, it is evident that the sample in the white shopping bag was handled according to the procedure laid out in the statute and the appellants contention that there was a contradiction is not founded. PW1, PW 2, PW 7, and PW 8 established that the procedure under Section 74A of the said [Act](#) was followed. Photographs of the psychotropic substance were taken. The substance was weighed and found to be 508 grams. A weighing certificate was issued in that regard. A forensic test was conducted by PW 3 which indicated the substance to be heroin. The same is categorized as a psychotropic substance under the Act. A certificate of sampling was adduced in evidence. A notice of seized substances was prepared and adduced in evidence. A notice of intention to tender records in evidence was also produced in court. PW 5 valued the substance at Ksh.3,000/- per gram. A certificate of valuation was adduced in evidence.
27. In the event I was to find that there was a contradiction as to how the narcotic substance was handled as alleged, the same would be a minor contradiction that would not affect the substance of the prosecution case, which is that the appellants were caught trafficking narcotic drugs. I thus conclude that the offence was proved beyond any reasonable doubt and the conviction was well founded against the 1st appellant.
28. The appellants also argued that the prosecution failed to call a key witness to the case. Section 143 of the [Evidence Act](#) (Cap 80) Laws of Kenya provides:
- No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact
29. In the case of *Bukenya & Others v Uganda* [1972] EA 549 court addressed itself thus:-
- “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
 - (ii) That Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.



(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

30. The evidence in the instant case was adequate to prove the ingredients of the offence the 1st appellant was charged with at the trial court. The ground of appeal therefore fails.

31. The appellants challenged the charge sheet against which they were convicted as being defective. They submitted that the prosecution made a presumption of the value of the narcotic substance and charged them before the value was even determined. However, the valuation affects the sentence to be meted out to the appellants and not their guilt as to the charges of trafficking in narcotic drugs. The Court of Appeal in *Kabibi Kalume Katsui v Republic* [2015] eKLR held that:-

“The law is clear on the offence of trafficking the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself.”

32. It therefore follows that the valuation certificate is only meant to assist the court in imposing the appropriate sentence.

33. Finally, the appellants contended that the trial magistrate failed to consider their sworn defences. A reading of the trial court’s judgment clearly shows that the learned trial magistrate reproduced and considered all the evidence adduced in support of the prosecution and defence case. She weighed the evidence in its totality after which she concluded that the appellants’ statements in their defence were not credible and were unworthy of belief. It is therefore not true that the trial court disregarded their testimonies in their defence. The record also shows that the learned trial magistrate carefully considered the submissions filed on behalf of both parties before arriving at her decision. It is therefore my finding that the above complaint is unfounded and is bereft of any merit.

34. It is noted that the appellants did not challenge the conviction on the second count. They were convicted for the offence of being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2011. They were each sentenced to serve 6 months imprisonment.

35. With respect to count I, the appellants were each sentenced to pay a fine of Kshs. 4,572,000/= in default to serve one-year imprisonment in addition to serve a term of ten (10) years imprisonment. The trial court’s ruling on the sentence indicates that the learned trial magistrate considered the plea in mitigation advanced by the appellants particularly the fact that they were first offenders and their personal circumstances as detailed in their mitigation. The trial court also considered their pre-sentence reports.

36. My reading of the ruling on the sentence reveals that the learned trial magistrate considered all relevant factors including the quantity and value of the drugs the appellants were found trafficking. Taking into account the maximum penalty prescribed by the law for the offence of trafficking in narcotic drugs which is life imprisonment and the devastating effects the drug menace has had on our society, particularly the youth, I am satisfied that the sentence of 10 years imprisonment meted out on the 1st appellant was not harsh nor excessive and is therefore affirmed.

37. In the end, I make the following orders:

i. The 1st appellant’s appeal lacks merit and it is consequently dismissed in its entirety.



- ii. The 2nd appellant's appeal on count 1 is merited and is hereby allowed. His conviction and sentence by the trial court are hereby nullified and set aside.
- iii. The 2nd appellant to be deported and be repatriated to his country of origin, (Nigeria).

Orders accordingly.

DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.

D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State

Appellant present virtually

Joy C/A

