**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. E045 OF 2021**

**CALVIN OGALLO OTIENO..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(*Being an appeal from the conviction and sentence in JKIA Criminal Case No. 93 of 2017***

***dated 11th May 2021 (Hon. L. O. Onyina (SPM))***

**JUDGMENT**

**1.** The appellant, *Calvin Ogallo Otieno,* was tried and convicted of 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* (hereinafter the Act).

**2.** The particulars of the charge were that on 7th March 2017 at Cyton Apartments in Kibera within Nairobi County, the appellant, jointly with others not before the court, trafficked in a narcotic drug namely cocaine to wit 345.83 grams, with a market value of KShs.1,383,320 by conveying it in a motor vehicle registration number KBM 949S, Mercedes Benz in contravention of the said Act.

**3.** Upon his conviction, the appellant was sentenced to pay a fine of KShs.2 million in default to serve 1 year imprisonment and in addition to serve 7 years imprisonment.

**4.** Aggrieved by his conviction and sentence, the appellant proffered the present appeal. In his petition of appeal filed through his advocates, *Messrs. Omondi Ogutu & Associates*, the appellant advanced a total of ten grounds of appeal which were largely a duplication of each other.

In summary, the appellant complained that the learned trial magistrate erred in law and fact by: convicting him on evidence which was insufficient to prove his guilt as charged beyond any reasonable doubt; failing to consider his defence and final submissions; and, failing to consider his plea in mitigation and imposing a harsh sentence. He prayed that his conviction be quashed and his sentence be set aside.

**5.** At the hearing, the appellant and the respondent chose to prosecute the appeal by way of written submissions which they duly filed. The written submissions were briefly highlighted before me on 23rd February 2022 by *Prof. Tom Ojienda, SC* who represented the appellant and learned prosecuting counsel *Mr. Mutuma* who appeared for the state.

**6.** In his written and oral submissions, learned counsel *Prof. Ojienda* submitted that the appellant was wrongly convicted as the prosecution had failed to discharge its burden of proof to the standard required by the law which was proof beyond reasonable doubt. Relying on the persuasive authority of ***Ahmed Said Bakari V Republic, [2020] eKLR***, *Prof. Ojienda* contended that the prosecution had failed to prove that the appellant had possession of the vehicle at the time the drugs were recovered or that he had knowledge of existence of the drugs in the vehicle. He urged the court to find that the appellant would not have voluntarily led the police to his vehicle if he knew that it had prohibited substances; that the appellant's conduct was that of a person who had nothing to hide which demonstrated that he was not aware of existence of the drugs in the vehicle. For this proposition, counsel relied on another persuasive authority of ***Joseph Odhiambo Opiyo V Republic, [2017] eKLR.***

**7.** Further, *Prof. Ojienda* cited the Court of Appeal decision in ***Gabriel Ojiambo Nambesi V Republic, [2007] eKLR*** where the court expounded on the definition of trafficking in *Section 2* of the *Act* and the elements needed to establish the offence of trafficking in narcotic drugs in support of his submission that the prosecution had failed to prove the conduct of the appellant which constituted trafficking.

**8.** In addition, Counsel averred that the learned trial magistrate erred by unjustly dismissing the appellants defence as an afterthought. He implored me to find that the evidence adduced by the prosecution did not establish a link between the appellant and the offence charged and that therefore, the appeal was merited and ought to be allowed.

**9.** The appeal is contested by the state. Learned prosecuting counsel *Ms Akunja* filed written submissions on behalf of the respondent supporting the appellant's conviction and sentence.

During the hearing, learned prosecuting counsel *Mr. Mutuma* chose not to highlight the written submissions filed by *Ms Akunja* and entirely relied on them.

**10.** In the written submissions, *Ms Akunja* elaborately analysed the evidence adduced before the trial court and asserted that the evidence presented by the prosecution proved beyond any reasonable doubt all the ingredients of the offence preferred against the appellant, namely, identity of the recovered substance as a narcotic drug, its possession by the appellant and its conveyance.

**11.** With regard to the appeal against sentence, *Ms. Akunja* opined that the sentence was not only lawful but was also lenient considering the value of the narcotic drug recovered from the appellant. In the premises, she urged me to dismiss the appeal in its entirety for lack of merit.

**12.** The court record shows that in support of its case, the prosecution called a total of nine witnesses. The brief facts of the prosecution case is that on 6th March 2017, police officers drawn from different units in the Directorate of Criminal Investigations (DCI) who included PW4 *PC Joseph Mbugua*, PW5 *PC Anderson Randu*, PW6 *CPL David Kipsoi* and PW8 *Sergeant Albershir Oloo* were summoned to DCI Headquarters and were instructed to participate in an intelligence led operation aimed at arresting persons suspected to be dealers in narcotic drugs.

**13.** The appellant was identified as one of the suspects. He was suspected of dealing in narcotic drugs and cybercrime. The witnesses were given details of his residence and they proceeded there on the same day at around 9.30 pm. The residence was at Cyton Apartments, 5th floor, House Number 59, in Kibera. They found the appellant and his wife in the house. After identifying themselves, they conducted a search in the house and confiscated several electronic equipments.

**14.** According to the evidence of PW4 and PW5, as the search was going on in the house, their team leader one *Mr. Gicheru* instructed them to go and search the appellant's vehicle. The appellant led them to where the vehicle, a Mercedes Benz registration number KBM 949S was parked on the ground floor. Both witnesses recalled that on searching the vehicle, PW4 recovered an AK 47 rifle under the driver's seat. It had a magazine with 24 rounds of ammunition. PW5 also recovered a black polythene bag containing a whitish powder which was under the co-driver's seat.

**15.** PW2, *CIP Ndegwa,* who joined the operation later, recalled having witnessed PW4 and PW5 recovering an AK 47 rifle and a whitish substance from the appellant's vehicle. He prepared a seizure notice in respect of the recovered whitish substance and the vehicle which the appellant declined to sign. He produced the seizure notice as *pexhibit 3*.

**16.** PW7, *PC Alfred Kutoi* testified that he was summoned to the scene at 4.30 hours. He documented the scene by taking photographs which he produced in evidence as *pexhibits 13 (a-g).* The photographs revealed an AK 47 rifle, a magazine and a package wrapped in a black polythene bag.

After the recoveries were made, the appellant was arrested and escorted to Parklands Police Station.

**17.** PW8 who was the investigating officer testified that on 17th March 2017 at the JKIA Anti Narcotic offices, he weighed the whitish powdery substance recovered from the appellant's vehicle in the presence of PW3, *Mr. Dennis Owino Onyango,* a designated Government Analyst, PW1 *PC Caleb Simbiri*, a designated scene of crime officer, the appellant and his advocate. He testified that the substance weighed 345.83 grams. Sampling of the substance was done by PW3. PW1 documented the weighing and sampling process by taking photographs which he produced as *pexhibit 1 (1-23)*.

**18.** According to PW3, he conducted a comprehensive analysis of the sample taken from the whitish powdery substance and confirmed that it contained cocaine with a purity level of 40%. He compiled his report which he produced as *pexhibit 9*.

**19.** After confirmation that the recovered substance was cocaine, it was valued by PW9, *Mr. Joshua Okalo*, a proper officer appointed under *Section 86* of the *Act*. According to PW9, the cocaine had a market value of 4,000 per gram which translated to a total of KShs.1,383,320 for 345.83 grams recovered in this case.

**20.** When placed on his defence, the appellant elected to give a sworn statement and called one witness, his wife. In his long and detailed sworn statement, the appellant narrated how he left his place of work on the evening of 6th March 2017 driving his car (the Mercedes Benz) arriving at his apartment at around 8.30 pm. He claimed that he left its doors open and requested the security guard, one *Patrick* to clean it for him.

**21.** He further testified that at around 10.30 pm, a group of about 40 police officers stormed into his apartment and searched it till 2a.m. They confiscated his phone and that of his wife and other electronic devices. One of the officers asked him for his national identity card and as he had forgotten it in the car, he requested to be escorted by police officers to go and get it which request was granted. He then took some officers to his car but found four other officers standing behind the car. He opened the driver's door and as he was reaching out to get his wallet, one of the officers opened the rear door and placed an AK47 gun on the rear seat as he watched. When he walked to the rear passenger door which was also open, he saw a black polythene bag which he could not recall having left in the vehicle.

In a nutshell, the appellant denied having committed the offence claiming that police officers planted an AK47 rifle which was the subject of another ongoing criminal case and the narcotic drug the subject matter of his conviction by the lower court.

**22.** His wife who testified as DW2 replicated the appellant's evidence regarding the events of the material night and the extensive search conducted by police officers in their house. She recalled having heard a police officer ask the appellant for his identity card and the appellant's response that he had forgotten it in his car. She witnessed as police officers accompanied the appellant downstairs to get his identity card. She did not however accompany them and was not thus able to tell what happened after the appellant was escorted to his car.

**23.** This being a first appeal to the High Court, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which was succinctly captured by the Court of Appeal in ***Kiilu & Another V Republic, [2005] eKLR***, as follows:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.***
>
> ***It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusion. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

**24.** Guided by the above principles relating to the duty of the first appellate court, I have considered the grounds of appeal, the evidence on record, the written and oral submissions made on behalf of the parties and all the authorities cited. Having done so, I find that two key issues crystallize for my determination which are:

i. Whether the prosecution proved the guilt of the appellant as charged beyond any reasonable doubt.

ii. Whether the trial court considered all relevant factors in sentencing the appellant and whether the sentence imposed on him was harsh and excessive in the circumstances of the case.

**25.** Before embarking on a determination of the above main issues, I wish to deal first with the appellant's complaint that the learned trial magistrate disregarded his defence and final submissions.

**26.** 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.

He weighed the evidence in its totality after which he concluded that the appellant's statement in defence was not credible and was unworthy of belief. It is therefore not true that the trial court disregarded the appellants statement in defence.

The record also shows that the learned trial magistrate carefully considered the submissions filed on behalf of both parties before arriving at his decision.

It is therefore my finding that the above complaint is unfounded and is bereft of any merit.

**27.** Turning now to the first issue, as stated earlier, the appellant was convicted of the offence of trafficking in 345.83 grams of a narcotic drug namely cocaine by conveying it in his motor vehicle registration number KBM 949S Mercedes Benz. 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…"***

**28.** 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."***

**29.** In this case, the prosecution alleged that the appellant trafficked in cocaine by conveying it in his vehicle. In ***Mohamed Famau Bakari [supra],*** the Court of Appeal considered the definition of the term "conveyance" as stated in *Section 2* of the Act and stated as follows:

> ***"The term 'conveyance' is defined to mean; "... a conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel". As defined above and used throughout in the Act, "conveyance" is not the action or process of transportation but the means of transport."***

**30.** In this case, the prosecution case is that in the course of an intelligence led operation, PW4 and PW5 recovered from the appellant's vehicle a whitish powdery substance in a black polythene bag which was on 17th March 2017 scientifically analysed by PW3 and found to contain cocaine which was listed as a narcotic drug in the *First Schedule* of the *Act*.

**31.** I wholly agree with *Prof. Ojienda's* submissions that 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 conveyance in question. *Prof. Ojienda* argued that the appellant could not have had knowledge of the existence of the drugs in his vehicle because if he had, he would not have voluntarily led the police to the vehicle.

**32.** This argument is in my view flawed and cannot be sustained for two main reasons. First, it is clear from the evidence that the appellant offered to take the police officers to his car when he was asked for his identity card which he had forgotten in the vehicle and needed to be escorted to the vehicle to retrieve it. He was not taking the police officers to the vehicle knowing that they will conduct a search therein.

Secondly, the issue of the appellant's prior knowledge of the existence of the drugs in his car does not arise in this case considering the gist of the appellant's defence that the drugs were planted in his vehicle by the police officers together with a firearm as he watched.

**33.** It is pertinent to note that though the appellant claimed that the police officers who planted the drugs in his vehicle were among the prosecution witnesses who testified during the trial, the court record shows that none of the prosecution witnesses was cross examined by the appellant on the claim that he had planted the drugs in his vehicle. The claim only featured in the appellant's statement in defence.

**34.** In my view, if indeed it was true that the police officers had planted the drugs and firearm in the appellant's vehicle with the aim of framing him with the offence for being a whistleblower of rigging in the General Elections of 2013, this being the gravamen of his defence, the appellant would not have failed to cross examine the prosecution witnesses who he claims planted the drugs in his car to challenge the veracity of their evidence and to advance his defence at the earliest opportunity.

Further, in his evidence in cross examination, the appellant testified that he did not see any of the police officers carrying a black paper bag that evening.

**35.** After my own independent appraisal of the evidence on record, I find that PW4 and PW5 were consistent in their evidence regarding how they recovered a firearm and a black polythene bag containing a substance which was subsequently confirmed to be cocaine hidden under the vehicle's co-driver's seat. It is not disputed that the vehicle belonged to the appellant and that he is the one who had driven it to the parking yard on the evening of 6th March 2017 before recovery of the drug was made at dawn the following morning.

**36.** There is no evidence that anybody else accessed the motor vehicle after the appellant parked it. Although the appellant claimed that he left the vehicle unlocked as he had requested the security guard one *Patrick* to clean it for him, there is no evidence that the said Patrick acceded to his request. The appellant admitted in his evidence in cross examination that he did not know whether *Patrick* cleaned the vehicle that evening. There is therefore no evidence to support the appellant's insinuation that Patrick had accessed the vehicle that evening and there was a possibility that he could have placed the drugs in his vehicle.

**37.** In view of the foregoing, I find that the appellant's statement in defence lacked credibility and 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 him from the offence.

**38.** Having found as I have above and considering the definition of the term conveyance under the Act which I have referenced earlier in this judgment, I am satisfied that the prosecution proved without doubt that the appellant was found trafficking in 345.83 grams of narcotic drugs namely cocaine at the material time by conveying them in his vehicle. The conduct constituting trafficking was the appellant's act of conveying the drugs in his vehicle.

**39.** Given the foregoing, I have come to the conclusion that the appellant was properly convicted. His appeal against conviction therefore fails.

**40.** On the appeal against sentence, the appellant's complaint was that the trial court failed to consider his mitigation and passed a sentence that was harsh and excessive in the circumstances.

**41.** The Court of Appeal in ***Robert Mutungi Muumbi V Republic, [2015] eKLR***, cited with approval its decision in ***Bernard Kimani Gacheru V Republic, [2002] eKLR*** *where* it held 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."***

**42.** *Section 4 (a)* of the *Narcotic Drugs and Psychotropic Substances (Control) Act* prescribes the penalty for the offence of trafficking in narcotic drugs, which is a fine of KShs.1 million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, imprisonment for life.

**43.** In sentencing the appellant to pay a fine of KShs.2 million and in addition to serve 7 years imprisonment, the learned trial magistrate apparently relied on the jurisprudence developed by the Court of Appeal to the effect that the penalty prescribed under *Section 4 (a)* of the Act was not mandatory; that the word "*liable"* meant that the trial court retained discretion to impose an appropriate sentence subject to the maximum provided by the law taking into account the quantity and value of the drugs and the past records of the accused - ***See***: ***Coroline***

***Auma Majabu V Republic [2014]e KLR; Mohamed Famau Bakari V Republic [ Supra]*** .

**44.** The trial court's ruling on sentencing clearly indicates that the learned trial magistrate considered the plea in mitigation advanced by the appellant particularly the fact that he was a first offender and his personal circumstances as detailed in his plea in mitigation and the pre-sentence report filed on 18th May 2021 before making his sentencing decision.

**45.** My reading of the ruling on sentencing reveals that the learned trial magistrate considered all relevant factors including the quantity and value of the drugs the appellant was 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 7 years imprisonment meted out on the appellant was not harsh or excessive in the circumstances of this case. That sentence is therefore affirmed.

**46.** The court record shows that in sentencing the appellant, the trial court did not take into account the period of 4 months and 11 days which the appellant had spent in lawful custody prior to his release on cash bail on 28th July 2017. In accordance with the provisions of *Section 333 (2)* of the *Criminal Procedure Code*, that period shall be taken into account in computing the appellant's sentence.

**47.** In the end, it is my finding that the appellant's appeal lacks merit and it is consequently dismissed in its entirety.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

The Appellant

Ms. Awour Holding brief for Prof Ojienda, SC for the appellant

Ms. Ntabo for the respondent

Ms Karwitha: Court Assistant