Danho v Republic (Criminal Appeal E019 of 2021)
[2022] KEHC 11874 (KLR) (Crim) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11874 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E019 OF 2021

DO CHEPKWONY, J

MAY 31, 2022

BETWEEN

BOIGNAN AUDE-BARTILLE DANHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant 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.

   The particulars of offence being that:-

   > "On January 7, 2017at Moi International Airport within Mombasa County, jointly with others not before court, trafficked by conveying narcotic drug namely Heroin to wit 10,300 grams with a market value of Kshs.30,900,000 concealed in the fake bottom and sides of your travelling bags in contravention of the provisions of the said Act.

2. After a full trial, the Appellant was convicted and sentenced him to a fine of Kshs.91.80 million or in default one (1) year imprisonment and twenty-five (25) years imprisonment. The sentences were ordered to run consecutively.

3. The Appellant was aggrieved by the conviction and sentence, hence filed this appeal on March 12, 2021. The Appellant relied on the following Grounds of Appeal as are reproduced below;-

   i. That the learned Judge erred in law and fact by failing to find that there was no sufficient evidence to sustain a conviction;

ii. That the learned Judge erred in law and fact by failing to find that there was no evidence to establish the ingredients of the charge;

iii. That the learned Judge erred in law and fact by failing to find that the evidence adduced was at variance with the particulars of the charge sheet;

iv. That the learned Judge erred in law and fact by failing to find that the charge sheet was incurably defective;

v. That the learned Judge erred in law and fact by failing to find that the trial magistrate offended and contravened the Appellant's constitutional right to a fair trial;

vi. That the learned Judge erred in law and fact in upholding the prosecution witnesses testimonies which prima facie was incredible whilst proceeding on extraneous considerations which were not before the court to disregard the defence evidence which was verifiable;

vii. That the learned Judge erred in law and fact by failing to find that the exhibits tendered by the prosecution failed to be of any evidentiary value to the prosecutor's case;

viii. That the learned Judge erred in law and fact in convicting the Appellant while the prosecution did not satisfy their burden of proving their case beyond reasonable doubt;

ix. That the learned Judge erred in law and fact by imposing a harsh, excessive and untenable sentence upon the Appellant.

4. The parties were directed to canvass the appeal by way of written submission. The Appellant filed hers on March 22, 2022while the Respondent filed theirs on March 28, 2022. At the hearing, both the Appellant and the Respondent chose to rely entirely on their written submissions.

5. I have carefully considered the Grounds of Appeal, ready through the entire evidence as was presented before the trial court, and the Judgment that was delivered by the trial Magistrate. I have also read the written submissions filed by both the Appellant and the Respondent.

6. Having done so, I find that three main issues emerge for determination. These are:-

i. Whether the trial court relied on circumstantial evidence to convict the Appellant;

ii. Whether the prosecution proved its case against the Appellant beyond reasonable doubt;

iii. Whether the sentence was excessive.

7. This is the first Appellant court and as such I am guided by the principles set out in the case *David Njuguna Wairimu –vs- Republic* [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse the 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 Appellant 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."

8. The first issue is whether the trial court relied on circumstantial evidence to convict the Appellant. It is common ground that there was no eyewitness account or direct evidence connecting the Appellant

to the charge of drug trafficking. The only evidence available was circumstantial evidence upon which the trial court was convinced linked the Appellant to the offence.

9. Circumstantial evidence is evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. This being a case based on circumstantial evidence, the principles to be applied by the court before convicting on the basis of the same were clearly re-stated in the case of *Sawe –vs- Republic* [2003]KLR 364, wherein the Court of Appeal held as follows:-

> " In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused"

10. Therefore, the question this court ought to answer is whether the evidence on record satisfy the above requirements in relation to connecting the Appellant to the offence of trafficking for which he was convicted.

11. The Appellant was charged with the offence of trafficking. PW4 testified that on 7th January, 2017 as she was X-ray screen monitored by Exhibits 3 and 4 which were placed in the X-ray chamber. He saw some materials inside the bags and could not ascertain what they were. He testified that the Appellant picked the bags after they exited the X-ray Chamber. He then asked his colleague PW5 to check the bags.

12. PW5 testified that she checked the bags in the presence of the Appellant who had emptied the contents of the bags but she could not see anything. She then called her team leader PW6.

13. PW6 testified that when the empty bags were placed on the X-ray, the images PW4 had first seen were still visible. He then called the Duty Manager PW7. PW7 testified that the bags were rescreened but the images still appeared which they realized there was concealment in the bags. He then called PW8.

14. PW8 testified that when she arrived, the bags were rescreened in the presence of the Appellant. She saw the same images. She testified that even though the bags were empty, they were both heavier than the normal weight of an empty suitcase. It was her testimony that she suspected that something was concealed at the sides and the bottom of the suitcases. She further testified that they went to the office with the Appellant where a secondary search was done and discovered a brownish substance that was concealed at the sides and bottom of the suitcases.

15. In my considered view, from the above testimonies of PW4, PW5, PW6, PW7 and PW8, the trial court correctly addressed its mind to the evidence that linked the Appellant with the narcotic substance and the ultimate question was whether she trafficked the same.

16. The second issue for determination is that of conviction and question of whether the prosecution proved its case beyond reasonable doubt. The Appellant was charged with the offence of Trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act, which provides that:

> " 'Any person who traffics 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'

17. In her defence, the Appellant told court that she did not know that she was carrying the drugs that were found in her luggage. It was her testimony that Richard, the hotel manager at Mtwapa Gardens and another lady had given her the two suitcases that she was arrested with. Further, she said that she did not know the contents of the bags when she packed her things in them.

18. In response, Ms. Chege submitted that the Appellant had concealed the narcotic drugs inside the bags in order to convey them without raising any suspicion.

19. The prosecution adduced evidence which established that the substance which had been found in the Appellant's possession was a psychotropic substance within the meaning ascribed to it by Section 2(1) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* and the 1st Schedule thereof. This confirmation was contained in the evidence of PW11 who analyzed the substance that had been found in the Appellant's possession.

20. Further, in the case of *Malingi –vs- Republic*, [1989] KLR 225, the Court of Appeal had this to say about the doctrine of recent possession:

> " By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts."

21. Thus, it is my considered view, that the establishment of how or who caused the heroin to be concealed in the suitcases is not an element of the charge of trafficking in narcotic drugs but in whose possession the same was found. In this case, the narcotic drug was found in the Appellant's possession, a fact not rebutted.

22. The other issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant "trafficked" the narcotic drugs.

23. Section 2 of the Act defines trafficking 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.'

24. On this issue, the Appellant's advocate Mr. Swaka submitted that the prosecution did not satisfy the requirement of the charge of trafficking in narcotics since it was not proved that the Appellant had the mens rea which ought to accompany the actus reus in order to establish the offence. He submitted that the absence of mens rea on the Appellant's part was evident from her defence when she explained that she did not know that she was carrying the drugs that were found in her luggage. Further, the prosecution did not demonstrate the existence of drug trafficking since forensic examination was not done on the Appellant's phones to establish if indeed she was a trafficker. He placed reliance on the case of *Madline Akoth Barasa & Another –vs- Republic* [2007] eKLR and *PON –vs- R* [2019]eKLR.

25. In response, the learned prosecution counsel, Ms. Chege submitted that the prosecution had proved its case to the required standard by tendering evidence to show that the Appellant had been found trafficking narcotics by way of conveyance.

26. According to Section 20(1) of the *Penal Code*, a person is deemed to have taken part in committing the offence as a principal offender in the following instances:

> ‘(a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids or abets another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
>
> (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

27. I have perused the record of the trial court, and I am of the opinion that the evidence adduced sustained a charge of Trafficking of a Narcotic Drug contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. The circumstances under which the narcotic drugs were recovered from the Appellant’s luggage clearly pointed to a plot which the Appellant was well aware of but is feigning ignorance to exonerate herself from the offence whereby she was being used to traffic the narcotic drug from Mombasa to Cote d’Ivoire.

28. I have no doubt in my mind that the Appellant had travelled to Kenya so that she could act as a conduit for trafficking in the drugs. In a joint enterprise, all the persons involved are deemed to have committed the offence. With the evidence available, I find that the evidence inextricably links the Appellant to the offence and she cannot therefore claim innocence.

29. I therefore find no merit in Mr. Swaka’s contention that the prosecution did not establish the necessary mens rea on the part of the Appellant. In my opinion, the offence was proved beyond any reasonable doubt and the conviction by the trial Magistrate was well founded.

30. On sentence, the Appellant’s advocate submitted that the learned magistrate erred by imposing a harsh and untenable sentence. He cited the cases of *Kabibi Kalume Katsui –vs- R* [2015]eKLR and *Caroline Auma Majabu –vs- R* [2014] eKLR.

31. In response, Ms. Chege urged this court to uphold the sentence. She

submitted that the sentence was neither excessive nor harsh. However, she stated that the trial court did not take into consideration the time the Appellant had spent in custody.

32. The Court of Appeal, on its part, in the case of *Bernard Kimani Gacheru –vs- Republic* [2002] eKLR restated 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

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 states is shown to exist."

33. Therefore, the sentence that is meted out on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in their entirely before settling for any given sentence.

34. The punishment for this offence is provided for under Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* which states: -

> " 4. 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....."

35. The trial court made the following observations before meting out the sentence;

> " Firstly, the convict is fined Kshs.91.80 million – three times the value of the drugs in question, in default of payment of which she shall serve default sentence of one (1) year in line with the provisions of section 28(2) of the Penal Code and in addition thereto and;
>
> Secondly, she is sentenced to imprisonment for a period of 25 years.
>
> As by law required, should she fail to pay the imposed fine, then the default sentence shall run consecutive to the imprisonment term. R/A 14 days explained."

36. It is this court's finding that the Appellant was charged on a count that by law carries a heavy penalty. It is apparently clear that the sentence meted out though harsh, was legal. This is because the law provides for upto a life imprisonment for that sort of offence. There is no doubt that Parliament enacted this Act with a view of stamping out the menace that is brought about by the misuse and or abuse of the Narcotic Drugs and Psychotropic Substances.

37. The above provision of Section 4(a) graduates the issue of fine in the sentence from merely an issue of fact to a matter of law. It has been proven in this case that the weight of the drugs was 10300 grams and the market value at the time was Kshs.3,000/= per gram. The correct amount of the fine as recalculated in accordance with the above provision would therefore be 10300 multiplied by 3,000 multiplied by 3 which equals to Kshs.92,700,000/=.

38. Section 333(2) of the *Criminal Procedure Code* provides that:

> (2) Subject to the provisions of section 38 of the Penal Code 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.

39. The Judiciary Sentencing Policy Guidelines at paragraph 7.10 states as follows:

> " 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."

40. Section 382 of the Criminal Procedure Code Actprovides for instances where a finding or sentence are reversible by reason of error or omission in a charge or other proceedings. It states that:-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

41. Upon perusal of the presentence notes, it is clear that the trial Magistrate was not alive to the proviso to Section 333 (2) of the Criminal Procedure Code and that he did not take into account the period the Appellant had spent in custody during trial in passing sentence against her.

42. Consequently, I find that the trial court gave the appropriate sentence in the circumstances of the case. However the sentence should run from the date of her arrest which for avoidance of doubt is January 7, 2017.

43. Also, being that the trial Magistrate erred in calculations of the fine, this court sets aside the fine of Kshs.91.80M and substitutes the same with one of Ksh.92,700,000/=, and in default the Appellant to serve one (1) year imprisonment, and an additional 25 years imprisonment.

44. Further, it is my considered view that the trial court erred in imposing consecutive sentences and thus proceed to order the imprisonment terms to run concurrently.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2022

D. O. CHEPKWONY

JUDGE

In the presence of:

Appellant in person

M/S Gikonyo counsel holding brief for M/S Akunja counsel for the Respondent