



**Ondieki & another v Republic (Criminal Appeal 43 & 1 of 2020  
(Consolidated)) [2022] KEHC 11534 (KLR) (Crim) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11534 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 43 & 1 OF 2020 (CONSOLIDATED)**

**LN MUTENDE, J**

**JULY 27, 2022**

**BETWEEN**

**GEOFFREY ONCHANGU ONDIEKI ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL UCHE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 84 of 2017 at the Chief Magistrates Court JKIA by Hon. L. Onyina – CM on 13th December, 2019))*

**JUDGMENT**

1. Geoffrey Onchangu Ondieki, (1<sup>st</sup> appellant) and Samuel Uche, (2<sup>nd</sup> appellant) herein were charged as follows:

Count (Both appellants) trafficking in narcotic drugs contrary section 4(a) of the *Narcotics Drugs & Psychotropic substances (Control) Act* No. 4 of 1994.

Particulars being that on the 9<sup>th</sup> day of March, 2017 at DHL Cargo Offices Jomo Kenyatta International Airport in Nairobi County, jointly with others not before the court, trafficked by exporting a Narcotic Drug namely, Heroin to wit 1000.16 grams with a street value of Kshs. 3,000,480/- concealed in four Motor Cycle Pistons and sent as a parcel to Lagos Nigeria in contravention of the provisions of the said Act.

Count (2<sup>nd</sup> appellant) trafficking in narcotic drugs contrary to section 4(a) of the *Narcotic Drugs & Psychotropic Substances (Control) Act* No.4 of 1994.



Particulars being that on the 3<sup>rd</sup> day of March 2017, at DHL Cargo offices, Jomo Kenyatta International Airport in Nairobi County, jointly with others not before the court, trafficked by exporting a Narcotic Drug namely, Heroin to wit 484,315 grams with a market value of Kshs. 1,452,945/- concealed in ten pieces of tortoise wood carvings and sent to Amsterdam, Netherlands in contravention of the provisions of the said Act.

Count (2<sup>nd</sup> Appellant) Being unlawfully present in Kenya contrary to section 53(1)(j) as read with 3: section 53(2) of the [Kenya Citizen and Immigration Act](#), No.12 of 2011.

Particulars being that on the 11<sup>th</sup> day of March 2017, at Kayole Estate within Nairobi County, being a Nigerian National was found unlawfully present in Kenya without a valid visa in contravention of the provisions of the said Act.

2. Having been taken through full trial, the 1<sup>st</sup> appellant was found guilty of the 1<sup>st</sup> Count, convicted and sentenced to serve ten (10) years imprisonment, and, in addition he was ordered to pay a fine of Kenya shillings Nine Million (Ksh. 9000,000) and in default to serve an additional one-year imprisonment. The 2<sup>nd</sup> Appellant was acquitted of that particular charge.
3. On the 2<sup>nd</sup> Count, the 2<sup>nd</sup> appellant was sentenced to serve ten (10) years imprisonment, and, in addition to pay a fine of Ksh. four million (4000,0000), in default he would serve one (1) year imprisonment.
4. On the 3<sup>rd</sup> Count, the 2<sup>nd</sup> appellant was sentenced to pay a fine of Kenya Shillings Fifty Thousand (Ksh. 50,000/-), and, in default he would serve six (6) months imprisonment; and, subsequently be repatriated to his country of origin.
5. Aggrieved, both appellants appealed against the conviction and sentence. The 1<sup>st</sup> appellant proffered the appeal on the grounds that:
  - a) The trial magistrate erred in law and fact by convicting the appellant on evidence which did not meet the required standard of proof.
  - b) The magistrate erred in law and fact by failing to find that the offence was never proved to the required standard based on inconsistency and contradiction in evidence.
  - c) The court failed to note the main suspect in the offence and made the 1st appellant bear the burden of a different suspect which was against the law.
  - d) The court failed to consider the defence thus offending the requirements of section 169 of the [Criminal Procedure Code](#).
  - e) The court failed to appreciate the burden of proof in the criminal trial and shifted it to the appellant and also failed to appreciate that the case lacked crucial witnesses.
  - f). That the applicant is entitled to mitigate the sentence hence benefit from the findings of the court of Appeal in [Jared Koita Injiri versus Republic](#) (2019) eKLR.

The 2nd appellant appealed on grounds that:

- (a) The court erred in law and fact by failing to find that the offence as charged was not conclusively proved to the required standard.
- (b) The court erred by convicting the appellant when crucial witnesses were never called to testify.



(c) The conviction was based on circumstantial evidence which failed to satisfy the standard of proof.

6. To prove the case the prosecution called twelve (12) witnesses. PW1 No. 63487 Corporal Joseph Kipruto of Anti-Narcotics Unit, Directorate of Criminal Investigations (DCI) headquarters, stated that while on an operation scheduled to arrest suspected drug traffickers, under Commander Emily Wangare, they got information regarding the appellants in connection to parcels sent through DHL which had been intercepted at JKIA a few weeks earlier and acting on information received, they traced the 1<sup>st</sup> Appellant at Kigwa restaurant along Kiambu road, who led them to Mayaka, another suspect who was arrested around Ngara area. The following day Mayaka led them to another suspect, at Kayole, a Nigerian known as Michael Obina. Upon interrogation Obina led them to the 2<sup>nd</sup> Appellant who was found in a house in Kayole with another man, a Nigerian who introduced himself as Emmanuel Anaeto. A search carried out in the single room that the 2<sup>nd</sup> appellant occupied resulted into the recovery of a passport No. A019xxxxx in the name of Uche Samuel without a valid visa, DHL express waybill No. 838xxxxxxx sent by the 2<sup>nd</sup> appellant from Nairobi to Ruth Brown in Amsterdam and DHL express waybill No 838xxxxxxx sent from Nairobi by Geoffrey Onchangu Ondieki (1<sup>st</sup> appellant) to Odera Udo Michael of Lagos. Also recovered was a brown wallet containing a Mount Kenya University library card, a visa card in the name of the 2<sup>nd</sup> appellant, Kenya Shillings Five Thousand (Ksh.5000/-), 1000 Naira single note, a digital weighing scale and one packet of Rizla paper popularly used for wrapping narcotic drugs. An inventory of items recovered was made and signed by the 2<sup>nd</sup> appellant. PW1 and his colleagues also signed the inventory.
7. PW2 Peter Musau Nzioka, an enforcement officer with Customs, based at JKIA, received information on 3<sup>rd</sup> August, 2018, regarding a suspect cargo that had been identified at DHL Shed which was to be exported. He went and found Police Frontier and KAA security Officers at the premises. There were two suspect consignments which were opened, and, one consisted of wooden carvings in form of a tortoise. On being opened they found brown powder stuffed inside. It was weighed and subjected to preliminary tests as to whether it contained drugs. The tests were positive. He issued Seizure Notice No. 039940 in respect of the 10 pieces of wooden carvings and handed over the consignment to Anti-Narcotics Officers at JKIA for further investigations and testing. On 9<sup>th</sup> March, 2017, he was notified of another consignment, he went to the DHL Shed where the Multi Agency personnel were. The consignment was of used aircraft piston (4) and some other packages which contained other spares. These were scanned and results showed some substance concealed inside the pistons. On opening the consignment, the police found some yellowish powder stuffed inside the pistons. Preliminary tests conducted turned positive to narcotic drugs. He issued a Notice of seizure Serial No. 039941 dated 9<sup>th</sup> March, 2017. The Air Way bill in issue was No. 838xxxxxxx. The 2<sup>nd</sup> and 3<sup>rd</sup> were for spare parts marked as bill No. 838xxxxxxx for 2 pieces of spare parts and 838xxxxxxx for 10 pieces.
8. PW3 Albert Omweno Ontweka, a security officer and supervisor with Tandu alarm system, DHL, testified how they found suspicious shipment on the X-ray machine.<sup>st</sup> appellant of ID No. 29xxxxxx, telephone 0718xxxxxx and the consignment was sent to Eze Emak. The sending date was the 7<sup>th</sup> March, 2018. It was taken to the strong room where there was no interference and the manager was the only person who had the key and they involved the law enforcement officers for further investigations.  
The suspect shipment was Air Way bill No. 838xxxxxxx and the sender was the 1
9. On 1<sup>st</sup> March, 2017, there was a suspected shipment following screening process so they informed the security manager, Evans Amukaka. Documents to the consignment were Air bill No. 838xxxxxxx sent



by Uche Samuel to Ruth Brown. It was also taken to the strong room awaiting other law enforcement officers and the officers responded on 21<sup>st</sup> March, 2017.

10. PW4 No. 235123 Chief Inspector Elizabeth Lumumba, of DCI Anti-Narcotics, was informed of a shipment at DHL centre warehouse that was suspicious and needed verification from their office. She instructed PC Seurey and the dog handler PC Mure to join other security agencies at DHL. She later joined them at 1200hrs, therefore, was present during verification of the shipment and the findings thereto and witnessed photographing of the scene by the Scenes of Crime Officer Caleb Simbili. After the exercise, Chief Inspector Ndegwa prepared a certificate of weighing; the substance weighed 1000.16 grams. All officers present signed against the document but the suspects declined to sign since they were instructed not to sign by their lawyers. A Sampling certificate was also prepared by the government analyst, Denis Owino Onyango. The Chief Inspector took all substances and samples and kept them in safe custody.
10. PW5 Dennis Owino Onyango, a gazetted government analyst from the Government Chemist received from the police, the certificate of weighing and certificate of sampling. He witnessed the weighing that was done by Mr. Ndegwa on 17<sup>th</sup> March, 2017. It was in respect of ten packages containing creamish powder with a total weight of 484.315 grams. He referred to the certificate of sampling and testified that he did the sampling and prepared the certificate. The samples were 10 sachets containing creamish substance, the total weight was 484 grams. He witnessed as the investigating team present signed but the 2<sup>nd</sup> appellant declined to sign. He referred to the exhibit memo which he received at the Government Chemist Department that he stamped, signed and gave it the Laboratory reference No. 022/2017. He analyzed the 10 polybags/sachets and concluded that they contained heroin also called as diacetylmorphine listed in the first schedule of the Narcotics Drugs and Psychotropic substances control Act, 1994.
11. PW6 Joshua Okalo, an Investigator from the Drug Enforcement Administration at the US Embassy in Nairobi who was notified of the seizure by Senior Superintendent Emily Wangare on 17<sup>th</sup> March, 2017 at 5:00pm, required value to be assigned to the substance. The witness proceeded to the DCI headquarters where he was shown substances which were in four packages. A copy of the certificate of sampling as prepared by the government chemist. A Certificate of weighing in respect of 1000.16 grams by Martin Ndegwa and the Government Analyst report. He also saw the charge sheet in respect of the two accused persons. He then prepared and signed the certificate of valuation in respect of 1000.16 grams of heroin whose market value was Kenya Shilling Three Million and Forty Eight (Ksh. 3,000,048/-)
12. Thereafter, he was called again by Mrs. Wangare SSP over a report for 484.315grams of heroin, he went to the DCI where he was shown 10 packages, the report from the government chemist and a copy of the charge sheet in respect of the 2<sup>nd</sup> appellant. He prepared and signed the valuation certificate which he dated 26<sup>th</sup> May, 2017 and indicated the market value of the 484.31 grams at Kenya Shillings One Million Four Hundred and Fifty-Four Thousand, Nine Hundred and Forty-Five (Ksh 1,454,945/-).
13. PW7 No. 85551 P.C. Caleb Simbili, a gazetted officer from the Scene of Crime Department documented the sampling process and took a set of photographs of different kinds of exhibits which he adduced in evidence.
14. PW8 No.233801, Chief Inspector Martin Ndegwa of Anti-Narcotics Unit, JKIA was tasked to lead the security team that proceeded to DHL cargo, to verify a shipment which was on hold. The shipment was removed from the cage by the DHL manager, the Airway Bill was No. 838xxxxxxx and was sent by Uche Samuel of phone number 673xxxxxxx to Ruth Brown of Amsterdam and was described as artwork. Upon confirmation he collected the shipment for safe custody.



15. On 17<sup>th</sup> March, 2017, DCI, Anti-Narcotics Unit went with the 2<sup>nd</sup> appellant and carried out the weighing and sampling exercise. He prepared the certificate of weighing but the 2<sup>nd</sup> Appellant refused to sign while the other officers and the government analyst signed it. Sampling process followed, preliminary tests conducted pointed to heroin, but, it was later submitted to the government chemist for further analysis.
16. PW8 also issued a Notice of Seizure in respect of the substances to the 2<sup>nd</sup> appellant who refused to acknowledge receipt of the Notice. Further, he testified that on March 9, 2017 he received a shipment which was intercepted at DHL Cargo which was sent by Geoffrey Onchangu Ondieki of telephone number 0718xxxxxx from Balozi Estate to Eze Emak in Lagos Nigeria and described as motorcycle parts. It was under Airway Bill No. 838xxxxxx. In company of other officers, they converged at Anti-Narcotics Unit office at JKIA on 17<sup>th</sup> March, 2017 for weighing and sampling. He weighed the substances that were concealed in four pistons. This was in the presence of the 1<sup>st</sup> appellant and others.
17. PW9 IP. Joshua Mutua, of DCI Forensic and Crime Investigation Department received a sealed envelope and Exhibit Memo from Police Constable Ishmael Oroko of Anti-Narcotics Unit, DCI headquarters which contained a 16 GB flash disk which had CCTV footages dated 1st March, 2017 - 7<sup>th</sup> March, 2017 retrieved from visual cameras installed in DHL XEP warehouse at JKIA. He processed the footage and prepared still photographs relevant to the case and certified them as per the requirements of the *Evidence Act*. He stated that a man who was in a grey shirt entered the reception of the warehouse and placed a bag on top of the counter; he was seen holding a piece of paper as he leaned on the counter, he was also seen filling some documents and then seen exiting the warehouse.
18. On events of 7<sup>th</sup> March, 2017, he stated that a man in a checked shirt arrived carrying a white bag, he entered the warehouse and placed the bag on top of the counter, removed a package which he handed over to the counter attendant and filled some documents. Then he removed a black bag from the white bag and later exited the warehouse.
19. He testified that the CCTV was recorded in CD media approved for official use which was new and blank and previously unused. That the machines were in good working conditions, and the footages had not been modified or altered during his handling. He prepared a certificate which he duly signed. He identified the individuals in the photographs as the 2<sup>nd</sup> and 1<sup>st</sup> appellant, respectively.
20. PW10 Samuel Kariuki, an Immigration Officer attached to Investigations, Nyayo house, testified to have received a request through a letter authored by SSP Emily Wangare requesting for the immigration status of Samuel Uche, holder of Passport Number A019xxxxx. He established that per the passport his last visa indicated that he had entered the country on 6<sup>th</sup> April, 2015 and had been issued with a visitor's pass for three months, which had expired by the time the department did its response. He was therefore unlawfully present in the country.
21. PW11 Philemon Mwamodo, a Finger Print officer with the National Registration Bureau received a letter from DCI dated 2<sup>nd</sup> May, 2017 requiring certification of ID No. 29xxxxx, and the data lease search confirmed that the bona fide owner of the Identity Card was Geoffrey Onchangu Ondieki.
22. PW12 SSP Emily Wangare, the Deputy Director of the Anti-Narcotics Unit, DCI headquarters, testified to have received some information of a suspected drug trafficker who was along Kiambu road. She arranged for an operation and accompanied by Sergeant Albashir, Sergeant Kipruto, Corporal Sitienei and Corporal Sheila, they went to Kigwa Conference Hotel along Kiambu road, found the 1<sup>st</sup> appellant, arrested and informed him of the reason for the arrest. Having mentioned other suspects, they went on another operation and arrested other suspects including the 2<sup>nd</sup> appellant. She concluded investigations and caused the appellants to be charged.



23. Upon being put on his defence, the 1<sup>st</sup> appellant who gave sworn evidence testified that he had been living in Kayole since 2014 and he used to visit his Nigerian neighbour, Michael Obina Chibundu, to watch football. That he met the 2<sup>nd</sup> appellant in 2016 at Obina's house, they interacted and also exchanged contacts hence became good friends. Subsequently the 2<sup>nd</sup> appellant told him about his brother who dealt in motor-vehicles and being a motorcycle-rider, he was interested in doing business with him. That following his arrest he was searched but no narcotics were recovered. Similarly, a search conducted at his home did not materialize in any recovery but in the course of investigations he was threatened with death.
24. That on the 6<sup>th</sup> March, 2017, the 2<sup>nd</sup> Appellant placed an order for spare-parts that his brother required, namely, Key starter, carburetor, and headlamp, which he bought and delivered to Life House DHL. That the attendant at the counter received the package that was in a black bag, and the document that he had filled, which were stamped and he retained a copy. He faulted the police for alluding to 3 packages when he only delivered one package. He denied being Ondieki per the report from the registrar of persons.
25. The 2<sup>nd</sup> appellant also gave sworn testimony. He stated that he was a Nigerian citizen, holder of passport No. A011xxxxxx and a footballer by profession. That he met the 1<sup>st</sup> Appellant at Michael Obina's place in 2016 who introduced himself as a Boda Boda Operator. That he told him about his brother in Nigeria who dealt with motor cycle parts, new motor cycles in Nigeria and spare parts that were highly sought. The 1<sup>st</sup> appellant agreed to be procuring the orders so as to send them to his brother.
26. That the waybill No. 838xxxxxxx was found in his house which confirmed that he had sent the shipment. That his brother made an order for a key starter, head lamp and carburetor on 6<sup>th</sup> March, 2017. He called the 1<sup>st</sup> appellant who procured the parts and sent them on 7<sup>th</sup> March, 2017. That he met Madam Ruth Brown in Kenya earlier in December, 2016 when she had come for vacation, as a tourist. She was working on linking him up with a FIFA licensed football agent at the Netherlands, therefore he planned to give her a gift on her birthday so he purchased wooden plates, spoons, forks, mortar and sugar container from Maasai market and sent them to her on 1<sup>st</sup> March, 2017 by DHL. The parcel was inspected and weighed and approved for shipment, and a receipt was issued without any complaint.
27. That on 11<sup>th</sup> March, 2017, he was at home resting after his morning training when he was ambushed. His house at Kayole estate was searched for 45 minutes and he was arrested and later assaulted. During cross examination he stated that he had a single visa entry for 3 months and that his passport expired but he had an abstract from the police, but, both had expired at the time of his arrest.
28. The trial court considered the evidence and documents produced and found that the prosecution had proved the case beyond reasonable doubt. That the CCTV footage, proof of identity card, the still images presented and produced in evidence was proof to the required standard that the first appellant was connected to the pistons in which the 1000.16 grams of heroin was found and he was exporting the same to Lagos to the receiver Eze Emak. On the second count, the trial court held that the CCTV showed the 2<sup>nd</sup> appellant delivering the consignment at DHL offices on 1<sup>st</sup> March, 2017; The Way Bill No. 838xxxxxxx showed it was from Uche Samuel and that the identification document was indicated as A01939728, the image and name of the 2<sup>nd</sup> appellant also appeared on the passport. That the consignment was seized and the reason for seizure as per the Customs and Excise department was that the same were prohibited goods contrary to Section 200 of the East Africa Community Customs Management Act of 2004. That the substances were weighed and tested and the government analyst produced the report which indicated that they contained diacetylmorphine a narcotic drug; and, that the 3<sup>rd</sup> Count was proved against the 2<sup>nd</sup> Appellant to the required standard.



29. The appeal was canvassed through written submissions. It was urged by the 1<sup>st</sup> appellant that the trial court never considered his claim of being arrested without dignity and breach of his rights. That the police never allowed him to call his lawyer or close family members. The appellant complained of unfair treatment and breach of his rights under the Criminal Procedure Code and the presumption of innocence under the Constitution.
30. That there were contradictions in PW2's evidence, who stated in his statement that four pistons were broken and found to contain substance which was suspected to be heroin, but, his evidence was that it was a yellowish powder that was stuffed inside. That DHL receipt showed that the appellant sent motor cycle parts and not aircraft pistons, therefore, whatever DHL had received from the 2<sup>nd</sup> Appellant and whatever PW2 had come across was not the same.
31. That PC Nzioka made changes to the notice of seizure when he indicated pistons were 3 from 4 and he countersigned changes though he stated during cross examination that he could not remember any changes but he admitted his handwriting. That PW2 was not a gazetted officer, and, therefore he was not fit to produce the report.
32. That no photos or videos were produced to prove what really transpired at the cargo terminal at JKIA, therefore, there was no evidence to prove where exactly the shipment emanated from prior to being intercepted,
33. The trial magistrate was faulted for not upholding the law as the 1<sup>st</sup> appellant was charged before the government analyst report was ready and judging the appellant harshly by relying on the prosecution's scanty evidence.
34. On the question of vital witnesses having been left out, the 1<sup>st</sup> appellant urged that the lady who received the package at the counter was not availed to state how the package was handled.
35. The 2<sup>nd</sup> appellant submitted that evidence adduced was inconsistent, that PW3 having reported to work in the morning at 6:00 am, at DHL JKIA offices, when he sent the parcel at 1409 hours at Express Nondoc DHL agent, Lusaka road, the shipment that was intercepted at 6:00am could not have belonged to him. Just like his co-appellant he urged that crucial witnesses, namely, the Counter attendant at Express Nondoc DHL Lusaka road was not called to testify. That the attendant who received the parcel, inspected and weighed it, accepted and issued receipts. He denied having been present when the seizure notice was issued.
36. The State/Respondent urged that the 1st appellant delivered the parcel to DHL on 7<sup>th</sup> March, 2017. That the substance found concealed in 4 pistons was weighed by PW8 and sampled by PW5 on 17<sup>th</sup> March, 2017 in the presence of the 1<sup>st</sup> appellant who at the time had been arrested, and the total weight was 1000.16 grams.
37. With regard to the 2<sup>nd</sup> appellant, it was urged that the evidence was sufficient and that contrary to the allegations of the 2<sup>nd</sup> appellant, that there was interference by intelligence, the photographs produced by PW7 showed the consignment even before it was opened and captured the whole process, and, that, the prosecution proved beyond doubt further charges that the 2<sup>nd</sup> appellant was illegally in Kenya.
38. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of *Okeno -vs- Republic* [1972] EA 32, it was held that:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate



courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. 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 - See Peters v. Sunday Post [1958] EA 424".

39. In *Erick Onyango Ondeng' vs. Republic* [2014] eKLR the court stated as follows with regard to the duty of a court when considering contradictory evidence:

"The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, reevaluate and analyze the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. See *Okeno vs Republic* (1972) EA 32."

40. Section 4 (a) of the *Narcotics Drugs & Psychotropic substances (Control) Act* provides that:

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 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 greater and , in addition to imprisonment for life .

41. It is urged by the appellants that the prosecution did not prove elements of the offence. Section 2 of the Act defines Trafficking to include the act of exporting the Narcotic Drug. The particulars of the offence expressly disclosed the act the appellants were being accused of.

42 The 1<sup>st</sup> appellant does not dispute the fact that he sent a package to Nigeria on 1<sup>st</sup> March, 2017 through DHL. However, his complaint is that the package that was intercepted at the airport did not belong to him. Evidence adduced by the prosecution proved that the suspect shipment at JKIA came from DHL and the package had details of the 1<sup>st</sup> appellant as the sender.

43. The prosecution produced electronic evidence including photographs showing the name and Identity card of the 1<sup>st</sup> appellant, and his place of residence. Evidence was tendered from the National Registration Bureau which proved that the bona fide holder of ID No. 29806196 was Geoffrey Onchangu Ondieki as per the bio data records which had never been altered at the time of the evidence which disapproved the allegation that the name Ondieki was not his.

44. The shipment was opened and preliminary-tests were done at the airport. The samples were also taken to the government chemist and upon further tests and analysis the substance was confirmed to be heroin, a Narcotic Drug. The substance was weighed and valued and found to be 1000.116 gms with



a street value of Ksh 3,000,480/-. This was as per the evidence of PW8 who weighed the substance and PW6 who valued it.

45. It is true, the report from the government analyst was made on May 22, 2017 which date was after the appellants were arraigned in court. Although the appellants contend that they were charged before the substance was confirmed to be heroin, at the time of arraignment, the prosecution had done preliminary tests, the substance had been weighed and the value of the Narcotic Drugs established. There was sufficient evidence and reasonable cause to present charges. Further, it is trite that charges would be amended at any time before judgement where new information or material is discovered;(See section 214 of the *Criminal Procedure Code*); and the report was further proof and/or confirmation of earlier findings of the the substance being Narcotic Drug under the 1<sup>st</sup> Schedule of the Act.
46. Narcotic Drugs were concealed in the spare parts that were delivered to DHL offices by the 1<sup>st</sup> appellant, They were on transit to Nigeria. This was proof that he was exporting the drugs which were unfortunately intercepted at the airport.
47. With regard to the 2<sup>nd</sup> appellant, the package he was exporting alleged to be a birthday gift included heroin, a Narcotic Drug, that was concealed/stuffed in the artifacts/tortoise carvings that was on transit to Amsterdam.
48. The appellants have advanced an argument that their defence was not considered. They testified that the drugs were not recovered from their person, meaning that they were not in physical possession of the narcotics or in their respective houses. However, the shipment was linked to them as per their contact, identification and the package details on the suspect consignment. Secondly, the CCTV footages established that they delivered the consignment which was later intercepted and found to contain heroin, a Narcotic Drug.
49. As to whether the case was proved to the required standard, PW3, the security supervisor, Tandi Alarm Systems, JKIA, received information from operators who were screening shipment regarding images that showed something dangerous at the X-ray machine. The airway bill in issue was No.8385889783, the sender of the shipment was Geoffrey Onchangu Ondieki of ID card No. 29806196 and telephone number 0718734540. The shipment was addressed to Eze Emak and the sending date was 7<sup>th</sup> March, 2017. PW3, the first witness to interact with the suspect cargo at the airport explained that the shipment came from DHL Industrial area and was on transit. That the cargo was taken to the strong room where it was kept under lock and key until the law enforcement officers took over the matter. The appellant's details as captured in the prosecution's case came from the documents of consignment.
50. PW4 of Anti-Narcotics Unit, JKIA, upon being notified of the suspicious shipment at DHL warehouse which needed verification, joined officers at DHL warehouse. They proceeded to the machine that had detected color variance and showed strange organic matter in what was proclaimed motor vehicle parts. She confirmed that the shipment was open, it had pistons with suspicious substance and that the shipment which belonged to the 1<sup>st</sup> appellant was on transit to Lagos addressed to one Eze Emak.
51. PW7 the scene of crime officer witnessed the sampling and documented the process using photographic images of the shipment. He captured the process as they were being opened. Evidence of PW5 linking the 1<sup>st</sup> Appellant to the scene of crime as photographed that was admissible evidence of his connection to the suspected package was not challenged.
52. PW4 and PW8 both testified on the sampling process. They confirmed in material particulars the fact of the X-ray machine having detected something dangerous in the consignment on the date it was intercepted.



53. PW5 an investigator with the Anti- Narcotics-Unit, JKIA talked of a pre-test done on 17<sup>th</sup> March, 2017 in the presence of the appellants which pointed to heroin. He prepared a certificate of sampling authenticating the results thereof which he adduced in evidence that was signed by other officers in the team, but the 1<sup>st</sup> appellant declined to sign. He clarified that the delay between the dates did not affect the substance. The weighing was also done in the presence of the 1<sup>st</sup> appellant on 17<sup>th</sup> March, 2017 after the 1<sup>st</sup> appellant was arrested but declined to accept or sign the certificates and notices.
54. With regard to the 2<sup>nd</sup> appellant, after the consignment which bore his particulars was intercepted, it was opened and found to contain one wooden carving in form of a tortoise. Powder substance stuffed therein was examined at the government chemist and found to be heroin, a Narcotic Drug. The Notice of Seizure No. 039940 in that regard was issued by PW2 and kept under key and lock. Photographs were taken by the scene of crime officer.
55. The 1<sup>st</sup> appellant has faulted the trial court for failing to consider contradictions in the prosecution's case. His argument is that there were contradictions in PW2's evidence who stated that four pistons were broken and found to contain some substance which was suspected to be heroin, but his evidence was that it was a yellowish powder that was stuffed inside. That DHL receipt showed that the accused sent motor cycle parts and not air craft pistons. Therefore, he argued that whatever DHL had received from him and whatever PW2 had come across was not the same.
56. In the case of *Twehangane Alfred Vs. Uganda* Criminal Appeal No. 139 of 2001 (2003) UGCA 6 it was stated that:
- “With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”
57. In the case of *Peter Ngure Mwangi vs. Republic* [2014] eKLR, the Court of Appeal, while dealing with the question of alleged inconsistencies in evidence, opined that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. The Court stated as follows: -
- “We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case.”
58. The description of the cargo was spare parts and not aircraft pistons. PW1 was an arresting officer and was not at the airport though he described the shipment as aircraft spares. PW2 was not the investigating officer thus any contradictions on the description of the package was immaterial. Evidence tendered was clear that the appellant concealed the heroin inside the pistons. The 2<sup>nd</sup> appellant had also concealed heroin in his artifact consignment. The changes in the Notice of Seizure to indicate the four pistons was immaterial as PW2 who made alterations to the notices of seizure clarified that the fourth one did not have any suspect substance.
59. The 2<sup>nd</sup> appellant contended that the procedure on record of movement of the exhibits was not highlighted as per part 111 paragraph 11(1) & (2) of the Act. That the package was handed over to



Anti-Narcotic Unit at JKIA on 3<sup>rd</sup> March, 2017, that it reached the office on 7<sup>th</sup> March, 2017 but there was no record where the exhibits had been kept.

60. The evidence was clear how the exhibits were intercepted and kept under lock and key at the ware house prior to being handed over to the law enforcement officer from the Anti- Narcotics unit and the DCI. PC Seurey prepared the exhibit memo that forwarded the samples to the Government Chemist and the weighing officer. The packages remained in the custody of the police before they were produced in court. It is worth noting that evidence in this respect was not subjected to cross examination.
61. The appellants have faulted the court for overlooking the fact of vital witnesses having not testified. In particular it was pointed out that the agent who received the consignment was not called as a witness. That DHL approved the consignment and the transaction complied with the term and conditions of the transaction of consignment, otherwise, it would have been stopped.
62. Section 143 of the Evidence Act provides that:
- 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.
63. In the case of *Keter vs. Republic* [2007] 1 EA 135 the court held inter alia:
- “The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”
64. PW12 stated that DHL could not accept drugs and thus the package was intercepted; therefore, failure to call the agent/ lady was not fatal to the prosecution’s case.
65. In the case of *Julius Kalewa Mutunga vs. Republic* [2007] eKLR, the Court of Appeal stated thus:-
- “As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
66. The prosecution witnesses proved beyond reasonable doubt that the details on the Air Way bill linked the appellants to the suspect shipment, the CCTV footage was also confirmed that fact. The prosecution called a witness from the Directorate of Immigration Services who confirmed the identity of the 1<sup>st</sup> appellant and passport details of the 2<sup>nd</sup> appellant. There was no evidence before the court to suggest that the agents changed the shipment, and such allegations were not brought up at the defence stage.
67. On the question whether or not the defence put up was considered; and section 169 of the Criminal Procedure Code having been allegedly contravened; the alluded to provision of the law provides as follows:

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- (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.



- (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
- (3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

68. In the learned magistrate's judgment, it delved into details of issues raised, and gave reasons for the decision. Therefore, the law was not flouted.
69. On the contention of the 1<sup>st</sup> appellant's rights having been violated; The complaint of the alleged violation was raised before the trial court and at a preliminary stage as required, but, a conviction cannot be vitiated by such allegations.
70. In the case of *Julius Kamau Mbugua Vs. Republic* (2010) eKLR, the Court of Appeal held that breach of constitutional rights does not warrant an acquittal in a criminal matter and the available remedy would be damages through a civil claim.
71. On sentencing, the trial court meted out the sentence provided by Statute. The issue of a right to mitigate on sentence as stated in the cited case of *Jared Koita Injiri vs. Republic* (2019) eKLR following the principles set out in *Muruatetu & Another vs. Republic* (2017) eKLR, where Court of Appeal reviewed the life sentence under Section 8(1) of the Sexual Offences Act, to 30 years imprisonment, noting that the appellant was provided an opportunity to mitigate where it was stated that he was a first offender. The stated principle is not applicable in the instant case. The appellants who were represented by counsel were accorded the right to mitigate, mitigation that was considered by the court prior to passing sentence. The court acted within the law and the sentence was not excessive.
72. The upshot of the above is that the conviction in respect of the 1<sup>st</sup> and 2<sup>nd</sup> appellant was safe, and, sentences were also appropriate in the circumstances, save that they will be effective from the date of arraignment.
73. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Appellants

Ms. Kibathi for DPP

Court Assistant - Mutai

