Wanjiru v Republic (Criminal Appeal E029 of 2021) [2022] KEHC 12777 (KLR) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12777 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E029 OF 2021

JM MATIVO, J

AUGUST 31, 2022

BETWEEN

MARY WAIRIMU WANJIRU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against Conviction and Sentence in Criminal Case Number 991 of 2019, Voi Republic v Mary Wairimu Wanjirui, delivered by C.Kithinji, PM on 24th May 2021)

JUDGMENT

1. The appellant was charged in Criminal Case Number 991 of 2019 at the Principal Magistrates Court, Voi with the offence of Trafficking Narcotic Drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substance (Control) Act*[1] (the Act). It was alleged that on the 25th day of September 2019 at around 1330 hrs at Manyatta Prison Road gate in Voi Sub-County, within Taveta County jointly with others not before the court, she was found trafficking in Narcotic Drugs namely, heroin to wit 8.1 grams approximate street value of Kshs. 24,00/= while selling to prisoners at Manyani Maximum Prison in contravention to the said Act.

2. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion while at the same time bearing in mind that this court did not have the advantage of seeing the witnesses testify. (See *Kiilu & another v Republic*[2] and *Okeno v R*[3]). It is the function of a first appellate court to scrutinize the evidence to see if there was evidence to support the trial court's findings. Only then can it decide whether the magistrate's

[1] Cap 245, Laws of Kenya

[2] {2005} KLR 174

[3] {1972} EA 32 at 36.

findings should be supported. However, this court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses testify.

3. The following is a brief evaluation of the evidence adduced in the lower court. The prosecution case rested on the testimony of 6 witnesses. The essence of the prosecution case was that the appellant approached the Manyani Maximum Main gate seeking to visit two inmates. Her luggage was searched and 8 satches of heroin concealed in pieces of bar soap was recovered. The defence case stood on her own sworn evidence. She did not call any witnesses. Her defence was that she was not aware of the contents.

4. PW2, PC Joseph Njuguna and PW3 PC Kennedy Kipande were manning the main gate on 25th September 2019 when the complainant came seeking to visit two inmates, namely, Francis Kungu and Hamisi Kiema. Upon searching her the items she was carrying, they a powder like substance concealed inside pieces of bar soap wrapped in polythene papers and white tissue paper. They called PW1 who also came to the scene and confirmed the said items. PW4 Yahya Ismael, a Government Chemist based at Mombasa produced a report prepared by a one Daniel Mleao. The report confirmed that the white substance was heroin. PW5 CID Philip Langat prepared the valuation report which he produced in court. PW6 Sgt George Otuoma was the investigating officer. He produced the exhibits in court.

5. At the close of the prosecution case the learned Magistrate concluded that a *prima facie* case had been established and placed the accused person on her defence. She elected to give sworn defence. In her sworn defence, she stated that she received a receipt showing the origin of the consignment but she did not know what is contained.

6. In her judgment, upon analysing the evidence and the law, the learned Magistrate was satisfied that the offence of possession was proved as opposed the offence of trafficking in narcotic drugs. She invoked section 179(2) of the *Criminal Procedure Code*[4](CPC), convicted the appellant and sentenced her to serve 20 years in jail.

7. The appellant seeks to upset the conviction and sentence citing the following grounds: - (a) that the prosecution evidence was contradictory; (b) that the prosecution did not prove its case beyond reasonable doubt; (c) that the Magistrate failed to consider her defence and mitigation; (d) that the Magistrate erred in relying on a probation report that the appellant refused to disclose information and that she had an attitude.

8. The appellant submitted that the prosecution evidence was marred by inconsistencies. She argued that she was prejudiced by the amendment of the charge sheet. She submitted that the evidence tendered did not support the charge. Also, she argued that her defence was not considered.

9. The Respondent submitted that the trial court rightly applied section 179(2) of the *CPC* and convicted the appellant under section 3(1) as read with section (3)(2) (a) of the *Narcotic Drugs and Psychotropic Substances Act* for the offence of possession. As for the amendment of the Charge Sheet, the appellant submitted that a charge sheet can be amended even after a witness has testified and cited section 214 (a) of the *CPC*. Lastly, the Respondent submitted that the appellant's defence was considered in the judgment.

10. For starters, the requirement of culpability encapsulates an accused person's blameworthiness. Much of our criminal law is predicated on imposing legal liability on accused persons who perpetrate acts for which they are culpable; it is a general principle that criminal liability should broadly match personal culpability. The presumption of innocence lies at the very heart of the criminal law and is protected expressly by Article 50 (2) (a) of the *Constitution*. This presumption has enjoyed longstanding

[4] Cap 75, Laws of Kenya.

recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

11. The standard of proof in criminal proceedings is not proof beyond doubt but proof beyond 'reasonable' doubt. What is required of the prosecution in discharging the onus of proof of guilt is not that every possibility of innocence be excluded by the evidence but only that every reasonable possibility be excluded. The absence of a reasonable possibility of innocence has often been equated with proof of guilt beyond reasonable doubt. if there is any reasonable hypothesis consistent with innocence, it is the duty of the court to acquit.

12. Turning to the instant appeal, the prosecution evidence was that the appellant tried to enter Manyani Maximum Prison claiming that she was visiting two inmates. Her luggage was searched and 8 satches of heroin weighing 8.1 grams were found stashed inside pieces of bar soap. Her explanation was that she did not know the contents of the luggage she was carrying. This explanation did not in any manner absorb her from culpability. Her explanation did not cast reasonable doubt on the prosecution evidence.

13. The appellant argues that the prosecution evidence was full of inconsistencies. The court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence, whether the contradictions or inconsistencies (if any), are so material that the trial Magistrate ought to have rejected the evidence. As was held by the Uganda Court of Appeal in *Twehangane Alfred v Uganda*,[5] it is not every contradiction that warrants rejection of evidence. It subtly stated: -

> "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."

14. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.[6]The question to be addressed is whether the contradictions are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. The Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria*[7] stated:-

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

[5] Crim. App. No 139 of 2001, [2003] UGCA, 6.

[6] See *Uganda vs Rutaro* {1976} HCB; *Uganda vs George W. Yiga* {1979} HCB 217

[7] {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

15. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[8] It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. In my view, the correct approach is to read the evidence tendered holistically. I find no inconsistencies in the prosecution evidence.

16. The explanation offered by the appellant is in my view improbable and does not cast reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[9] The prosecution evidence weighed against the appellant's defence leaves me with no doubt that the appellant did not rebut the allegations against her. It is my finding that the evidence tendered by the prosecution sufficiently proved the offence and irresistibly pointed to the appellant's guilty.

17. The other ground of assault mounted by the appellant is that the charge sheet was amended to her prejudice. The law permits amendment of charges. The record shows that the appellant pleaded to the amended charge sheet. I find no prejudice to her at all. As was held in *Sigilani v Republic*,[10] the principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his/her defence. My reading of the particulars in the amended charge sheet and the evidence tendered leaves me with no doubt that from the onset; the appellant knew the charge facing her.[11]

18. I should underscore that the charge sheet outlines the essential ingredients and particulars of the offence. The evidence adduced was geared to establishing the said offence and the defence offered was clearly a direct response to the allegations made against the appellant. (See *Republic v Mohamed Abdi Bille*,[12] and *Vincent Shatuma Naste v Republic*[13]).

19. Section 134 of the *CPC* requires that every charge or information shall contain, and shall be sufficient, if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. Section 137(a) of the *CPC* requires that the Statement of an offence should offer a brief description in ordinary language, avoiding as far as possible the use of technical terms and that it is not necessary to put all the elements of the offence within the Statement. Section 137(a)(i) and (ii) of the

[8] See *Osetola v State* {2012} 17 NWLR (Pt1329) 251.

[9] Duhaime, Lloyd, Legal Definition of Balance of Probabilities, *Duhaime's Criminal Law Dictionary*

[10] {2004}2KLR 480

[11] *Brian Kipkemoi Koech v Republic* [2013] eKLR

[12] [2014] e KLR.

[13] [2014] e KLR.

Criminal Procedure Code[14] provides that if the offence charged is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence.

20. The appellant faults the Magistrate for failing to consider her defence. In determining whether the appellant's defence was considered, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower. I must, however, make it clear that by requiring the trial court to consider and weigh all the material tendered in the lower court is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led and the submissions made as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence and the submissions must indeed entail a complete embodiment of all the material presented before the court.

21. This court must determine, what the evidence and submissions of the state witnesses was, as understood within the totality of the evidence, including evidence led on the part of the accused and submissions made and compare it to the factual findings made by the trial court in relation to that evidence and submissions, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its.[15]

22. In other words, this court must consider whether the Magistrate considered all the evidence, that is, the prosecution and defence evidence, and both party's submissions and whether it weighed it correctly and correctly applied the law or legal principles to it in arriving at his/her judgment in respect of both the conviction and sentence. This exercise necessarily entails a scrutiny of the evidence of each witness within the context of the totality of evidence, and, the submissions made and what the trial court's findings were in relation to such evidence.[16]

23. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, including whether the appellants defence was considered, this court must consider the evidence led in the trial court, the submissions tendered and juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the judgment.[17]

24. This means that if this court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.[18]Turning to the facts of this case, at Page 39 of the record, (page 4 of the judgment) the learned Magistrate clearly considered the appellant's defence and submissions.

25. I also note that section 86 (1) and (2) of the Act was complied with. In addition, section 74 A provides: -

> "Where any Narcotic drugs or psychotropic substance has been seized and is to be used as evidence, the Commissioner of Police and the Director of Medical Services or a Police

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid.

or a Medical Officer respectively authorized in writing by either of them for the purpose of this Act (herein referred to as “the authorized officers”) shall, in the presence of where practicable-

a. The person intended to be charged in relation to the drugs (in this section referred to as “the accuses 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.

(2) After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts’ certificate for production at the trial of the accused person.

26. As per the above section, the suspected substance must be weighed in the presence of the suspect and that the person verifying the drugs must be an authorized person. On record is the evidence of PW 5 and the requisite certificate which demonstrates compliance with the above section.

27. Lastly, I will address the sentence imposed. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[19] (See Shadrack Kipchoge Kogo v Republic[20]).

28. The Supreme Court of India in *State of M.P. v Bablu Natt*[21] stated that the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.’ Moreover, in *Alister Anthony Pareira v State of Maharashtra*,[22] it was held: -

> “ Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case

19 See Makhandia J (as he then was in *Simon NdunguMuragevs Republic*, Criminal appeal no. 275 of 2007, Nyeri.

20 Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O’kubasu&Onyango JJA)

21 {2009}2S.C.C 272 Para 13

22 {2012}2 S.C.C 648 Para 69

and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances."

29. After evaluating the evidence, the trial Magistrate concluded that the facts before her disclosed the offence of possession of narcotic drugs under section 3(1) of the Act which provides for a lessor offence. She invoked section 179 (2) of the *CPC* which provides that:-

When offence proved is included in offence charged

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

30. Section 3 of the Act (prior to the amendment which was introduced by Act No. 4 of 2022) provided for penalty for possession of narcotic drugs, etc as follows: -

1. Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
2. A person guilty of an offence under subsection (1) shall be liable—
    a. in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a term of not more than five years or to a fine of not more than one hundred thousand shillings;

31. The learned Magistrate correctly invoked section 179 (2) of the *CPC* which provides for conviction for a minor offence other than the offence charged, but proceeded to impose a higher sentence than the law then provided in the said section. The section provided for a term of not more than 5 years yet the learned Magistrate imposed 20 years. In so doing, she acted contra the above provision. Having found as herein stated, I up hold the conviction, but reduce the prison term to 5 years. In computing the said term, the period served so far shall be considered.

Right of appeal

DATED AND DATED AT VOI THIS 29TH DAY OF AUGUST 2022

John M. Mativo

Judge

Dated, Signed and delivered virtually this 31st day of August 2022

STEPHEN GITHINJI

JUDGE