



REPUBLIC OF KENYA



KENYA LAW
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**Gitonga v Republic (Criminal Appeal 61 of 2020)
[2022] KEHC 14389 (KLR) (Crim) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 61 OF 2020

DO OGEMBO, J

OCTOBER 25, 2022

BETWEEN

PETER KIHUGA GITONGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence arising from
Criminal Case No. 32 of 2018 at the Chief Magistrate's Court, JKIA, by
Hon. L. O. Onyina, Chief Magistrate dated 14.2.2020 (date of sentence))*

JUDGMENT

1. The appellant herein, Peter Kihuga Gitonga, was charged and tried before the lower court 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. That on March 3, 2018 at Jomo Kenyatta International Airport, Terminal 1E, with Nairobi county, jointly with others not before the court, he unlawfully trafficked by conveying in a checked in black bag, a narcotic drug, namely cocaine, to wit, 1494.49 grams with a market value of Kshs 5,977,960/= concealed in false covers of 3 books packed in a dufty shipping polythene bag in contravention of the provisions of the said Act.
2. After full trial, the appellant was convicted as charged in a judgment read out in court on January 30, 2020. He was subsequently sentenced to pay a fine of Kshs 15 million or in default to serve 1 year imprisonment in line with the provision of section 28(2) of the [Penal Code](#) and in addition, he was ordered to serve 18 years imprisonment. This was on February 14, 2020.
3. The appellant, aggrieved, has now appealed against the same before this court. In the memorandum of the appeal filed herein on May 18, 2020, the appellant has listed the following grounds:-



1. That the trial magistrate erred In law and in facts by failing to find that the ingredients of the offence were not established as required by the law, hence the prosecution's case was not proved to the required threshold.
 2. That the trial magistrate erred in law and facts by not taking into consideration that the plea taken by the accused in the trial court was not equivocal contravening article 50(2)(b) of the Constitution of Kenya as stated in law.
 3. That the learned trial magistrate erred in both law and facts by failing to observe that the prosecution case was marred on in consistencies, contradictions and erroneous facts which could have not sustained a conviction.
 4. That the learned trial magistrate erred in law and facts when he convicted the appellant on prosecution case yet disregarded the appellant's plausible defence without cogent reason which contravened section 169 of the criminal procedure code.
4. The appellant has pleaded that this appeal be allowed and that the sentence be set aside. The state/ respondent opposes this appeal. By consent of the parties, this appeal was canvassed by way of written submission, which both sides duly filed.
5. From the appellant's side, an amended grounds of appeal was incorporated in the submissions. The appellant, however, never obtained prior leave to amend the initial grounds of appeal. The amended grounds were as follows:-
1. That the learned trial magistrate erred in law and in fact by basing his findings on circumstantial evidence which was not safe to base a conviction.
 2. That the learned trial magistrate erred in law and fact when he proceeded to convict and sentence the appellant on evidence that was not conclusive in that there was so many doubts and inconsistencies as to seizure of the drugs.
 3. That the learned trial magistrate erred in law and fact when he proceeded to convict and sentence the appellant yet failed to evaluate the evidence before making an independent opinion as to whether the appellant was found with the said drugs.
 4. That the learned trial magistrate erred in law and fact when he proceeded to convict and sentence the appellant yet the evidence of the prosecution witnesses was marked with errors and thus unsafe to back a conviction.
 5. That the learned trial magistrate erred in law and fact when he failed to find that the credibility of the witness was doubtful and thus cannot sustain a conviction.
 6. That the learned trial magistrate erred in law and fact when he failed to consider the appellant's defence as provided for under section 169 of the Criminal Procedure Code.
6. It was submitted that PW1 was not credible and was only there to connect the appellant with the alleged drugs. That the appellant was never in exclusive possession of the drugs. That the charge sheet refers to many traffickers and it was improper to zero in on the appellant as the one who had the drugs.
7. The appellant relied on the case of *Ramanlal Tiambaklal Bhatt v Republic* [1975]EA 332, that the prosecution must prove a prima facie case and that a mere scintilla of evidence can never be enough.



That the appellant was convicted on mere suspicion. He relied on the case of *Mary Wanjiru Gichira v Republic*, criminal appeal No 17 of 1998, that;

“Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

8. On the photographic evidence, the appellant submitted that PW5 PC Benard Serem or some of the scenes of crimes personnel were not gazetted officers, thereby rendering the photographs void.
9. The appellant went further to challenge the expert opinion as just an opinion and not conclusive of a fact in issue. That expert opinion can contribute to miscarriage of justice. These submissions were made to challenge the evidence of PW4, whose evidence was probably influenced. The appellant went on to rely on a number of decisions from foreign jurisdiction.
10. It was also submitted by the appellant that there were contradictions in the evidence and exhibits of the prosecution. He relied on *John Mutua Musyoki v Republic* criminal appeal No 11 of 2016, that;

“Clearly the High Court failed to evaluate the veracity of all these contradictions and discrepancies. To our mind, these contradictions and inconsistencies are not minor as submitted by the respondent. They were critical and go to the roof of the prosecution’s case and whether the complainant was a credible and truthful witness. If the complainant could lie as to what led her to report to school late, what else did she lie about?”
11. He went on that the scenes of crimes personnel were selective in the manner they took the photographs of the exhibits, and thereby showing an attempt by the prosecution to implicate the appellant.
12. The appellant also submitted that the trial court failed to consider his defence in its entirety, and that the court used the appellant’s defence to fill the gaps in the prosecution’s case. That the defence of the appellant left no doubt that he did not and had no intention to possess the drugs. Lastly, the appellant submitted on alleged incompetence of his counsel, which thereby prejudiced his case.
13. The respondent, on the other hand, submitted that the conviction of the appellant was a result of direct evidence and not circumstantial evidence (page 150 of proceedings). And that there were no inconsistencies in the prosecution’s case and that the learned trial magistrate properly analysed the evidence before making the determination. Lastly, that section 169 of the *Criminal Procedure Code* was duly complied with and the defence of the appellant was accordingly considered. The respondent urged that this appeal be dismissed and that the conviction and sentence be upheld.
14. These are the summary of the submissions of the 2 sides. This court sits on this matter as a 1st appellate court, whose jurisdiction is well settled. In *David Njuguna Kariuki v Republic* [2010]eKLR, it was held;

“The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion.”
15. It is therefore mandatory that this court looks at the evidence placed before the trial court as a whole, evaluate and analyse the same before the court may come up with its determination.
16. From the record of the proceedings before the lower court, the case of the prosecution commenced with the evidence of PW1, Corporal Reuben Munialo of Anti-Narcotics Unit, JKIA, that on March 3, 2018 at about 15:00 hours, together with his colleagues, Chief Inspector Martin Ndegwa, Sergeant Barbabas Kemei, Corporal Otando were on duty at terminal 1E arrivals. They were profiling passengers



from Emirates flight No EK 719 from Dubai, when they came across a passenger with Kenyan passport No B224931 in the name of Peter Kihuga Gitonga (MFI-1). The passenger had an air ticket showing he had travelled from Brazil to Dubai and to Nairobi. And also Nairobi Nairobi to Dubai and to Rio de Janeiro. He had the boarding passes and vaccination card in his name. also a claim tag No EK877639 in his name. the claim tag had name of Rio de Janeiro G722RN. He also had a baggage claim card serial Number EK 261023 in his name. that the appellant was allowed to pick his own check in luggage which had luggage tag serial number EK 261023 in the name of Gitonga Peter Kihuga. He was then escorted to the anti-narcotics office where a search was done on his body and luggage. That in the course of the search, Corporal Otando retrieved 1 brown wallet from the appellant's rear trouser pocket which had 2 ATM cards (family Bank), NHIF card number 3735473, 2 withdrawal slips of Family Bank, 3 small keys, an IC card serial number 217963426, and identity card No 24505251, all in the name of the appellant. That the appellant was allowed to open the check in bag using one of the 3 keys. That the bag had clothes and a paper bag with words "dufry shopping" with 3 books which had unusual weights. That Corporal Otando broke the covers that concealed whitish powdery substance they suspected to be narcotics drugs. That there were a total of 6 packets. The scene was photographed by the scene of crime officer. That Chief Inspector Martin Ndegwa seized the exhibit and Corporal Otando prepared an inventory of the recovered items, which the appellant signed. PW1 witnesses the same inventory dated March 3, 2018. In court, this witness marked and identified all the exhibits. That the appellant was duly arrested and placed in the cells.

17. In his evidence, the colour of the bag was black and that it did not have a false bottom.
18. PW2 Chief Inspector Martin Ndegwa testified that on March 3, 2018, he had been on duty with other officers including PW1 at the JKIA. He basically reiterated the evidence of PW1. He added that he made a notice of seizure which the appellant signed (MFI-19). He later presided over the weighing exercise of the recovered substance. That it came to 1494.49 grams. He then had prepared a weighing certificate which was then signed by the appellant and the other officers present (MFI-20). That sampling was done and a preliminary test pointed to cocaine, and appellant duly signed the certificate of sampling (MFI-21). The witness also prepared the record of seizure which was duly signed (MFI-22). That appellant also signed the notice of intention to tender the records in evidence (MFI-23). He produced all these exhibits in court.
19. The 3rd witness (PW3) was Joshua Okalo, also a police officer at the time of this incident. He is the valuer who valued the exhibits at Ksh 5,977,960/=, at Ksh 4000/= for every gram. He prepared the valuation report, which he produced in court (Exh 26).
20. Denis Owino Onyango (PW4) an analyst at the Government Chemist gave evidence that the substance was analysed. He found it to contain cocaine with a purity of 45%. He produced his analyst report as exhibit (Exh 27).
21. And PW5, PC Bernard Serem, a gazetted scenes of crimes officer, testified on how on March 6, 2018, at the JKIA, he took photographs of the exhibits herein. In court, he produced the photographs and his certificate (Exh 28,29).
22. The last prosecution witnesses was Corporal Wycliffe Otado (PW6). His evidence was that on March 3, 2018, he had been on duty with his colleagues at JKIA when he arrested the appellant. He went on that he is the one who searched the appellant and his baggage and made recoveries of the exhibits. He produced each of the exhibits in court. He was the investigating officer of this case.
23. When the appellant was put to his own defence, he gave a sworn evidence that a lady customer had asked to go to Brazil to get clothes which he agreed to do. That he proceeded to Sao Paulo and to Rio de Janeiro where communicated with one Pedro as advised. That he stayed there for more than 1 week.



- That being taken I circles by Pedro on when he would return to Kenya, a man called Sam appeared in his hostel with a back bay which he took to his room. He was then given Ksh 50,000/= and USD 500/=. That he was told the bag was carrying clothes and on landing at JKIA, he would find a Brazilian whom he would give the (bag and the books). His evidence was that he only had books and did not know that the books had drugs.
24. On being cross examined the appellant admitted that he had gone to Brazil, but to bring clothes. That he did not check the bags he was given. He also said that he put his clothes in the bag and remained with a trouser. He also went on that he had earlier been to Brazil in 2017 to pick clothes, and 3 times to Thailand to bring hair. He otherwise also admitted that he is the one who was carrying the bag when he was arrested, and that he was present during weighing and sampling. That he had gone to pick clothes, but came back with books.
25. This basically, is the evidence the 2 sides brought up before the court. I have considered the same in totality. It is important to note the material evidence of the prosecution that have been proved and admitted by the appellant's side. I can state them as follows;-
- i) That on March 3, 2018, the appellant was arrested by PW1 and the other police officers (PW2, PW6) on landing at JKIA from Rio de Janeiro Via Dubai aboard Emirates Flight EK719. That appellant had Kenyan passport No B224931 in the name of Peter Kihuga Gitonga.
 - ii) That appellant also had a boarding pass and claim tag No EK877639, and a baggage tag serial number EK261023 in his name. that on being allowed to pick his check in luggage, the appellant proceeded to pick the same. It had the same serial number EK261023.
 - iii) That the arresting officers proceeded to search the body of the appellant. His personal documents were found in a wallet recovered from his trousers.
 - iv) That on being requested, he opened his bag using one of the keys that had been recovered from him. That inside the bag were clothes and 3 books with rather abnormal weights. That on opening the covers f the 3 books, whitish powdery substance was recovered, in a total of 6 packets. The substances was weighed at 1494.49 grams. The same was subsequently examined and determined to be cocaine by the government analyst, Denis Owino Onyango (PW4), a narcotic drug listed under first schedule of the *Narcotic Drugs and Psychotropic substances (Control) Act*, No 4 of 1994.
 - v) That the appellant duly signed in agreement with the investing officers, the inventory of the recovered items, notice of seizure, the weighing certificate, among other exhibits including the notice to tender the exhibits in court.
26. All the exhibits and the photographs taken by the scenes of crimes officer (PW5) were produced in court as exhibits.
27. With this evidence, this court is convinced that the exhibits (Narcotic drugs) were recovered from the travelling bag of the appellant who had been on transit from Rio de Janeiro, Brazil to Nairobi, via Dubai. And more importantly that the exhibits were duly examined at the Government chemist and determined to be cocaine a narcotic drug under the Act. The only issue for determination is there whether the appellant trafficked in the narcotic drugs by conveying as charged. Section 2 of the Act defines trafficking as;

“ Trafficking means the importation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug...”



28. The evidence on record clearly shows that the narcotic drugs were recovered from the luggage of the appellant. He had the keys to the bag which he used to open the same. The same bag had his clothes. The drugs were carefully stored in the 3 books placed in the bag below the clothes. The evidence on record is that the books had unusual weights. The drugs alone weight 1494.49grams. the appellant had apparently been away in Brazil for only a short period of time. He had travelled out on February 13, 2018 and was back on March 3, 2018.
29. These factors put together convinces this court that the appellant knew the nature of the substance he was carrying in his back and that he was trafficking in the narcotic drugs by way of conveyance. With the weight of the drugs, obviously, the appellant had he been honest, would not have agreed to carry the books in his bag without knowing what was hidden in the books. And his relatively short stint in far away Brazil, also points to his participation as a conveyancer of the narcotic drugs.
30. In the defence of the appellant he has admitted that the narcotic drugs were indeed recovered in his bag. He has however maintained that he did not know what was in his bag. That one Pedro had given him the bag with the books instead of the clothes he had gone to buy. With respect, I do not believe this defence. The weight of the books would ordinarily aroused his suspicion on the nature of what he was carrying. He also gave no explanation on how he ended up carrying books (3 in number) and not clothes he had set out to buy.
31. The evidence of the appellant in defence was also fully of inconsistency. At one time in the proceedings he gave the impression that it was his first time in Brazil, at another time, he stated it was the 2nd time. He was equally inconsistent on when he first obtained a passport. Even when he first met the lady called Sarah who allegedly sent her to Brazil. I sincerely do not find any merit in the defence of the appellant which I dismiss.
32. Considering the above observation, I am convinced that the prosecution discharged its burden and proved this case against the appellant beyond any reasonable doubt as required by the law. I therefore reach the same finding as the learned trial magistrate on this.
33. Before I pen off, it is important to consider the issue that the appellant has raised in his submissions. First, with the well corroborated evidence of the prosecution, I do not see any material inconsistency in the evidence of the 6 witnesses as submitted by the appellant. Second, the appellant, claiming that certain material witnesses were never summoned, did not even give a hint about any such witness and it would be improper for the court to speculate on the nature of any such witness, if at all. And as regards the expert opinion, the relevant witness (PW5) clearly gave his gazette number, while PW4, the analyst also spelt out his qualifications. And lastly, on representation, the appellant was represented by advocates of his own choice throughout the trial. The submissions of the appellant along these lines are therefore misplaced and I dismiss the same.
34. It is noted that the appellant has not challenged the sentence meted out by the trial court. I have considered the same. I find the sentence herein both legal and proper.
35. This appeal of the appellant Peter Kihuga Gitonga, filed herein on May 18, 2020, lacking in any merit as already found above, is accordingly wholly dismissed. Ordered accordingly.

D. O. OGEMBO

JUDGE

25TH OCTOBER, 2022.

Court:



Judgment read out in presence of the appellant (Kamiti Maximum) and Ms. Akunja for the state.

D. O. OGEMBO

JUDGE

25TH OCTOBER, 2022.

