



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 159/196 OF 2019

CHUKWU OZOEMENA JAMES OKKWUDILI.....1ST APPELLANT

GACHECHE GOLD PATIENCE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment and sentence of the Hon. L. Onyina Chief Magistrate, in Chief Magistrates Court at JKIA, on 5.7.2019 in Criminal Case Number 136 of 2017)

JUDGMENT

The 2 appellants **CHUKWU OZOEMENA JAMES OKKWUDILI** and **GACHECHE GOLD PATIENCE**, were charged before the trial court in the above case on 29.6.2017. They were charged with 1 count 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 the charge were that on 23.6.2017 at Beach Road Apartments, Gichanga Avenue in Nyali within Mombasa County jointly with other not before court they trafficked by storing a Narcotic drug, namely Heroin, to wit, 2,022,26grams with a market value of Ksh.6,066,780/= concealed in the false bottom of a suitcase in contravention of the provisions of the said Act.

The case of the appellants before the trial court progressed to full hearing. They were each convicted on the charge. In the sentence of the court pronounced on 5.7.2019, the appellants were sentenced as follows:-

- i) That each was fined Kshs.15 million and in default to serve 1 year imprisonment in line with section 28(2) of the Penal Code, and in addition,
- ii) Each is sentenced to 15 years imprisonment.

It was further ordered that upon completion of the sentence, the 2 appellants would be repatriated to their country of nationality in accordance with section 26A of the Penal Code. The 2 appellants have appealed herein against the conviction and sentence. They files separate petitions of appeal.

The 1st appellant, in the amended grounds of appeal has listed upto 12 grounds of appeal as follows:-

- 1. THAT the learned trial magistrate erred in law by adopting the written submissions by the appellant's counsel without the appellant's consent contrary to section 213 and section 310 of the Criminal Procedure Code.**
- 2. THAT the learned trial magistrate erred in law and fact in failing to observe that the photographic evidence was in contravention of part II of the Narcotic Drugs and Psychotropic Substance Regulations, 2006.**
- 3. THAT the learned trial magistrate erred in law and fact when he convicted and sentenced the appellant on inconsistent evidence that was marred with doubts.**
- 4. THAT the learned trial magistrate erred in law and in fact when convicting without evaluating the evidence independently as to the appellant's knowledge of the drugs in question.**
- 5. THAT the learned trial magistrate erred in law and fact by failing to find that there was no nexus between the appellant and the drugs.**

6. **THAT the learned trial magistrate erred in law and fact by failing to observe that the alleged drugs were not recovered from the appellant possession.**

7. **THAT the learned trial magistrate erred in law and fact when he failed to warn himself of the dangers of convicting the appellant on circumstantial evidence.**

8. **That the learned trial magistrate erred in fact by failing to observe that the plea was taken in the absence of any evidence as investigations were still incomplete.**

9. **THAT the learned trial magistrate erred in law and fact when he failed to find that the prosecution case was marred with contradictions which impugned on the credibility of the prosecution witnesses.**

10. **THAT the appellants defence counsel representation was so ineffective and deficient that no reasonable counsel would have conducted the case the way he did.**

11. **THAT the learned magistrate of the trial court erred in law and fact by failing to consider the appellants defence as provided under section 169 of the Criminal Procedure Code.**

12. **THAT the learned trial magistrate erred in fact in awarding the sentence of 15 years imprisonment having no regard to the sentencing guidelines, the appellants ill health.**

For the 2nd appellant, a total of 9 grounds of appeal have being raised as follows:-

1. **THAT the learned trial magistrate erred in fact and law failing to find that there was no evidence to sustain a conviction.**

2. **THAT the learned trial magistrate erred in fact and law by failing to find that there was no evidence to establish the ingredients of the charge.**

3. **THAT the learned trial magistrate erred in fact and law by failing to find that the evidence adduced was at variance with the particulars of the charge sheet.**

4. **THAT the learned trial magistrate erred in fact and law by failing to find that the charge was incurably defective.**

5. **THAT the learned trial magistrate erred in fact and law by failing to find that the trial offended and contravened the appellant's constitutional rights to a fair trial.**

6. **THAT the learned trial magistrate erred in fact and law in upholding the prosecution witness's 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.**

7. **THAT the learned trial magistrate erred in fact and law by failing to find that the exhibits tendered by the prosecution failing to be of any evidentiary value to the prosecution's case.**

8. **THAT the learned trial magistrate erred in fact and law in convicting the appellant while the prosecution did not satisfy their burden of proving their case beyond reasonable doubt.**

9. **THAT the learned trial magistrate erred in law and in fact by imposing a harsh, excessive and untenable sentence upon the appellant.**

Both the appellants pleaded that this court do set aside the conviction and quashes the sentence. For the 2nd appellant, it was pleaded that in the alternative, the sentence be reviewed to the period already served. The Respondent, on its part has prayed that these appeals be dismissed for lack of merit. This appeal was canvassed by way of written submissions. All the parties duly complied and filed their set of submissions.

The 1st appellant first stressed on the duty of the court. He relied on *Okeno Versus Republic (1972)EA32*, that

“An appellant on first appeal is entitled to expect the evidence as a whole to a fresh and exhaustive examination it is must make its own findings and draw its own conclusions; it must make its own findings and draw its own conclusion. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.”

The appellant submitted that the Court of Appeal authority in *Akhuya Versus Republic (2003)eKLR*, giving directions on written submissions, held;

a) THAT a presiding officer is expected to orally hear such submissions as both sides in a criminal case wish to make and seek clarification of such submissions as found necessary in order to appreciate each side's case before delivering his opinion.

b) The accused person is also supposed to hear the submissions and has the right to clarify any point raised or object to it being raised where he considers it necessary for benefits.

c) The trial cannot be said to be complete unless the record shows that both sides were granted an opportunity of addressing the court on the merits on otherwise of the case against the accused.

d) Written submissions do not have any sanctions of the law. Magistrates and judges who ask for or accept them deny the accused person a statutory right to orally persuading the court to grant him an acquittal.”

It was contended therefore that the trial was in violation of sections 213 and 310 of the Criminal Procedure Code (see also Henry Odhiambo Otieno Versus Republic, Court of Appeal 83/05 (Kisumu)). Further that the appellant never has access to the submissions filed by his advocate.

On the issue of possession, the appellant challenged the prosecution’s position that he had exclusive possession of the premises, whether he was culpable of trafficking of the existence of the drugs in the house we shared with the 2nd appellant. He relied on Mohamed Gani Taiib Versus Republic Appeal No. 183/2002(NAI, HC). Also Wachira Versus Republic (1985)KLR 761, that is incumbent upon the prosecution to demonstrate by evidence that the appellant and reasonable be deemed to be in possession in terms of section 4 of the Penal Code.

The appellant also referred to the evidence of PW2, the caretaker, that he agreed to rent the house to Akpar Arinze, 3rd accused who was acquitted. And that James, the owner of the house, also had a key. That this means that the appellant did not have exclusive possession of the house, since both James and Arinze had keys to the house.

The appellant also referred to the termination of tenancy letter (Exh – 32), which showed that 3rd accused still had an interest in the house as he sought to know on how he would get his households. And that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence (Mary Wanjiku Gachira Versus Republic, Criminal Appeal No. 17/1998).

On circumstantial evidence, the 1st appellant relied on Abanga alia Onyango Versus Republic, Court of Appeal, 32 of 1990, that;

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests i.e. the circumstances under which inference of guilt is sought to be drawn must cogently and should be of a definite tendency unerringly pointing towards the guilt of the accused the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

The appellant challenged the evidence of PW1 on what she found at the sitting room, noting that nothing was recovered from his bedroom but the second bedroom.

It was further submitted that the evidence of PW1 was full of contradictions. Citing John Mutua Musyoki Versus Republic (2017) Criminal Appeal No. 11/2016, it was submitted that the same were critical and go to the root of the prosecution’s case.

Appellant also challenged the evidence of PW7, the scenes of crimes officer and claimed that the same fell short of the requirements of the Narcotic Drugs and Psychotropic substances (Control, seizure, analysis and disposal) Regulations, 2006, that the drugs ought to have been documented and photographed at the scene. It was lastly submitted that the appellant’s right to fair trial under Article 50(2) was infringed since at the time the appellant took plea, the drugs had not even been examined, giving the question as to whether the analyst had been induced.

Lastly, on sentence, the 1st appellant pleaded with the court to invoke the principles in the Muruatetu case and consider alternative sentence of repatriation to Nigeria, on health grounds.

Mr. Swaka, counsel for the 2nd appellant, on his part, submitted that there was no sufficient evidence to sustain a conviction. That she was a mere visitor in the house. The ownership of the suitcase was not determined. And that whereas PW1, PW4 and PW12 said that the bag was maroon, PW3 and PW8, said it was brown. The appellant’s own bag was found on the floor with nothing incriminating. The phones of the appellant where also never subjected to any forensic examination. Simply, that prosecution relied on circumstantial evidence. He relied the old case of Rex Versus Kipkerring Arap Koskei and 2 others (1949)EACA 135 that;

“In order to justify a conviction 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 and the burden of proving facts which justify drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.

Counsel also submitted that the ingredients of the charge were never proved. That the particulars of the charge did not disclose any offence under section 4 of the Act. He relied on Wanjiku Versus Republic 2002 1 KLR 825 (Onyancha J.) that;

“It is therefore logical and indeed sensible that a charge of trafficking should clearly specify the exact kind of trafficking to enable not only prosecution to know what evidence to lead to prove the charge, but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing.”

It was submitted that for this crime, one must both the mens rea and actus reus, which were never proved against the appellant. Counsel also noted the contradictions in the testimonies of the prosecution witnesses on who exactly found the bag, the colour of the bag, whether the drugs were found in the bag and who had opened the house. In the submissions of the 2nd appellant, the prosecution failed to prove the case beyond any reasonable doubt as required by the law.

On the issue of sentence, the 2nd appellant submitted that the learned trial magistrate failed to give any weight to the mitigation of the appellant. Counsel relied on Carolyn Auma Majabu Versus Republic (2014)eKLR, in which it was held in part;

“... The use of word “liable” in section 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act, merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of Judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable, the mandatory sentence must be expressed in clear and unambiguous terms”

This decision was by the Court of Appeal who went ahead to set aside the sentence of life imprisonment, substituting it with an additional fine of Ksh. 1 Million taking into account the mitigation of the appellant.

The state respondent, in its filed submissions restated the evidence of the prosecution and maintained that it proved the case beyond any reasonable doubt as required by law. And that the inconsistencies, if at all, were minor. An example was given on who opened the door. Counsel relied on Philip Nzaka Watu Versus Republic (2016)Eklr, (Court of Appeal) that the court must consider the nature and extend of the inconsistencies.

On the charge, it was noted that it showed trafficking by “storing”, with the particulars stating “Concealed the narcotic drug in the false bottom of a suitcase.” And that the mens rea was proved in the manner in which the drugs were stored and the exhibits that were recovered. And lastly, that the sentence was proper, with the court taking into account the mitigations raised and the periods taken in custody. Counsel pleaded that the appeals be dismissed for lack of merit.

This court sits on this case as a first appellate court. I am accordingly guided by the directions given in the case cited by the 2nd appellant of Okeno Versus republic (1972)EA, 32, that the court must consider the evidence before the trial court, make its own findings and draw its own conclusions. As held in the referenced case, this is the only way a first appellant court can decide whether the trial magistrate’s findings should be supported or overturned. It is therefore imperative that this court considers the evidence tendered before the trial court exhaustively.

The case of the prosecution commenced with the evidence of PW1, Inspector Ruth Mwangangi, that on 22.6.2017, with Corporal Kipruto and other police officers, they had information about 3 Nigerians at Beach Road apartment, Nyali, who were preparing narcotic drug to transport the same to Brussels. They proceeded to Room 6, on the 2nd floor of the apartment and knocked the door. Same was opened by a lady. After introducing themselves, they entered. On being asked to call the other occupants, she called out a name and the first suspect appeared from the first bedroom, introducing himself as Chunkwu Ezoemena. Their search started from the bedroom of 1st appellant (1st accused), conducted by corporal Maleya and Corporal Kipruto, in the presence of the 1st appellant and other officers. Corporal Maleya recovered a bluish porch and a Nigerian passport with the name Chunkwu Ezoemena James Okwudili, No. A03275112, Ethiopian Airline ticket dated 22.5.2017 of Msa – Addis Ababa. Also recovered in the room were screw drivers, nut sorry screws, while corporal Kipruto also recovered some parts of suitcase. Also recovered were 2 containers of BYB bond glue, 2 cellotapes, sewing thread, and a needle.

On further search in the bedroom of the 2nd appellant, Patience Gold Gacheche. In the room, the witness recovered a black handbag which had a Nigerian Passport No. A07241884 in the names of the 2nd appellant. In the black porch were Ksh.1,926/=, 689 Euros which were inside a brown porch which was in a black handbag. The witness further recovered a maroon suitcase from the wardrobe which had nothing in it, but had abnormal weight. On opening the same at the sitting room, and corporal Kipruto tearing the bottom of the bag with a knife, a blue carbon paper appeared. Inside it, there was brown powdery substance, which on preliminary test, tested positive for heroin. The witness prepared a search certificate. In court, she identified the exhibits. Corporal Kipruto prepared the inventory which was signed by both 1st and 2nd appellants and the officers present.

She added that Ksh.1,100/= was also recovered from the bedroom of 1st petitioner, together with 50 Euros. But that the appellants declined to sign the seizure notices. That later on 24.6.2017, the suitcase’s false bottom was opened in the presence of the appellants. 4 packages of brownish powdery substance packed in transparent polythene bags and covered with a blue polythene paper were recovered. The appellants and the exhibits were ferried to Nairobi. The samples were weighed in the presence of the appellants, totaling 2022.26 grams. The appellants signed for the certificate of weighing. The appellants were then charged in court.

On cross examination the witness added that she took the money as proceeds of crime and that the house only had 2 mattresses and further that it was the 1st petitioner who was dismantling the bag. There was also an air ticket for the 2nd appellant whose room also had her clothes and hair pieces. She also stated that the 2nd appellant told her she had been there for 6 days which she confirmed from her air ticket. And that though the house was rented by one Antony Arionza, the 2 appellants were the normal occupants.

The 2nd witness was Jeremiah Wawer Ngari (PW2), the caretaker of the apartment. He recalled that on 10.6.2017, he was approached by one Akbar Arinze and his brother James who needed a house. They agreed on a monthly rent of Ksh.26,000/= for a 2 bedroomed house. Later on 13.6.2017, Mr. Arinze told him on phone that he had deposited 52,000/=. The 2 moved into the house without paying for 1 month only to later on 15.6.2017 for Mr. Arinze to pay a further sum of Ksh.15,000/ via Mpesa, pending the signing of the tenancy agreement on 1.7.2017. That James told him that the lady who had joined them was Italian. He was only later told that James and the lady had been arrested. He produced the rental receipts he had issued to Mr. Arinze, and the notice to vacate from the same man. He identified James (accused 1), the lady (Accused 2) AND Arinze (accused 3).

To the cross examination by the 2 counsel for the appellants, the witness answered that the owner of the house, James and Arinze all had keys to the house. James brought mattresses and came with them only. That house was new with no previous occupier. On their first meeting, 2nd appellant was not present. He only saw her on 15.6.2017.

PW3 was Sargent Justus Kinge, whose evidence was that he had accompanied the other police officers to the Beach Road apartment, where he witnesses the search and recovery of the exhibits. According to him, it was 1st appellant who opened for them the door. And the other caretaker, Mwinyi Nyawa Masha was PW4. He recalled that on 16.6.2017, he showed the 2 appellants and the other man the house in the apartment. They were happy with the house and put their items therein before leaving. He later helped remove the tenant's items when a vehicle brought the same and assisted in taking them to the house. He later witnessed the arrest of the appellants on 23.6.2017. He confirmed that appellants are the ones who lived in the house, not the other man (3rd accused) who had paid for the house.

Corporal Absalom Maleya was PW5. He had accompanied PW1 on this assignment. His testimony was the same that it is 2nd appellant who opened for them the door, before 1st appellant appeared from a bedroom on the left. He conducted the search in the bedroom of 1st appellant and recovered his passport. He also witnessed the recoveries in the bedroom of 2nd appellant, and the opening of the suitcase at the sitting room to show the contents. He also witnesses the presumptive test of the substance recovered.

And PW6 PC Gaudencia Olweny, a scene of crime officer recounted that on 27.6.2017, she documented the exhibits herein in the presence of the other officers and the 2 suspects, the appellants. She took photographs of the same which she produced together with her certificate. PW7 Chief Inspector Klein Kulicha, on his part, stated that he is also a gazette scenes of crimes officer. He recalled that on 23.6.2017, at Port police station he took photographs of the exhibits. He produced the same.

The next witness was PW8, PC Julius Kipkosgei Ngetice, who recalled that he was one of the officer who proceeded to the apartment on Beach Road. He witnessed the recoveries and in court, he identified the appellants. And PW9, assistant superintendent Joshua Okalo, a drug law enforcement officer, is the one who valued the recovered drugs at Kshs.6,066,780/=. He produced his certificate.

PW10, was Denis Owino Onyango, a government analyst. He examined the substance on 27.6.2017 in the presence of the appellants and the investigating officers and determined that it contained diacetylmorphine at 30%, and that the same is a narcotic drug under the Act. He produced his report in court. He confirmed that at the time of sampling, only preliminary tests was done, and it was desired that the establishes the contents. And PW11, Corporal Geoffrey Kipkurui, was also one of the officers who proceeded to the residence of 3rd accused at Mwembe Legeza. He was part of the officers who arrested the 3rd accused, who was acquitted of the charges by the trial court and is therefore not a party in this appeal.

PW12, corporal Joseph Kipruto, was the investigating officer of this court. He was part of the team who went to the apartment, participated in the recoveries and arrest of the appellants. He produced all the exhibits in court.

1st appellant gave a sworn evidence in defence. He said that on the material night, police came to the apartment he had just moved into after his lady colleague opened the door. That they first searched his bedroom and only took his passport to the 2nd bedroom while he remained in the sitting room. He denied knowledge of anything about the maroon suitcase. He added that the cleaner was brought into the apartment and had access just as the caretaker. That the cleaner would even go into the room in his absence and he would always leave the keys with the caretaker. That it was Arinze who was paying the rent and that he came to Kenya to do genuine business. He otherwise could not say if the police had planted the bag in the room as he only saw it when it was brought down in the sitting room. He called no witness.

The 2nd appellant also gave a sworn defence. Her testimony was that she came to Kenya from Italy to purchase items. That it was 1st appellant who took her to the house. That on the material date, 22.6.2017, the door was knocked at she opened. She then called out 1st appellant. That the police first went to the room of 1st appellant with the 2 of them. That they were taken to the other room where she found all the things she had brought scattered on the ground. On being asked, she said she did not know the owner of the luggage. She was then taken to her room as 1st appellant remained in the sitting room. She showed the police her luggage with clothes and pieces. She went on that when she first saw the suitcase, it was on the ground inside the room that 1st appellant gave her to stay. On being asked, she said she did not know its owner. She denied that the same was recovered from up the wardrobe. She also denied seeing any photographs being taken of the bag/suitcase and the contents in the sitting room; she also did not see any parts of the bag, screw driver, or thread. He denied knowledge of any drugs.

She insisted that she had come to bring 1st appellant shoes to sell and not medicine. She however did not see any of the officers came in with the suitcase, the needle or the other exhibits. On cross examination, her evidence was that she first saw the suitcase in the first room on the floor, closed, she maintained that she was only a guest in the house. She did not know if the cleaner and caretaker would access the house in their absence.

She admitted that she was present when Arinze bought the things (Exh – 33) for use in the house and also when the same were moved into the house.

I have considered the evidence on record by both the prosecution and the defence (Appellant's) sides and the determination of the lower court. I have also carefully considered the submissions made herein by the parties in this appeal. It is clear that there are a number of facts and evidence material to this appeal that are not in dispute. There is no dispute as to the fact that the exhibit recovered and produced herein (Exh 22(a) to (d) contained diacetylmorphine, listed in part one of the Narcotic Drugs and Psychotropic substances (Control) Act, No. 4 of 1994. This was the evidence of the Government analysts, Denis Owino Onyango, PW10. The weight of the substance at 222.26 grams was not disputed. The value of the recovered exhibit at Kshs.6,066,780/= as demonstrated by PW9 Joshua Okalo, was also not disputed. Also not disputed is the evidence that both 1st and 2nd appellants were found and arrested at the Beach Road Apartment on 22.6.2017, where it was alleged by the prosecution that the narcotic drugs were recovered.

Having noted some of the material evidence not disputed in this case, I am convinced that the issues that arise for determination in this appeal are the following:

i) Whether the appellants trafficked in the said narcotic drugs by storing as charged.

ii) The defence of the appellants.

iii) Whether the prosecution discharged its burden and proved the case against the appellants beyond any reasonable doubt as required by the law.

iv) The issue of sentence.

On the 1st issue, this court notes that the appellants had been charged with 1 count of Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act, No. 4 of 1994. At section 2 of the said Act, trafficking is defined as:-

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

The act of storing is therefore one of the ways by which a narcotic drug may be trafficked. The case of the prosecution is that the police officers, acting on information proceeded to House No. 6 at the Beach Road Apartment where both 1st and 2nd appellants resided as tenants. The house itself had been rented out and paid for by the 3rd accused (acquitted), who had allowed both 1st and 2nd appellants to occupy the same. That upon searching both the bedrooms of the 1st and 2nd appellants, various exhibits were recovered relevant to this case. That from the bedroom of 1st appellant, the items recovered included, his Nigerian passport, bluish porch, Ethiopian Airlines ticket for Mombasa – Addis Ababa, screw drivers, nine screws, a suitcase parts, 2 containers of BYB Bond Glue, 2 cellotapes, sewing thread and a needle. And that from the bedroom of 2nd appellant, they recovered her Nigerian passport, inside her handbag, and some currency notes. Also recovered from the wardrobe in the bedroom was a maroon suitcase which on being opened, revealed a false bottom where narcotic drugs (Heroin) was recovered. That this process of search and recovery was witnessed by both the appellants and the police officers and a search certificate and inventory of the recovered items were prepared and signed by the police officers and the 2 appellants.

The 1st appellant, however maintained that it was one Arinze (accused 3), who had offered him the house to live in. His testimony was that he had come to do genuine business in Kenya of selling shoes and that in his bedroom, only his wallet, suitcase and passport were recovered. He denied any knowledge of the maroon bag which he only saw for the first time when it was brought down at the sitting room and opened by the police.

2nd appellant, on her part, testified that she was only a visitor who had come to Kenya to deliver shoes to the 1st appellant and also buy Maasai slippers, beads and pieces, only for the police to arrest her from the house with 1st appellant. She denied any knowledge of the recovered bag and the narcotic drugs recovered from its false bottom. She denied being present when the same was recovered from her bedroom.

It is clear therefore, that this court is faced with 2 conflicting pieces of evidence. The court must therefore determine which side gave credible and truthful evidence and in the process also determine who stored the narcotic drugs that were recovered from the house.

It is noted that the prosecution called upto 4 witnesses, PW1, PW3, PW5 and PW12 who gave exactly the same evidence and corroborated the evidence of each other on how they acted on information, how the search was conducted and how the recovery was made. These witnesses were cross-examined at length by counsel for the appellants, but their evidence remained totally intact. It is clear from the evidence of these prosecution witnesses that from the bedroom of 1st appellant, exhibits including screw drivers, screws, cellotapes, needle and glue were recovered. Also recovered were parts of a suitcase. These exhibits have a direct relationship with the bag recovered from the bedroom of the 2nd appellant. The said bag was sewn with a false bottom to hide the narcotic drugs. Parts of the exhibits were therefore found in the 2 separate bedrooms of the 1st and 2nd appellants. In my view, if the implements used to sew the false bottom of the bag were found in the bedroom of 1st appellant, while the bag itself with the drugs were recovered from the bedroom of the 2nd appellant, it means that both the 1st and 2nd appellants both knew of the existence and storage of the narcotic drugs in the false bottom of the bag. 1st and 2nd appellants were the only 2 persons who resided and were in occupation of this house.

PW2, Jeremiah Waweru Ngari, the caretaker of the apartment, further gave material evidence that was unchallenged. That though it was the 3rd accused (acquitted) who paid rent for the house, it was the 1st and 2nd appellant's who occupied the house for the short duration of the tenancy. And that this was a new house in the appellants being the 1st and 2nd appellants who occupied the house for the short duration of the tenancy. And that this was a new house with the appellants being the 1st occupants. The witness had even assisted the appellants, and the 3rd accused, move their belongings into the house. There is no evidence whatsoever, to show that any other person, other than the 1st and 2nd appellants ever resided or gained any entry into the premises with the appellants or in their absence. Worth noting also is the fact that on assuming occupancy of the house, neither of the appellants ever complained or reported to anyone (ie, 3rd accused, PW2, or even the police) of any bag in the house they were occupying. Had there been such bag in the house when they moved in obviously, the 2 appellants would have raised the issue with the 3rd accused or the caretaker of the building (PW2) and 4). They made no such report.

Amongst the exhibit the exhibits produced by the prosecution were the certificate of search (seizure notices) and the inventory of the recovered items. These documents had been prepared in the house after the search and recovery. They were prepared in the presence of both the appellants who appended their signatures to both documents. The fact that the 2 appellants signed both the seizure notices and the inventory of the recovered items, convinces this court that indeed both appellants witnessed the search and recovery of the exhibits in this

house. I do not get any other conclusion from their act of signing.

These narcotic drugs must have been brought into the house. It must have been sewn in the false bottom of bag. The bag and the drugs must then have been stored in the wardrobe in the bedroom of the 2nd appellant. With the evidence given by the prosecution, I am convinced that both 1st and 2nd appellants had full knowledge of these processes and in fact stored the narcotic drugs.

On the defence of the 1st appellant, I have considered the same. With respect, I do not find merit in the same. First, whereas 1st appellant stated that he came to Kenya to do business and that 2nd appellant only talked of bringing him shoes. It is evidence on how the search was done is distinctly similar to the evidence given by the prosecution witnesses. His denial of the recovery of the exhibits from his room was to say the least, a mere denial. And whereas he claimed that a cleaner would access the house, he never gave any specifics of this. Who was the cleaner? When did he access the house? If at all the cleaner left anything in the house, did he raise the same with the 2 caretakers, PW2 and PW4? And how come he did not raise this issue with the 2 witnesses whilst they testified in court? And the same questions would be relevant respecting both PW2 and accused 3 both of whom 1st appellant claimed to also have had the keys to the house. He otherwise admitted being photographed with the recovered exhibits in the sitting room. The defence of the 1st appellant, in my considered view, lacked any merit. I dismiss the same.

For the 2nd appellant, her defence was that she was a mere visitor in the house and had no knowledge of the drugs recovered and produced as exhibit. The appellant made a number of other denials. She denied that she was the one sighted at the house with 1st appellant and Mr. Arinze on 13.6.2017. She denied witnessing the suitcase (Bag) being removed from up the wardrobe. She denied knowing when the photograph of the said suitcase was taken. She also denied seeing any parts of a bag, screw drivers, or sewing thread. The 2nd appellant, however contradicted herself when she testified as to seeing the same suitcase (bag) on the floor of her room before the same was taken to the sitting room where the same was opened to reveal the false bottom.

It is further noted that the appellant never raised these issues, which she denied in her defence, with the relevant prosecution witnesses. She signed both the certificate of seizure of the exhibits and also the inventory of the recovered exhibits signifying that she witnessed the recoveries as testified by the prosecution witnesses. She was even present and photographed together with the 1st appellant and the police search team in the sitting room with the recovered exhibits. And in her own evidence, she did not see any of the police officers move into the house with this bag or any other. She is the one who opened the door, called in 1st appellant to the sitting room, stood at the corridor and watched as the bedroom of the 1st appellant was searched before the team moved to her own room. Had anyone brought the bag into the room and into her bedroom, this court is convinced that she was in a position to see the same. She never did.

The sum total is that the 2nd appellant gave a defence that was a mere denial and unbelievable. Same lacked merit and I dismiss it.

I have considered the findings of the learned trial magistrate and I find that the learned trial magistrate ably analyzed the evidence before him and arrived at the correct decision in convicting both appellants on the offence charged.

The appellants have, by their submissions raised a number of issues which deserve consideration of this court.

On the submissions that the charge did not contain sufficient ingredients, the case of *Wanjiku Versus Republic (2001KLR 825* (Onyancha J) was relied on. I associate myself with the finding of the court that the charge sheet ought to have specified the specific mode of trafficking. The trial magistrate considered this issue and determined that the charge sheet gave the required details by specifying therein that the charge was trafficking by storing. I am on my part convinced that this was sufficient detail enough for the appellants to understand the charge they faced and to appropriately prepare their defence.

An issue was raised by the appellants that the prosecution's case was wired with inconsistencies e.g on the colour of the bag and who of the police officers knocked the door first. To me, if these were indeed inconsistencies, they were of such little weight that same cannot challenge the well corroborated evidence of the prosecution. On this score, I am guided by the authority of *Philip Nzaka Watu Versus Republic (2016)eKLR)(C.A)*, cited by counsel for the Respondent in which the Court of Appeal held:

“However, it must be remembered that when it comes to human recollection, no. 2 witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is infallible and no 2 people perceive the same phenomena exactly the same way ... whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

In this case, I do not find any material discrepancies in the case of the prosecution.

To the submission that the right under Article 50(2)(j) was infringed by the fact that they were arraigned and charged before the court even before the examination of the exhibit (narcotic drug) was conducted, the answer to this in my view, is in the evidence of PW1 at the sitting room which formed the opinion that the substance was heroine. The detailed examination done by PW10 only confirmed the preliminary findings. That the exhibit was indeed heroine. Had PW10 reached a different determination, obviously the charges that the appellants had been arraigned with would not have stood. I therefore do not find that any of the rights of the appellants under Article 50(2)(J) were infringed on by the fact of the appellants being subjected to taking plea on these charges before the conclusive examination of the exhibits.

The 1st appellant has also challenged the legality of written submissions as was adopted by the trial court. The appellants relied on the decision of *Akhuya Versus Republic (2003)KLR (CA)* wherein the Court of Appeal held;

“That a presiding officer is expected to orally hear such submissions as both sides in a criminal case wish to make and seek

clarification of such submissions as found necessary in order to appreciate each sides case before delivering his opinion.”

In the said case the court directed that the presiding officer would hear such oral submissions as the accused would wish to make. Conversely, if the accused person does not wish to make such oral submissions, then the written submissions filed would suffice. Before the trial court, counsel for the appellant clearly went on record as confirming that the written submissions would suffice and a date of judgment could be given. Those submissions were duly filed and the trial court considered the same in making its determination. Nowhere in the judgment of the Court of Appeal cited is it declared that written submissions are an illegality. The appellant has also not cited any law outlawing the filing of written submissions and reliance on the same by the court. It is generally a common practice that parties to a suit may file written submissions to sum up their case. Again, the parties may wish to further orally highlight on those written submissions, so as to specifically point out the salient elements in support of their case. It is therefore upon a party to choose to either file written submissions, or after such filing, to further orally submit (highlight) on the same. The appellant, having filed their submissions and being contented with the judgment of the court of being delivered without further oral submissions, I do not see how the same appellant would turn round to now make a claim that his rights to fair trial were infringed or that the procedures under section 213 and 310 of the Criminal Procedure Code, regarding the rights to make responses were not accorded to the appellants.

And the same situation has occurred in this appeal wherein the parties of their own volition, consented to this appeal to be canvassed by way of written submissions.

The 1st appellant, at ground 10 of the grounds of appeal has laid claim on apparent ineffective and inefficient representation by his advocate during the hearing before the trial court. Whereas the court is not competent to decide on this claim, it is noted that the 1st appellant was represented by an advocate through the proceedings. Article 50(2)(g) guaranteed to an accused person the right to choose and be represented by an advocate. This right was fully availed to the appellant who chose and was represented throughout the trial by his advocate.

Considering all the above observations, I am in total agreement with the considered finding of the Honourable trial magistrate that the prosecution discharged its burden of proof as laid down in the case of ***Woolmington Versus DPP (1935)AC 462***, and duly proved the case against the 2 appellants beyond any reasonable doubt as required by the law.

Lastly, on the issue of sentence, the 2 appellant were charged with the offence of trafficking in narcotics drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994. The same states;

(a) In respect of any narcotic drugs or psychotropic substances to a fine of 1 million shillings or 3 times the market value of the narcotic drug or psychotropic substance, whichever is greater, and in addition, to imprisonment for life.”

In view of the above sentence provision, the learned trial magistrate sentenced the appellants as follows:-

- 1. That each to pay a fine of Ksh.15million in default to serve 1 year imprisonment in accordance with section 28(2) of the Penal Code.***
- 2. That in addition each to serve 15 years’ imprisonment.***

The said sentence was passed following lengthy mitigations by both the appellants, same as have been reiterated in the present submissions of the appellants. The sentence passed is clearly legal and proper.

In the case of ***Benard Kimani Gacheru Versus Republic (2002)eKLR***, the Court of Appeal dealt with the issue of powers of the High Court on the issue of revision of sentences passed by the lower court. In the case of Court of Appeal held;

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence, unless anyone of the matters already stated is shown to exist.”

The above decision gives directions on the 3 elements that the court must consider in deciding on whether to interfere with the sentence of the lower court. As already opined above, I find the said sentence legal, proper and within the law. I therefore find no reason to interfere with the same.

The sum total is that I do not find any merit in the appeals of both 1st and 2nd appellants. I accordingly dismiss the appellant’s appeals, (Nos. 196/2019 and 159/2019 consolidated).

D. O. OGEMBO

JUDGE

24.5.2021.

Court:

Judgment read out in the presence 1st appellant (Kamiti) 2nd appellant (Langata Women Prison), and Ms. Kamau advocate for Mr. Swaka for 2nd appellant, Mr. Kirago for the state.

D. O. OGEMBO

JUDGE

24.5.2021.