



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 19 OF 2020

REPUBLIC.....APPELLANT

-V/S-

BILALI KIMALI NDECHUMIA alias

BENEDICTO KIMALA NDECHUMIA.....RESPONDENT

(Being an appeal against the decision by Hon. F. W. Odenyo, Senior Principal Magistrate

on 3rd September 2020 in Shanzu Criminal Case No. 970 of 2017, *Republic v Bilali Kimala*

***Ndechumia alias Benedicto Kimala Ndechumia*).**

JUDGMENT

Background

1. Bilali Kimala Ndechumia alias Benedicto Kimala Ndechumia was charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. The particulars are that Bilali Kimala Ndechumia alias Benedicto Kimala Ndechumia on the 22nd day of July 2017 at E-Brook Wood Apartment in Nyali within Mombasa County, jointly with others not before court, trafficked in a narcotic drug namely Heroin to wit 98.8 grams with a market value of Kshs. 296,400 by storing in contravention of the said Act.

2. The trial magistrate considered the evidence of eight prosecution witnesses and found that the accused had no case to answer. The accused was then acquitted under Section 215 of the CPC.

3. The appellant was aggrieved and dissatisfied by the entire ruling and decision by the trial court preferred the appeal herein on the following grounds:-

- 1) That the Learned Hon. Magistrate erred in law and in fact when she acquitted the accused against the weight of the evidence on record.
- 2) That the Learned trial Magistrate erred when she when she failed to find that the defence did not shake the prosecution evidence.
- 3) That the Learned Honourable Magistrate misdirected herself in law in the interpretation of the ingredients to the offence of Trafficking Narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and psychotropic substances (Control) Act No. 4 of 1994.
- 4) That the Learned Honourable Magistrate failed to consider the fact that once evidence was tendered in court it was her duty to impartially interrogate the same and to use it to arrive at a just decision.

4. This appeal was canvassed by way of written submissions.

Appellant's Case

5. PWI, No. 99897 P.C. Luke Kimati attached at DCI Nairobi whose duties entails investigation of drug related cases. PWI said that on 22.7.2017 at 01.20 hours acting on intelligence together with other officers raided a house at Ebrook Wood apartment block 33 belonging to

Bilali Ndechimia. PW1 said that they knocked on the door and introduced themselves, and they were 5 police officers, PC Oruko, himself, Cpl Kariuki, Cpl Ngao, and PC Kimutai. After introducing themselves, they told the accused that they were looking for illicit drugs in his house. The house had the accused person, his wife and three children. They started the search from the master bedroom. The house had 5 rooms. PW1 said they searched the bed, the wardrobe and the table that was beside the bed. In the wardrobe, they found Kshs. 37,000 stashed inside the clothes and some documents on the bedside table. They prepared the inventory capturing the items and the documents recovered include Seeman's record Book MFI 1, Birth Certificate for Benedictor Ndechimia MFI 2, Affidavit by Bilal Kimata MFI 3- affidavit to change names from Benedicto to Bilal, Tax Payers registration certificate of Bilal MFI 4, Ebrook service charge receipt MFI 5, purchase of apartments No. B3 on first floor on sub – 16432/1/MN. Letter from Scadeva Co. dated 8/5/2014 MFI 6, valuation report of plot No. Gede/Dabogo/125 – MFI 7, title deed for the same issued on 21.7.2015 MFI 8, copy of certificate of title for CR 28530 issued on 19/12/2012 – MFI 9, a copy of certificate of plot No. CR. 56827 issued on 1/12/2010 MFI 10, statement from Kilifi Body guard MFI 11, a copy of tax payers registration certificate for Mariam Abdalla Athman MFI 12, a copy of the compliance certificate from Cay Investment MFI 13, a certificate of registration of the company MFI 14, a copy of certificate of registration of Avast Company MFI 15, a copy of certificate of registration of motor vehicle land cruiser KBU 068 MFI 16, check book of DTB Nyalı Branch Mombasa MFI 17, See Farmers Contours discharge certificate MFI 18, a 2016 diary with assorted documents which is still under investigations. It will be produced by the Investigating officer, a Samsung digital camera MFI 19, 4 Safaricom SIM cards held as MFI 20 (a)(b)(c)(d), Orange sim card holder MFI 21, Airtel sim card holder MFI 22, 2 customer receipts of Family Bank for withdrawal and deposits MFI 23, KCB cheque deposit MFI 24, set of photographs MFI 25, National ID card in the names of Bilal MFI 26, driving license in the names of Bilal MFI 27. PW1 said that they went to the corridor joining the master bedroom and the washroom. There was a shoe rack and a search was conducted on the shoe rack where a creamish substance concealed in a black polythene bag MFI 28, creamish powdery substance MFI 29 was recovered. PW1 said that preliminary tests were conducted by PC Oruko and it was positive of narcotic drugs. Below the shelf, there was a safe that was concealed by the shoe rack. The accused was told to open it. There was Kshs. 4.5 million in there in which were in denominations of 1000/-. Since the accused could not explain the source of the money, it was seized. PW1 said they searched other rooms but recovered nothing. The inventory MFI 30 was prepared by himself. They also prepared the search certificate which was witnessed. The accused appended his signature. The search certificate MFI 31 was signed by the accused. He wrote the search was okey. Later, the suspect identified 2 motor vehicles outside which were towed to Provincial Headquarters awaiting verification. They were KBC 825A Toyota Vanguard and KCF 005D Toyota Wish. On 27.7.2017, they accompanied the suspect to the Government Chemist where the said substance was weighed and sampled. The total weight was 98.8g. It was done in the presence of the accused, Government Analyst, three police officers and his lawyer. He refused to sign upon instructions from his lawyer. Certificate of weighing MFI 32. The said substance was sampled by Yahya Hamisi designated Government Analyst where he witnessed. He prepared the certificate of sampling MFI 33. Later, the suspect was brought to court and charged with trafficking in narcotics. PW1 identified the accused in court. He said there was a CCTV camera in the house. They asked him to disconnect and he agreed because of security. PW1 said the CCTV camera is still under investigation. The CCTV camera was switched off as soon as they entered the house. MFI 11 is statement from Kilifi Bodyguard Ltd addressed to Bilali. A payment receipt was attached to the statement.

6. PW2, No. 37127 CPC Joseph Kariuki Gitau, allocated to DCI headquarters Nairobi performing investigation duties said that on 22.7.2017 at 2.30am in the company of Anti- Narcotics Unit officers as well as special crime prevention officers, all from Nairobi raided the house of one Bilali situated in Nyalı on suspicion of dealing in drugs. They started the search, checked the door, the owner Bilali opened it, he lives in a gated community and they have a security guard. The main gate was not opened, they had to call their colleagues from Nyalı to assist them. When the gate was opened, they went to the house of the accused. The accused was asleep, he later opened the door for them. They introduced themselves as police officers and stated their intention of being there. They started by searching the master bedroom. PW2 said the house had his wife, children and some other grownups. The search started at 3.00 am and the other people in the house including the children were seen at 5.00 am. In the master bedroom, they recovered Kshs. 37,000 kept under some clothes in the wardrobe. Some documents were recovered from the table by ANU officers who prepared an inventory which PW2 signed. The items in there were the ones recovered (MFI 30 identified). On the way to the room, there was a shoe rack. They recovered a brownish substance wrapped in a black paper bag and put in a small black bag. The suspect was present. One of the ANU officers PC Aruko tested the substance and it tested positive. The substance is MFI 29 and the black polythene bag is MFI 28. They continued the search and discovered a locked safe. They requested the owner to open it he did and inside there was money which was counted and it was Kshs. 4.5 million. They prepared an inventory about the money and continued with the search in the children's bedroom and the kitchen. In those two bedrooms, they did not find anything. The accused identified his two vehicle, KCB 852 Vanguard white in colour and KCB 005D Toyota Wish Silver in colour which the narcotics officers confiscated and drove to Provincial Headquarters Mombasa. Later on, they wrote the search plus the inventory of all the items recovered. The accused was arrested and booked at Nyalı Police Station. PW2 signed the search certificate MFI 31. The suspect made the remarks 'it was okey the search' which he wrote by himself. PW2 identified the accused in court. The accused's wife and other adults in the house were not arrested.

7. PW3, No. 84086 PC Geoffrey Ouma based at Mombasa CID headquarters gazetted No. 217/2013/Nov 11 for the purpose of photographic evidence said that at 10:00 hours he was on duty when he received a call from CIP Lumumba of ANU who requested for his services to go to the government chemist Mombasa where he met her there with PC Oruko amongst other officers. She requested that PW3 be present during the weighing exercise. There was an exhibit in an exhibit bag marked No. 6262493. During the exercise, PW3 took 23 photos which he put in a booklet form. They were photos of the general view of weighing machine, closer view of the home machine showing the serial number and the date of calibration, close view of the machine showing the serial number, general view of the weighing machine and receipt of 00, photos of general view of the exhibit bag which was to be weighed, closer view of the serial number of the exhibit bag No. 6262493, general view of the exhibit bag while open showing a black polythene bag, closer view of the polythene bag marked BKN, closer view of the polythene bag while open, closer view of the polythene bag showing its contents marked BK NI, a closer view of content B/VNI, closer view of BKN2, closer view of KN2 open and another content in it marked BKN3, No. 15, 16 and 17 gives a closer view of BKN 3 while being weighed, 18 and 19 a closer view of the sample bag and a sample of BKN3 now marked as BKN5, 21 and 22 a general view of BKN, BKN 1, BKN 2, BKN 3, and BKN 5, and a closer view of a presumptive test done to BKN 5 showing colour of the presumptive test. PW3 said that these photos were taken by him. The photos are not retouched or interfered in any way. The original are kept safely in their custody. PW3 prepared a certificate dated 25.8.2017 MFI 15, and produce the photos as Exhibit 34 and the certificate of photography as Exhibit 35.

8. PW4, No. 235123 CIP Elizabeth Lumumba from DCI attached at the Anti-Narcotics Unit. PW4 said that on 22.7.2017, they were in Mombasa County on operations against illicit drugs. They were instructed to proceed to Brook Apartments in Nyalı at the residence of Bilali Ndechimia Kimali. They rushed there as fast as possible since the in charge told them it was an emergency as there was a recovery of some items that she was supposed to confirm. PW4 arrived at the premises at 9.30 pm where she met PC Oruko with their colleagues. He informed her that they had found a brownish substance wrapped in a clear polythene bag that was inside a black polythene bag suspected to be

narcotics substance. PW4 confirmed the items. Under the Anti-Narcotics Act, they were supposed to recover any items availed by the suspects. He had two vehicles KCB 825A Toyota Vanguard white in colour and KCM 005D Toyota Wish silver in colour. They also recovered Kshs. 4,537,000. When PW4 arrived the officer had already taken the money and put it on the table. After PW4 was shown the items, the vehicle and the money, she prepared a Notice of Seizure for the vehicle, money and the substance and served the accused person. PW4 produced the seizure notices. The first notice was for the substance prepared on 2.7.2017 MFI 36, exhibit 36, Notice for the motor vehicle registration No. KCB 852A Toyota Vanguard, and KCM 005D Toyota Wish MFI 37 Ext 37. Notice of the seizure money dated 22.7.2017 for Kshs. 4,537,000 MFI 38 Exbt 38. On 27.7.2017, PW4 said they went to the Government Chemist Mombasa where they did weighing and sampling. PW4 witnessed the sampling as she was the weighing officer. The government chemist weighed the substance which was 98.8 gms. Upon doing the test, he found the substance to be heroine. PW4 prepared sampling and weighing certificates which were signed by all the officers. Mr. Magolo refused to sign the notice and told the accused not to sign the certificate of weighing Exb 32 sampling certificate Exb 33. The substance MFI 29 and the black polythene MFI 28. PW4 identified the accused in court. She stated that they had received intelligence information which was investigated, the substance was recovered and the accused arrested. The cash was kept safe by the investigating officer.

9. PW5, No. 232341 CIP Joshua Okal serving at Anti-Narcotics Unit as a drug law enforcement officer. He has gazette notice No. 12710 dated 3.3.11 with respect to the matter before court. PW5 said that he was called on 27.7.2017 by PC Ismael Oruko at 16.00 who told him that he was investigating a matter where heroin had been seized and had seizure of 98.8 grams and that he wanted him to give the value of the drugs. PW5 told him to assign a value of Kshs. 3000 per gram, making the total value of Kshs. 296,400. Later on 28.8.2017, PW5 received a set of documents from PC Oruko. There was a copy of certificate of sampling which was dated 27.7. 2017. PC Oruko also showed PW5 a certificate of weighing in respect of the substance dated 27.7.2017 as well as a copy of the Government Analyst Report dated 15.8.2017, a copy of charge sheet in respect of the accused person in accordance with Section 86. PW5 prepared a certificate of valuation which was signed and dated 28.8.2017, Exhibit 39, Gazette Notice No. 12710 Exbt 40.

10. PW6, No. 83622 CPL Mary Ngao of Transnational Organized Crime Unit DCI Nairobi said on 22.7.2017 at 2.30 am, they conducted a raid within Ebroom Wood Apartments block D3 with officers from ANU and others from Special Crime Unit. They went and introduced themselves as police officers and were allowed to enter the block. They went and started the search being conducted by PC Luke Kinoti and Ismael Oruko in the master bedroom of Bilali. Some documents were recovered and an inventory prepared by PC Kinoti for the same documents. Some cash of Kshs. 30,000 was recovered in the wardrobe and Kshs.7,000 recovered from a pouch. The recovery was made by PC Oruko after the search from the master bedroom. They proceeded to a small corridor leading to the wash room. P. C. Oruko saw a shoe rack built on the wall and started removing shoes one by one when he came across a black polythene bag wrapped with cello tape and asked the suspect what was inside but he denied. PW5 said PC Oruko unwrapped the black polythene bag and inside it there was a clear polythene paper containing a brownish substance. He immediately conducted a preliminary test which tested positive for narcotics drugs. He searched further and recovered Kshs. 4.5 million from the same shoe rack. He took possession of the cash because he believed they were proceeds of crime. He also managed to recover 7 mobile phones of different makes. A phone inventory was prepared, the scene documented and the suspect questioned about the exhibits but denied the drugs being his. He was further asked if he had any vehicles and he said he had two, KCB 852 Toyota Vanguard white in colour and KCM 005D Toyota Wish silver in colour. PW6 said that nothing was recovered from the other rooms. On the same date, CIP Elizabeth went and all the property seized from the scene was handed over to her. PW6 signed the inventory MFI 30.

11. PW7, Yahya Hamisi Maingu a Government Analyst Gazette 6934/27/7/2007 had a report from the chemist department which he prepared. On 1.8.2017 the exhibits were brought to the Government Chemist by PC Oruko, accompanying the exhibits was a memo form dated 1.8.2017. The exhibits included a clear evidence bag marked BKN/S containing 3.8 grams of brownish substance sampled from 99.8 grams. PW7 examined the brownish substance using 3 techniques, a Marquis test, UV spectrophotometer, and TCM machine. The brownish substance tested positive. PW7 later marked the exhibits TCK 380/2017 UHM for identification. He then prepared a report on 15.8.2017 MFI 41 exhibit memo MFI 42 Exbt 42.

12. PW8, No. 236988 IP Ismail Said Oruko attached to the DCI Anti- Narcotics Nairobi Region as the in-charge stated that on 27.7.2017 at around 2.30hours while in the operations within Nyalii where they had been informed that there was a suspect of trafficking Narcotic drugs. PW8 said he was in the company of Special branch Prevention Unit, trans-organised crime unit and anti-narcotics units. Upon arrival, they knocked at the door and it was opened by one Bilali Kimala who was the suspect. They introduced themselves as police officers and informed him the reason for being there that he was a suspect of trafficking in narcotic drugs. PW8 said that they requested him to allow them to conduct a search which he agreed. PW8 and PC Kinoti conducted the search in the presence of the suspect and his wife. They started from the master bedroom. PW8 was conducting the search in one of the bedrooms and found Kshs. 30,000 stuck inside clothes. He also found a purse with Kshs. 7,000 and several items which include Seemons Record Book in the name of Ndechumia Benedicto Kimala Ndechumia, Birth Certificate in the name of Benedicto Kimala Ndechumia, Affidavit in the name of Benedicto Kimala Ndechumia and N. Benedicto Ndechumia and Bilali is one and the same person, tax payer's certificate in the name of Benedicto Kimala Ndechumia, Brook Wood Apartment Receipt of D3 Purchase of D3 Apartment document dated 8.5.2014, valuation report to L/R Gede rates 125, title deed to above land, copy of a certificate of title to CR 58530, grant No. CR 56827 certificate, statement from Kilifi Boat Yard Limited sent to Bilali Kimala, copy of tax payer certificate from Mariam Abdalla Athumani, Tac Compliance certificate for CAY Investments, certificate of registration for CAY Investments, Certificate of registration for Avast Company, Copy of registration certificate for motor vehicle KBU 068Q Toyota Land Cruiser, Cheque book from DTB in respect to Avast Company, Discharge Certificate for accused, 2016 diary, contents diary, Samsung Camera, 4 Safaricom plate cards, Orange sim card, Airtel sim card, 2 family bank customer receipts in the name of Bilali Miriam, KCB charge defect by Miriam Abdalla, a set of photos of Bilali Ndechumia, ID card for Bilali Kimala Ndechumia, and a driving licence for Kimala Ndechumia. PW8 produced them as exhibits 1-27. They then proceeded to the bathroom. There was an inbuilt shoe rack on the wall. As he was removing shoes, he came across a black polythene paper bag which was wrapped with a cello tape (exhibit 28), inside there was a brownish substance (exhibit 29) and the accused said he did not know about it. Below the shoe rack, PW8 said he noticed a hollow compartment which had a safe and inside the safe there was Kshs. 4.5 million in Kshs. 100,000 bundles. PW8 said he did not find anything in the other rooms. He recovered 7 phones of different makes. PW8 prepared an inventory for each phone i.e. Nokia Phone Serial No. 357284080082703 and the inventory form (Exbt 43 (a) & (b)), Nokia RM 1134, IMEI 357284080083073 and the form of Mariam Athumani Abdalla (Exbt 44 (a) & (b)), Apple phone 6 IMEI No. 354449068404004 for Marriam Abdalla and the inventory (Exbt 45 (a) & (b)), Apple phone IMEI No. 355309089295899 and the form for Bilali Ndechumia (Exbt 46 (a) & (b)), Galaxy 58 IMEI No. 355089089101897101 for Bilali Ndechumia (Exbt 47 (a) & (b)), Fero IMEI No. 35212808-3765043 and form for Mariam Abdalla (Exbt 48 (a) & (b)), and Iphone 6+ IMEI No. 353290078785425 and form (Exbt 49 (a) & (b)). PW8 said that there were CCTV reader Serial No. RD63807 (Exbt 50) was working. At the time PC Kinoti prepared a search certificate where all officers who were present signed, Bilali

Ndechumia signed. An inventory of the items was also recovered (Exbt 30 & 31). On 27.7.2017 they took the exhibits to the Government Chemist in Mombasa where a preliminary test found the substance of brownish colour was heroin weighing 98.8g. PW8 called CIP Joshua Okala register for the value of the same substance. The value was given as Kshs. 296,400. PW8 proceeded to write a letter to PIN for A0042064271A and A005746602W and they belonged to Marriam Abdalla Athumani for the former PIN with NIL returns for 2014 to 2016 She had a valid tax compliance certificate on the 2nd PIN the letter was Benedicto Kimala Ndechumia, the tax payer was net tax compliant and a compliance certificate was not issued. The letter is Exbt 51. PW8 received 2 motor vehicles registration numbers KCB 852A Toyota Vanguard and KCM 005D Toyota Wish both vehicles were seized by CIP Elizabeth Lumumba. The 4.537 million was also seized (Seizure Notice as Exbt 52 and 53) the suspect could not give satisfactory account for them. The suspect was charged on 28.7.2017. The vehicles were taken to the Regional Police Headquarters and the cash taken by Mr. Hamisi Masa, the director of Anti-Narcotics Unit. PW8 said they charged the accused because the house was his and he had the responsibility of anything within that house. They did not have information as to which suspect they were looking for. They had the description of a man.

13. PW9, No. 79063 CPI Derrick Kiprono a scenes of crime officer said that on 25.8.2019 at about 1630 hrs while at the County DCI Headquarters Mombasa in the company of Ismael the investigating officer requested him to assist in documentation i.e. photographing 2 motor vehicles. The two motor vehicles were Toyota Wish Reg. No. KCM 005 and Toyota Vanguard Reg. No. KCB 852A. PW9 proceeded and took a closer view of the motor vehicle showing present set side and rear for both vehicles. He then issued a certificate. PW9 is gazette No. 407 dated 18.1.2010 and he certified that the photographs present were printed under his supervision with no interference. He produced the same as Exhibit 43.

Respondent's Case

14. DW1, Bilali Kimala Ndechumia said that he is a business person owning a cosmetic shop, salon and Mpesa shop which are near spending Hotel. DW1 said that on 22.7.2017 at 3 am he was with his wife and their 2 months baby when he was woken up by the door being opened by police officers. They were 7 police officers with one of them being a lady officer. The Security guard was also in the house. DW1 said he knows Mr. Oruko the Investigating Officer. They told him they wanted to search his house. DW1 asked how they had gained access to the house and they told him to shut up and listen to them. DW1 said he has a CCTV camera in his house and they asked where the main to the CCTV machine was in the bedroom. They ordered him to switch it off. DW1 said that the police officers saw where it was and they unplugged the DURC and took it. They also took his wife's phone. They ordered his wife to go to the sitting room, the same officers asked to have the TV switched on and they started watching it while others were conducting the search. There was a safe box and a camera near the shoe rack. One officer removed a plastic paper bag from the shoe rack. It had been fastened using a new cello tape. DW1 told them the paper bag was not his. They opened the paper bag and there was a white substance. They ordered him to open the safe where they got Kshs. 4.5 million which was for business purposes. They took the money together with Kshs. 37,000 which was in his wife's purse. DW1 said that he was asked whether he had wronged the bosses. The police officers proceeded to search his Toyota Wish Reg. No. KCM 005D and Vanguard Reg. No. 852A but they did not get anything. The police took inventory of the money and the plastic bag. Everything was then taken to Nyali Police Station. DW1 said that he had earlier been arrested in Madagascar and was taken to airport court because of his yacht but the matter was later dismissed and the officer who arrested him includes the investigating officer in this matter. DW1 said the CCTV DUR was later returned to him but the reading device and the previous data was not available. DW1 said that no images were produced as exhibits. He produced the ruling in CM Mombasa Cr. Case No. 628/17 which is the cause of the grudge.

15. DW2, Hemes Masaka a security guard with Texas Security was assigned E. Brook Apartments in Nyali said that on 21.7.2017, he reported to work at 6 pm after taking over from the day guard. On 22.7.2017 early morning, he heard sounds of moving vehicles. He peeped through and saw people going towards the gate. They ordered him to open the gate. DW2 told them to identify themselves and they refused so he refused to open the gate. They started to threaten him. He raise an alar by pressing the panic button and the response vehicle came. The commander went and asked what was happening. They went and slapped the commander and pushed him to the vehicle. They pushed the gate open, started beating DW2 up and told him that he was joking with the police. They asked about Bilali's vehicles which they were showed. They asked DW2 to take them to DW1's apartment which he did. The grill door was not locked. They opened it. They kicked the wooden door open and entered the house. They went to Bilali's bedroom. DW2 saw a female officer placing a plastic bag inside the shoes and thought she was to pick it up later. DW2 was then told to go outside.

Appellant's Submissions

16. The Appellant submits on whether the prosecution proved the trafficking charge that the trial court made a finding that indeed a black polythene bag containing heroin was recovered from the house of the Respondent and the court also confirmed that the respondent signed on the inventory. The Appellant further submits however, the trial court proceeded to take issue with the fact that the Respondent's wife never signed on the inventory though she was present at the scene. Further, the learned trial magistrate made a finding that the black polythene bag was planted by the police because of the assertions of the Respondent and his witness DW2. DW2 told the court that he saw a police officer place the bag on the shoe rack. Moreover, in the eyes of the court, the fact that the CCTV footage was deleted from the system and the informers were never called to testify was ample proof of foul play. The Appellant submits that this finding was erroneous and not in accord with the evidence.

17. The Appellant submits on whether the drugs were planted on the respondent that Section 62 and 64 of the Criminal Procedure Code empowers the police officers to arrest without warrant on information that a person is likely to commit a cognizable offence. With regard to the search, PW1 stated that after introducing themselves, they told the accused that they were looking for illicit drugs in his house. There was the accused person, his wife and three children, and they started the search in his master bedroom. The events were happening at 2-3 am in the night and there were no adults in the room apart from the respondent and his wife. This was confirmed by PW2 who stated that they started the search at 3 am within the master bedroom with the wife and the accused person. The Respondent signed on the inventory and wrote on the search certificate that 'it was okay, the search.' This finding was accepted by the trial court. The Appellant submits that PW1 and PW2 were two credible witnesses who confirmed seeing how the search was conducted. The defence was not able to impeach their credibility in terms of Section 163 of the Evidence Act. The trial court did not examine the issue of their credibility. The Appellant submits that there were no adults present in the master bedroom and near the shoe rack apart from the Respondent and his wife. The provisions of the Evidence Act Section 127 (3) meant that the wife could not be called as a witness in the circumstances. Also, the probative value of having the wife sign on the search certificate or inventory would be nil for the same reason. The Appellant submits that on matters of trafficking narcotics tend to rely heavily on information from informers. Their position is protected in our laws and unless a trial court makes a

determination that their evidence in court is necessary for the ends of justice, their identity is always kept a secret according to Section 33(5) Witness Protection Act, 2006. The trial court never made such determination. The Appellant quoted Section 33(3) of the Act which provides that no person shall be required to identify, or provide information that might lead to the identification of a witness who assisted or disclosed information to the court or law enforcement agency.

18. The Appellant submits on whether the substance recovered proved to be a drug that the substance recovered from the respondent was properly found and not planted. The drug was availed in court during the prosecution case and produced as an exhibit together with the black polythene bag in which it was wrapped. The government analyst PW7 confirmed that he received the substance via exhibit memo accompanied by the investigating officer. The substance tested positive for heroin and he produced his report as an exhibit. The Respondent was thus charged with trafficking in narcotics by storing in terms of Section 2(1) of the Narcotics Act. The Appellant further cited the Court of Appeal in *Maldine Akoth Barasa & Another v Republic* [2007] eKLR which dealt with the interpretation of what constitutes the offence of trafficking in narcotic drugs.

19. The Appellant submits that the state had proved its case against the respondent beyond reasonable doubt and that he was improperly acquitted. The Appellant prayed that the appeal be allowed and the judgment as well as orders of acquittal of the respondent set aside. The Appellant asked that the respondent be convicted on the charge of trafficking in a narcotic drug and grant the appropriate sentence.

Respondent's Submissions

20. The Respondent submits by citing the case of *Okeno v R* [1972] EA. 32 where the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court. The Respondent submits that the prosecution case was based on a finding of a substance that was later proved to be narcotic drug. The finding was not disputed but what was in dispute is how it found its way into the Respondent's house.

21. The Respondent submits that it is in evidence that the premises being searched had a CCTV camera which was disconnected by police officers for reasons which they stated as security reasons as they did not want the search being broadcasted. The officers took the CCTV for analysis though it was not in the inventory, nor was it produced in court. The Respondent was placed in his defence and he denied that the heroin was recovered in the house. The Respondent said he was fast asleep, woken up by the police who came in, disconnected the CCTV system and planted a wrapper paper bag containing the alleged drugs inside his sports shoes on the rack. Mr. Hames Masaka (DW2) a security guard also gave evidence that on the material day, he was guarding the apartments when police officers went there, forcing their way into the compound, got into the Respondent's house after he showed them and started conducting a search. Mr. Hames Masaka confirmed to the trial court that he saw a lady officer holding a plastic paper bag and placed inside the shoes. It therefore goes without saying that the officers switched off the CCTV in a bid to plant the alleged drugs on the accused person. The Respondent submits that the court should take note of the fact that the prosecution has the duty to prove its case beyond reasonable doubt and the defence has no duty to prove anything. The Respondent submits that from the evidence on record, there are grave doubts as to the fidelity of the search conducted at the accused person's house and that the search can never form the basis of a conviction considering the manner in which it was conducted.

22. The Respondent submits by quoting Section 73 (1) (a) & (b) and (5) of the Narcotic Drugs and Psychotropic Substances (Control) Act, Section 60 (1) of the National Police Service Act and Article 31 of the Constitution of Kenya. The Respondent submits that although it is not indicated when the officers allegedly received the tip off on the Respondent, the circumstances of the case indicate that they did have sufficient time to go to court and obtain a search warrant to validate the search, this is because PW1 and PW2 together with other officers were based in Nairobi at the material time and had time to travel and put together all necessary documents such as search certificate and inventory forms. The Respondent submits that no reason was advanced to the trial court on why it was so difficult to obtain search warrants which are usually obtained *ex parte* and with no difficulties if the application is based on reasonable grounds. The Respondent further submits that it is not for the police to elect whether or not to obtain search warrants, the general rule is that they must obtain a search warrant unless the police officer has reasonable cause to believe that the delay caused by obtaining a warrant would jeopardise the success of the investigation. The Respondent cited the case of *Leonard Mutua Munyao & Another v Attorney General & Another*. The Respondent submits that having analysed the manner in which the search was done on the house, the conclusion was that the search was unlawful, it violated the fundamental rights and freedoms of the accused persons, the search was not conducted in good faith, and the purpose of the search was to arrest the Respondent with or without recovery. In the case, the officers were armed with narcotics to plant. The Respondent quoted Article 50(4) of the Constitution which provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. The Respondent submits that it should be noted further that one officer admitted on oath that the item was planted and the magistrate recorded his narration verbatim. Additionally, OB No. 32 shows that the accused was booked in the cells at 10.45 am as a suspect of a substance but does not show that he had recovered a substance.

Analysis and Determination

23. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

24. After consideration of the grounds of appeal, Records of the trial court and submissions, the issues for determination are as follows:-

- i. Whether the Respondent was acquitted against the weight of the evidence on the record.

ii. Whether the trial magistrate misdirected herself in the interpretation of the ingredients of 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

iii. Whether the learned trial magistrate impartially interrogated the evidence in arriving at a just decision

Whether the Respondent was acquitted against the weight of the evidence on the record

25. The Appellant submitted that a black polythene bag containing heroin was recovered from the house of the Respondent. According to PW1, PW2, PW6, and PW8 testified and stated that a search was conducted on the shoe rack where a creamish substance concealed in a black polythene bag was recovered. Immediately, a preliminary test was conducted which tested positive for narcotic drugs.

26. On the contrary, the Respondent submitted that the prosecution case was based on a finding of a substance that was later proved to be narcotic drug. The finding was not disputed but what was in dispute is how it found its way into the Respondent's house. According to DW1's evidence, he was woken up when police officers opened his door. That they were 7 police officers including one female officer. The Security guard was also in the house. The police officers ordered him to switch off the CCTV camera. DW1 said that the police officers saw where it was and they unplugged the DURC and took it. One officer removed a plastic paper bag from the shoe rack which had been fastened using a new cello tape. DW1 told them the paper bag was not his. They opened the paper bag and there was a white substance. DW2 stated that the police officers asked him to take them to DW1's apartment which he did. DW2 stated that the grill door was not locked. They opened it. They kicked the wooden door open and entered the house. They went to Bilali's bedroom. DW2 saw a female officer placing a plastic bag inside the shoes and thought she was to pick it up later. DW2 was then told to go outside.

27. The Respondent submitted in evidence that the premises being searched had a CCTV camera which was disconnected by police officers for reasons which they stated as security reasons as they did not want the search being broadcasted. The officers took the CCTV for analysis though it was not in the inventory, nor was it produced in court.

28. This court finds that doubt was cast on the Appellant's case by the fact that when the police officers entered the Respondent's house, they ordered him to switch off the CCTV camera, unplugged the DURC and took it. The CCTV camera or its footage was never produced as evidence in court. DW2 also stated that he saw the female officer placing a plastic bag inside the shoes and thought she was to pick it up later. The question that this court begs to ask is whether the switching off of the CCTV was a ploy to conceal foul play by the police officers. The Appellant did not come out to defend the reason as to why the CCTV was not produced in court as evidence or provide valid reasons as to why they decided to switch it off when it would have been instrumental in demonstrating recovery of the narcotic drug from the Respondent's house. The trial court was therefore right to acquit the Respondent on the basis of doubts created in the prosecution's case.

Whether the trial magistrate misdirected herself in the interpretation of the ingredients of 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.

29. On the one hand, the accused person was charged under Section 4 (a) of the Narcotics Act which states as follows:-

‘Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life’

30. On the other hand, Section 2(1) of the Narcotics Act defines trafficking to mean:-

‘...the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof...’

31. The trial court in its decision stated that it is not in dispute that the black polythene bag which contained the heroine was recovered from the house of the accused. This was after a raid done after intelligence report were received that the accused was dealing in narcotic drugs. However, in consideration that there was a CCTV camera in the house, and which system was taken away by the police where they deleted the data confirmed doubts created in the prosecution's evidence and such doubt can only be resolved in favour of the Accused/Respondent.

32. From the foregoing, this court finds that the trial magistrate simply quoted verbatim the provisions of Sections 2 and 4 (a) of the Act as to the elements and meaning of trafficking and said no more. It cannot be said that there was misinterpretation of the two provisions when the trial magistrate did not deviate from the meaning of what constitutes trafficking in narcotic drugs.

Whether the learned trial magistrate impartially interrogated the evidence in arriving at a just decision

33. The Respondent was acquitted on account of his evidence, the evidence of the security guard who led the officers to his house and on account of the fact that the said officers told the Respondent to switch off the CCTV camera and they plucked it out but failed to avail the footage in court as exhibit to prove that indeed the narcotic drugs was recovered from the Respondent's house and that it was not planted as alleged by the Respondent and his witness. Allegations that the trial magistrate acted partially have not been proved as her verdict was based on the evidence on record.

34. In conclusion, this court upholds the decision of the lower court that the prosecution failed to discharge the burden so required. The

appeal herein is therefore dismissed. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 30TH DAY OF NOVEMBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Turuki - Court Assistant

Ms. Karanja for the Appellant

Mr. Kirui h/b for Mr. Magolo for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE