



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 120 OF 2018

AHMED SAID BAKARI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of Hon. J.M. Nang'ea, Chief Magistrate, in Mombasa Chief Magistrate's Court Criminal Case No. 732 of 2015).

JUDGMENT

1. The appellant herein was jointly with others before the lower court, charged in the 1st count 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 of the charge were that on the 9th day of April, 2015 at Kilifi Boat Yard in Mnarani area within Kilifi County, jointly with others not before the court, trafficked by conveying a narcotic drug namely heroin to (sic) weighing 2028 grams with a market value of Kshs. 6,084,000/= (Six Million Eighty Four Thousand Shillings) in motor registration (sic) number KCA 698H make Toyota Raum, concealed in the false top and bottom of a black suitcase in contravention of the provisions of the said Act.

2. In the 2nd count, he was jointly charged with others 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. The particulars of the charge were that on the 20th day of April, 2015 at Kilindini Port within Mombasa County, jointly with others not before the court, trafficked by conveying a narcotic drug namely heroin to weighing (sic) 7,600 grams with a market value of Kshs. 22,800,000/= (Twenty Two Million Eight Hundred Thousand Shillings) concealed under the water tank of BABY IRIS YACHT in contravention of the provisions of the said Act.

3. The appellant was convicted and sentenced for the two counts. He was dissatisfied with the decision of the Trial Magistrate and filed his petition of appeal on 13th November, 2018. The same was amended with the leave of the court on 5th April, 2019. The amended grounds of appeal are set out below-

(i) That the Learned Trial Magistrate erred in law and fact in proceeding with a trial and even proceeding to a conviction on a charge that was materially defective;

(ii) That the Learned Trial Magistrate erred in law and fact in proceeding with a trial when he had voluntarily recused himself and ceased to have jurisdiction;

(iii) That the Learned Trial Magistrate erred in law and fact in accepting a decision of the Chief Magistrate in charge which purported to have overturned or revised his order of recusal;

(iv) That the Learned Trial Magistrate erred in law and fact in making findings not supported by evidence, particularly with regard to the possession of the box in which drugs were allegedly found;

(v) That the Learned Trial Magistrate erred in law and fact in seeming to find as a fact that the appellant's personal documents were found in the box said to contain drugs which fact was not proved by evidence;

(vi) That the Learned Trial Magistrate erred in law and fact in shifting the burden of proof to the appellant;

(vii) That the Learned Trial Magistrate erred in law and fact in finding that the appellant must have known what was in the box and the vessel;

- (viii) That the Learned Trial Magistrate erred in law and fact in making a finding that the appellant having worked closely with one Mr. Bilali, must have known the contents of the vessel and the bag;
- (ix) That the Learned Trial Magistrate erred in law and fact in failing to interrogate the findings and recovery of drugs in a vessel in police custody;
- (x) That the Learned Trial Magistrate erred in law and fact in finding that the appellant was guilty simply because of his association with one Mr. Bilali;
- (xi) That the Learned Trial Magistrate erred in law and fact in failing to find that not being the Captain a Master of the vessel (sic), and not being a crew member, the appellant could not be held liable for the vessel's contents;
- (xii) That the Learned Trial Magistrate openly treated the appellant with bias and denied him a fair trial;
- (xiii) That the Learned Trial Magistrate erred in putting unnecessary weight on the evidence of the 2nd accused while rejecting the evidence of other accused persons with the clear intention of placing guilt on the appellant;
- (xiv) That the Learned Trial Magistrate erred in law and fact in failing to give the same consideration and the same weight of evidence given accepted (sic) to exonerate other suspects to the areas where they exonerate the appellant; and
- (xv) That the Learned Trial Magistrate erred in law and fact in passing a sentence that was manifestly excessive.

SUBMISSIONS

4. J. O. Magolo & Company Advocates, one of the law firms representing the appellant filed its written submissions on 10th June, 2019. On 17th June, 2019 Kang'ahi S. & Associates Co Advocates filed supplementary submissions and list of authorities. The office of the Director of Public Prosecutions did likewise on the 21st of August, 2019.

5. In highlighting his submissions, Mr. Magolo started off with the 2nd count that the appellant was charged with. He pointed out that the particulars of the charge indicate that the offence was committed on 20th April, 2015 at Kilindini Port. He contended that the prosecution was required to prove that on the said date the appellant and others were conveying drugs. He submitted that there was no evidence that there was conveyance at Kilindini Port from point A to B. Mr. Magolo stated that it was in evidence that the appellant was arrested on 9th April, 2015 at Kilifi and he was in police custody all along. He stated that there was no evidence of the appellant committing an offence while in custody.

6. He further stated that a yacht anchored in Kilifi was taken custody of and taken to Kilindini Port. It was argued that the police conveyed the motor vessel from Kilifi to Kilindini Port after which she was subjected her to several searches. He indicated that on 20th April, 2015 when it was claimed that narcotic drugs were found on the motor vessel, she had been under guard by police officers from 9th April, 2015. She was thereafter brought to Kilindini Port on 12th April, 2015. It was indicated that the police officers who were guarding the motor vessel were not called to testify and it was not clear whether any person accessed and placed drugs in the said vessel.

7. Mr. Magolo submitted that the motor vessel had been subjected to 2 searches at Kilifi and one at Kilindini Port. He stated that the said vessel was searched again on 20th April, 2015 and that PW1 testified that the UK Border Police Officers searched the motor vessel using a scanner and recovered drugs. Counsel for the appellant pointed out that the said police officers were neither named nor called to give evidence. It was also stated that there was no attempt made to explain which specialized equipment was used and how it helped in recovery or planting of the drugs aboard the motor vessel.

8. It was submitted for the appellant that the Trial Magistrate found that the vessel belonged to Mr. Bilal and that the appellant was very close to him. Mr. Magolo was of the view that the Trial Magistrate misdirected himself when he held that on the day the appellant was arrested, he had been sent to buy foodstuff and he must have known what was aboard the motor vessel. Counsel for the appellant argued that there was need to avail evidence to demonstrate that the appellant had knowledge of the narcotic drugs that were aboard the motor vessel. It was contended that the Captain was in charge and it could be assumed that he knew what was aboard the said vessel.

9. It was submitted that there was no evidence to connect the appellant to the charge in the 2nd count and the defect therein was not curable as the appellant was not charged with the conveyance of narcotic drugs in Kilifi but in Kilindini Port.

10. With regard to the 1st count, Mr. Magolo indicated that a suitcase which had a false bottom was found in the boot of the motor vehicle which was being driven by the appellant. Further, that the clothes of the Captain were found in the said suitcase. Counsel stated that the Trial Magistrate found that the suitcase which was in the boot of the said car was within the knowledge of the Captain and he knew of its contents. Mr. Magolo stated that on being cross-examined, the Captain (DW2) said that he made a statement to the police in which he told them that the suitcase recovered from the boot of the car and all its contents were his.

11. Counsel for the appellant stated that there was evidence that the appellant picked the Captain from Bamburi. He indicated that 2 crew members were picked on the way from Bamburi.

12. It was submitted that PW5 testified that they arrested and handcuffed 9 men and their identity documents were found on them, which meant that personal documents were found on their person. It was indicated that the Trial Magistrate suggested that the appellant's driving licence and passport were found in the suitcase that was recovered, yet PW5 testified that he found a driving licence on the appellant.

13. In making reference to the Judgment by the Trial Magistrate, it was submitted that the said Magistrate erred by convicting the appellant and acquitting the Captain even after finding that the suitcase contained the Captain's clothes. He also submitted that there was no evidence capable of sustaining a conviction. He prayed for the appeal to be allowed.
14. Mr. Kang'ahi Advocate who appeared for the appellant with Mr. Magolo was of the view that the Trial Magistrate overlooked what was necessary in the case and arrived at his own conjectures. In the appellant's Counsel's view, the court also overlooked contradictions.
15. In highlighting the said contradictions, it was pointed out that the recovery made from the appellant was his driving licence but the Trial Magistrate held that it found on him together with his passport, which was contrary to the evidence. This court was urged to resolve the contradictions in favour of the appellant.
16. Mr. Kang'ahi brought up the issue that the Trial Magistrate who had recused himself due to the destruction of the narcotic drugs and the motor vessel when the trial was ongoing. He submitted that the Presiding Chief Magistrate gave directions for the case to be heard by the same Magistrate who had recused himself. He further submitted that it was unprocedural for the Presiding Chief Magistrate to direct Hon. Nang'ea, CM, to hear the case after he had recused himself from hearing it. He was of the view that what was done by the said Magistrate did not regularize the proceedings.
17. It was indicated by the appellant's Counsel that at the point of recusal, the Trial Magistrate had seen a prejudice and it was expected that the person who was in charge of destruction of the exhibits would be charged. That was never done.
18. Mr. Kang'ahi pointed out that the Trial Magistrate noted that Section 74A of the Narcotic Drugs and Psychotropic Substances Control Act was not fully complied with. Counsel submitted that a breach of the said Section could not be cured as it led to an illegality. He contended that the Trial Magistrate lacked jurisdiction to hear the case thereafter as the contempt by the Executive (in destruction of court exhibits) had not been purged.
19. On the issue of failure by the prosecution to call some witnesses, the appellant's Counsel cited the case of **Mohamed Juma Malipo & 5 Others v Republic**, Mombasa High Court Criminal Appeal No. 33 of 2001, where the court found that failure to call an informer weakened the prosecution's case as their case was not buttressed in sufficient evidence to form the basis of a conviction. Mr. Kang'ahi reiterated the submission by Mr. Magolo that the evidence of the UK Border Control Police Officers was critical in this case but the said persons were not called to testify.
20. It was contended that after the recovery of narcotic drugs from the motor vehicle, there was no evidence that the appellant had knowledge that there were drugs in the suitcase in the boot.
21. Mr. Kemo, Senior Assistant Deputy Director of Public Prosecutions opposed the appeal against conviction and sentence. On the issue which was raised on whether Hon. Nang'ea had jurisdiction to hear the case in the lower court after recusing himself, it was submitted that Hon. Matheka, CM, addressed the issue very well and directed herself properly by stating that she was not privy to the issues that led to the destruction of the vessel and narcotic drugs. In addition, she addressed the provisions of Article 47 of the Constitution on fair administrative action. It was pointed out that she indicated in her ruling that although Hon. Nang'ea, CM, found that the destruction of the exhibits was a big blow to the rule of law, there would be a bigger blow to the rule of law if she was to re-allocate the matter to another Magistrate who would not have the advantage that Hon. Nang'ea, CM, had when he viewed the exhibits. She ruled that Hon. Nang'ea, CM, was the best placed to hear the case.
22. Mr. Kemo indicated that PW1 was a security officer stationed at Kilifi Boat Yard. He testified as to how the motor vehicle was driven to the venue and searched, as well as the suitcase which was in the boot of the said car. That the said witness identified the appellant as the one who was driving the said vehicle. Counsel for the DPP submitted that PW3 proved that the suitcase was recovered in the motor vehicle. He indicated that PW4 testified as to how they followed the motor vehicle and recovered a black suitcase in the boot of the said car. They also recovered a driver's licence for the appellant which was produced as Pexhibit 12.
23. With regard to the chain of custody of the motor vessel, it was submitted that PW4 testified that PC Ngatia and PC Mutie guarded her awaiting a search. PW5 found 2 police officers guarding the motor vessel. In cross-examination, he indicated that the said vessel was under guard during the time she was in the custody of the police officers. Mr. Kemo submitted that at no time was the chain of custody broken from the time the vessel was towed from Kilifi Boat Yard to Kilindini Port.
24. On the issue of recovery of personal documents from the appellant, it was pointed out that PW14 stated that the appellant's driving licence and passport were found in the bag (suitcase). He posited that PW14 may have been mistaken on the inventory of the exhibits recovered from the appellant.
25. This Court was urged to review the evidence as a whole and look at Pexhibit 25 which is the inventory of exhibits. In Mr. Kemo's view, the misdirection by the Trial Magistrate did not occasion a failure of justice or cause any prejudice to the appellant. Counsel for the DPP indicated that Pexhibit 2, a driving licence, was recovered from the appellant.
26. On the issue of the recovery of narcotic drugs from the yacht, the prosecution submitted that evidence was led by PW1 to the effect that after the yacht was towed from Kilifi to Kilindini Port, a search was made on her, in the presence of all the suspects. It was stated that PW1 was the head of the investigation team and with the assistance of the UK Border Control Police Officers, a search was conducted in the yacht and narcotic drugs were recovered under a water tank. It was further stated that the specialized equipment which was used included scanners. Mr. Kemo was of the view that there would have been no reason at all for the UK Border Control Police Officers to come up with made up evidence. He indicated that the yacht was searched after drugs were recovered in the appellant's vehicle since he said that she was due to sail to Madagascar. The prosecution indicated that the appellant declined to sign a seizure notice because his advocate was not present.

27. In addressing the issue of the destruction of the yacht and the narcotic drugs, the prosecution stated that the Trial Magistrate held that the provisions of Section 74A of the Narcotic Drugs and Psychotropic Substances Control Act were not mandatory but directory. It was pointed out that it was held that Section 74A of the said Act had been substantially complied with.

28. On the issue of jurisdiction, Mr. Kemo submitted that it was in order for Hon. Matheka, CM, to direct Hon. Nang'ea, CM, to proceed on with the hearing of the case.

29. Mr. Kemo submitted that PW4 and PW14 gave evidence that the appellant was the one who was driving the motor vehicle in which narcotic drugs were found in a suitcase. He further submitted that the appellant was the one who picked up his co-accused persons at various places. In the prosecution's view, the appellant could not deny knowledge of what was in the boot of the car. It was stated that it could not have been a coincidence that the appellant had shopped for food supplies for the yacht where narcotic drugs were recovered and 10 days later, similar drugs were found in the yacht. He submitted that the appellant had knowledge and was in possession of the drugs in the boot of the car and the yacht.

30. The prosecution buttressed its submissions by relying on the evidence of PW2 who testified that a boat was sold in November 2014 to one Bilal who was in the company of Ahmed and that the said witness identified the said person as the appellant herein. The prosecution indicated that the boat was bought 6 months before the appellant was arrested. In responding to the claim that the charge in respect to the 2nd count was defective because the appellant was charged with the offence of trafficking in narcotic drugs at Kilindini Port on 20th April, 2015, Mr. Kemo relied on the provisions of Section 137 of the Criminal Procedure Code. He cited the case of **John Irungu v Republic** [2016] eKLR, to buttress his submission. He emphasized that the charge substantially complied with the drafting guidelines.

32. On the failure by the prosecution to call the UK Border Control Police Officers and the police officers who guarded the boat as witnesses, the prosecution cited the case of **Keter v Republic** [2007] 1 EA 135, where the court held that a superfluity of witnesses was not necessary.

33. With regard to the evidence which was highlighted as being contradictory, Mr. Kemo submitted that any contradictions or irregularities on record did not occasion a miscarriage of justice. He urged this court to dismiss the appeal.

34. In response to the submissions made by the Senior Assistant DPP, Mr. Magolo submitted that the irregularity in the 2nd count could not be said to be a minor one for the reason that there was no conveyance of narcotic drugs at the Port of Mombasa.

35. In regard to the issue of failure to call witnesses, he submitted that the law provides that if witnesses are kept away from testifying, the presumption is that the evidence they would have given would be unfavourable to the person who was under duty to call them.

36. Mr. Magolo suggested that anything could have happened between 13th April, 2015 and 20th April, 2015 at Kilindini Port as the police officers who were guarding the motor vessel were not called to testify.

37. He reiterated his submission that Hon. Matheka, CM, had no jurisdiction to overrule the decision by Hon. Nang'ea, CM, to recuse himself.

38. He also emphasized his earlier submission that the appellant's identity card was found on his person and not in the suitcase which was recovered in the boot of the motor vehicle he was driving.

39. With regard to the recovery of narcotic drugs in the motor vessel, it was submitted that the appellant was not responsible for what the Captain of the said vessel was carrying on board.

THE EVIDENCE TENDERED BEFORE THE TRIAL COURT

40. PW1 was No. 230129, Superintendent of Police, Vincent Egesa. He testified that on 20th April, 2015 he was on duty at Kilindini Port, Mombasa where he worked as the Officer in Charge of Narcotics Police Unit. On the said date he was informed by his boss from CID Headquarters that 3 officers from the UK Border Police would visit him to search a yacht by the name MV Baby Iris which had been detained after being brought from Kilifi. PW1 indicated that the appellant and his co-accused persons accompanied the police to the yacht. He further testified that the UK Border Police had specialized equipment for searching the yacht. His evidence was that the search started at the front cabin and that under a water tank, PW1 recovered 10 substances wrapped in polythene bags. The yacht was photographed. A search certificate was prepared. Seizure notices were prepared for the substances which were recovered and the yacht. Copies of the said documents were given to the Captain of the yacht. Copies of the certificate of search were supplied to the suspects. They declined to sign the same on the advice of their Advocate. PW1 produced the seizure notices for the yacht and the substances which were recovered on board.

41. The following day the substances were taken to the Government Chemist for sampling and weighing which happened in the presence of the suspects. The substances were analyzed and found to be heroin. PW1 took the Trial Court to where the MV Baby Iris was being guarded offshore and showed the Hon. Magistrate and the parties who were present, a blue water tank underneath which the narcotic drugs were recovered. The said motor vessel was produced in court as Pexhibit 4.

42. PW2 was James Bateman, a businessman in Kilifi and Botswana. He testified that in November, 2014 one Mike sold his boat called the MV Baby Iris to one Bilal who was in the company of the appellant herein. He said that his company provided mooring services for the said yacht. He stated that the appellant herein was Bilal's representative when the yacht left its anchorage for an unknown destination. He later learnt that it was destined for Madagascar but it turned back due to unfavourable weather.

43. PW2 further testified that the appellant would at times make requisite payments as Bilal's representative and was a crew member of the yacht. He also said that he did not know the appellant's capacity in the yacht after it was purchased by Bilal. PW2 indicated that the crew had custody of the key to the yacht and that he had no control of the interior of the yacht.
44. PW3, Peter Onyango was a security guard at Kilifi Boat Yard Limited. He testified that on the night of 9th April, 2015 at 11:45 p.m., a red motor vehicle registration No. KCA 698H drove into the boat yard at a high speed and rapidly made a U-turn. 5 occupants alighted from the car. PW3 stated that he was concerned by their conduct. The said people said they were suppliers for the MV Baby Iris and were taking food to their customers as they were due to sail.
45. PW3 further testified that 3 other vehicles sped into the boat yard and surrounded the red car. The occupants introduced themselves as the police. They ordered them to lie down. The police inspected the red car and sought the keys for the yacht which they wanted to search for contraband goods. The keys could not be found and the padlock for the yacht was broken.
46. It was PW3's evidence that one Matano, 2 occupants of the car and the Police proceeded to the yacht. They returned and started searching the red car. A black suitcase was removed from the boot. It was searched and a substance suspected to be a narcotic drug was found. All the persons were arrested but 3 others were released later. He identified the appellant as the driver of the red motor vehicle.
47. PW4 was No. 80914 PC Samuel Kamuti who used to work at CID Kilifi. He gave evidence of how they received a tip off about some people who were traveling from Mombasa to Kilifi ferrying narcotic drugs to be delivered to Kilifi Boat Yard for transportation by sea. PW4 and other police officers laid an ambush on the road towards the yard. He testified that at midnight, motor vehicle registration No. KCA 698H, Toyota Raum appeared. They trailed the said motor vehicle up to a boat yard. They found that the occupants of the said vehicle had alighted. PW4 and his colleagues introduced themselves as Criminal Investigations Department (CID) Officers and ordered everyone to surrender. They arrested 9 men.
48. It was PW4's evidence that they found paper bags with assorted food stuff and a black traveling bag with a grey stripe along the zip which contained assorted men's clothes. He testified that while sampling the clothes, he smelt a choking substance. He searched the bag and at the bottom of it, he recovered some brownish powder. He further stated that there were things stashed in the upper and lower linings of the bag. He tore the bottom lining to check the substance. He unzipped the upper lining and found 2 polythene bags which contained a whitish substance which he suspected to be narcotic drugs similar to those contained in the black polythene found under the bottom lining of the suitcase. The polythene bags were 4 which he identified in court.
49. PW4 went on to say that the appellant was the driver of the motor vehicle in issue. He indicated that he found the appellant's driving licence in his possession. He also recovered the appellant's Thuraya phone, Thuraya phone permit, Thuraya phone package, 2 Samsung phones and ignition keys for the red motor vehicle. PW4 prepared an inventory of the recoveries made, dated 9th April, 2015. The appellant and his co-accused persons signed it, as well as some police officers who were in the company of PW4.
50. PW4 further testified that they then moved to a motor vessel christened the Baby Iris whose padlock they broke as the key was unavailable. They did not do a thorough search on the yacht as she had many compartments. They put her under 24 hours guard for a thorough search to be done later.
51. It was his evidence that the narcotic drugs which were recovered were weighed in the presence of the 5 accused persons. Police officers from Nairobi took over investigations and all the exhibits including the motor vehicle were handed over to them. He produced the motor vehicle as an exhibit.
52. No. 231067 Chief Inspector George Mutiso testified as PW5. He was working at the Anti-Narcotic Unit Headquarters Nairobi as at 9th April, 2015. His evidence was to the effect that on the said date his boss instructed him and Corporal Kemei to proceed to Kilifi Police Station to meet the DCIO. They proceeded there and met him. He told them that they were holding suspects who had been found in possession of narcotic drugs. They were shown a red motor vehicle registration No. KCA 698H, a black medium sized suitcase, a brown powdery substance contained in 4 black polythene bags. He said that at the time he was testifying in court, the substance was wrapped in clear packages. He indicated that all the exhibits were handed over to him. They issued the appellant and his co-accused persons with seizure notices dated 9th April, 2015 with regard to the narcotic drugs. A seizure notice for the motor vehicle was issued to the appellant.
53. PW5's evidence was that they issued a notice to tender the material confiscated as evidence and served the suspects with the same. He further stated that the motor vessel was moved to Kilindini Port and so were the suspects.
54. PW8, No. 73588 Corporal Ngale Samuel of Mombasa Police Anti- Narcotics Unit testified that on 9th April, 2015 he was instructed by his boss to travel to Kilifi to assist CID officers with investigations of narcotic drugs which had been recovered. He was accompanied by his colleague Benedict. On reaching Kilifi, they were informed of recovery of narcotic drugs concealed in a suitcase. PW8 weighed 4 packages which contained substances weighing 2028 grams in total. The suspects were present during the weighing exercise. He prepared a weighing certificate which he signed and so did all the 8 suspects. PW8's colleagues, namely, PC Benedict and PC Corani from Malindi also signed the certificate which PW8 produced in evidence.
55. On 10th April, 2015, PW8 took the 4 packages to the Government Chemist for sampling and analysis to establish if the substances in the said packages were narcotic drugs. PW8 testified that the Government Analyst removed samples from each package in his presence. The said Analyst prepared a sampling certificate which he and PW8 signed.
56. He also testified that after the boat was moved from Kilifi Boat Yard to Kilindini Port, a search was done on 13th April, 2014 in the presence of the accused persons and Government agencies. On 20th April, 2015 the accused persons were taken to the yacht for a further search with the assistance of UK Officers and that one of the said officers who was using a machine for the search said there were some substances under the yacht's water tank. They drained the water from the water tank and 10 packages were removed from the tank. PW8

prepared a search certificate but the suspects declined to sign it. He produced the search certificate in evidence.

57. It was PW8's evidence that on 21st April, 2015, he took the packages which had been recovered aboard the yacht to the Government Chemist for weighing and sampling. He and the suspects witnessed the exercise. He personally weighed the 10 packages and samples were taken from each package. He prepared a weighing certificate which the accused persons refused to sign. The Government Analyst prepared a certificate of sampling which PW8 signed but the suspects refused to sign. PW8 produced the 2 exhibit memo forms and weighing certificates as evidence. PW8 indicated that a report of the analysis which was sent to the police established that the samples tested positive for heroin, a narcotic drug. He further stated that the samples were released to the police and the packages containing the drugs which had been recovered, were destroyed together with the yacht.

58. PW12 Yahya Hamisi, a Government Analyst, produced the Government Analyst's report and certificates of sampling as exhibits on behalf of Mr. John K. Njenga who had retired.

59. PW13, No. 65672 Corporal Kenneth Kemeli was working at the DCI Headquarters Nairobi Anti-Narcotics Unit at the time he testified. He produced the exhibits that were recovered. He stated that the Government Analyst confirmed that the packages contained heroin. It was his evidence that the same were destroyed but samples had been taken which he produced in evidence. He also produced seizure notices.

60. PW14, No. 70534 Sergeant James Ochola was on duty on 8th April, 2015 at the DCIO's Office Kilifi. His evidence corroborates that of PW1 in material particulars with regard to the arrest of the appellant herein.

61. PW14's evidence was that the 2nd accused in the lower court told them the clothes in the suitcase which contained the drugs were his but he had borrowed the suitcase from the appellant. PW14 testified that the appellant's passport and Driver's licence were found in the said suitcase.

62. He further stated that a search was made in the yacht where a satellite radio and foodstuff were recovered. Inventories were prepared of the recoveries which were made and signed. He indicated that PC Ngatia and Mutie remained behind to guard the vessel. PW14 also said that the drugs recovered were weighed in his presence and that of the accused persons. Investigations were then handed over to Nairobi Anti-Narcotics Office.

ANALYSIS AND DETERMINATION

63. The duty of the 1st appellate court is to analyze and re-evaluate the evidence which was adduced in the lower court and come to its own independent conclusion while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for that fact. In the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR, the Court of Appeal reiterated this duty as follows:-

“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 appellate 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 decision.”

64. The issues for determination are-

- (i) If the Trial Magistrate had jurisdiction to hear the case after recusing himself;**
- (ii) If the appellant's passport and driving licence were found in the suitcase in which heroin was recovered;**
- (iii) If the appellant had knowledge of the contents of the suitcase;**
- (iv) If the charge in the 2nd count was defective;**
- (v) If destruction of the yacht and the heroin rendered the trial a nullity;**
- (vi) Whether failure to call the UK Border Control Police Officers rendered a fatal blow to the prosecution's case;**
- (vii) If the Trial Magistrate shifted the burden of proof; and**
- (viii) Whether the sentence is harsh or excessive.**

If the Trial Magistrate had jurisdiction to hear the case after recusing himself.

65. The Trial Magistrate, Hon. Nang'ea, CM, heard the evidence of PW1. After mentioning the lower court case a few times, he proceeded on annual leave. After he resumed work, on 12th October, 2016 he sought a confirmation from the prosecution if the motor vessel (yacht) had been destroyed as the said information was in the public domain. Mr. Muteti, for the prosecution, informed the court that he would seek confirmation from the police. Mr. Wamotsa, Prosecution Counsel, on 26th October, 2016 confirmed that the yacht had been destroyed. Hon. Nang'ea then recused himself from hearing the case. After doing so, he referred the case to the Chief Magistrate's Court No.1 for re-allocation. Hon. Teresia Matheka, Chief Magistrate (as she then was), who was in charge of the Mombasa Magistrates' Courts perused the

proceedings and ruled that Hon. Nang'ea, CM, should continue with the hearing of the case.

66. On 24th November, 2016 when the Advocates and the accused person appeared before Hon. Nang'ea, CM, Mr. Wamotsa informed the said Magistrate that the DPP had no objection to the said court resuming the hearing of the case.

67. Mr. Wangila Advocate who was holding brief for Mr. Magolo for the 3rd, 4th and 5th accused persons said that they had no objection with the court (Hon. Nang'ea) hearing the case. The 2nd accused said he no longer had an Advocate and that the court could hear the case.

68. The case was scheduled for hearing on 23rd February, 2017. Hon. Nang'ea said he would hear the case but it was expected that the DPP would cause the arrest and prosecution of those who unlawfully destroyed the court exhibit.

69. Flowing from the above proceedings that took place in the Trial Court, this court sees no illegality that was occasioned by Hon. Nang'ea agreeing to continue with the hearing of the case in which he had disqualified himself from, at an earlier date. The Advocates for the 1st, 3rd and 4th accused persons supported the decision of Hon. Matheka, CM, for the case to continue being heard by Hon. Nang'ea, CM.

70. The appellant's Counsel took issue with Hon. Matheka, CM, for having made a ruling to re-allocate the file to the Trial Magistrate in her capacity as the Magistrate in charge of Mombasa Magistrates' Courts. She explained well in her ruling that it was only Hon. Nang'ea, CM, who had seen the exhibit. In so doing, she did not purport to sit on appeal against his decision. This court's finding is that Hon. Nang'ea, CM, did not act outside his jurisdiction by presiding over the case in the lower court. The accused persons consented to the said Magistrate continuing with the hearing of the case.

71. Secondly, his recusal had not come about as a result of a complaint of bias or perceived bias. The record demonstrates that the DPP and the accused persons readily agreed to have their case heard by the Trial Magistrate. They can now not backtrack from the decisions they made.

If the appellant's passport and driving licence were found in the suitcase in which heroin was recovered.

72. Both Messers Magolo and Kang'ahi highlighted an inconsistency in the evidence by prosecution witnesses on whether the appellant's passport was recovered at all and if his driving licence was found on his person or in the suitcase in the boot of the car which he was driving. It cannot be said with certainty if the appellant's driving licence was found in the suitcase which was in the boot of the motor vehicle he was driving. PW4 in his evidence said that when they arrested the appellant, he had his driving licence. PW14 testified that they recovered the appellant's driving licence and passport in the suitcase in the car he was driving. Although PW14 spoke of the appellant's passport having been found in the said suitcase, in his evidence, PW4 did not mention about the recovery of the appellant's passport. The inventory of the exhibits which were recovered from the appellant and his co-accused persons makes reference to the appellant's driving licence but not his passport.

73. Had the inventory disclosed that the appellant's driving licence was recovered in the suitcase in the boot of the car which he was driving, the inconsistency in the evidence of PW4 and PW14 would have been resolved. The prosecution however failed to resolve the inconsistency in the evidence of PW4 and PW14 as to whether the appellant's driving licence was found on his person or in the suitcase. This court's interpretation of the evidence of PW4 is that the appellant's driving licence was recovered on his person. It is the finding of this court that the Trial Magistrate misdirected himself when he held that the appellant's driving licence was recovered in the suitcase which was in the boot of the car he was driving. The inconsistency which was raised is thus resolved in favour of the appellant.

If the appellant had knowledge of the contents of the suitcase.

74. For the offence of trafficking in narcotic drugs through conveyance to be proved, the court must be satisfied that the person who was charged with the offence of trafficking had knowledge of the existence of the said narcotic drugs in the means of conveyance that was being used. Section 2 of the Narcotic Drugs and Psychotropic Substances Control Act states thus-

“trafficking” means 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, but does not include—

(a) The importation or exportation of any narcotic or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a license therefore under this Act in accordance with the licence;

(b) The manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefore under this Act in accordance with the licence; or

(c) The selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or

(d) The selling or supplying in accordance with the provisions of this Act, of any narcotic or psychotropic substances by a registered pharmacist.”

75. The evidence adduced before the lower court by PW3 and PW4 was to the effect that the appellant was the one who was driving motor vehicle registration No. KCA 698H red in colour, from which heroin was recovered in a suitcase in the boot of the said car. He was with the Captain of the yacht and 3 other men. Police officers had trailed the motor vehicle following a tip off to the effect that some people were ferrying narcotic drugs from Mombasa to Kilifi for transportation by sea. A search was done by PW4 in a suitcase which was in the boot of the motor vehicle. The search revealed assorted men's clothes. As PW4 was checking the said clothes, he was struck by a choking smell. He tore the bottom lining of the suitcase and found 2 polythene bags containing a brownish substance stashed therein. He unzipped the upper lining and removed two black polythene bags which contained a whitish substance.

76. PW14 corroborated the evidence of PW4 on how they trailed and arrested the appellant and his co-accused persons. It was his evidence that the 2nd accused, Clement Serge, the Captain of the MV Baby Iris informed them that the clothes in the suitcase were his and that he had borrowed the suitcase from the appellant. The 2nd accused therefore exonerated himself from having knowledge of the drugs in the suitcase and thereby implicated the appellant with regard to ownership of the heroin therein. For this court to reach a decision of whether or not the appellant trafficked by conveying 2028 grams of heroin, it is important to look at the defence he put forth before the Trial Court.

77. He stated that he was a fish dealer who also engages in transport business and that one Bilal Kimala was his customer who was buying fish from him. That he told him that he was looking for a boat to buy and he introduced him to Peter (PW2) of Kilifi Boat Yard who showed him a boat which was being sold by one Mike. He further stated that Bilal bought the boat, the MV Baby Iris from Mike, who paid him a commission of Kshs. 180,000/=. The appellant further said in his defence that Bilal refused to pay him and instead offered to give him transport business. That thereafter Bilal hired him for the said business on various occasions.

78. The appellant indicated that on one occasion, Bilal sent him to pick Clement Serge, the 2nd accused person from the airport and transported him to a hotel in Mombasa. That on 8th April, 2015 Bilal told him that the boat was to sail to Madagascar and sent him to pick the 2nd accused who was the boat's Captain from the hotel. The appellant stated that he also picked the 4th and 5th accused persons who were the boat's crew. He picked his friend the 3rd accused on the way. The appellant indicated that he had borrowed the car he was driving from his friend Abdul.

79. He further said that he had bought some items which were in the car boot, for Bilal from Naivas supermarket. He stated that on reaching Kilifi Boat Yard, when he stopped the car he was driving, another car pulled next to theirs. He and the others were arrested. That he did not know what his customers were carrying and the police claimed that there were (narcotic) drugs in the 2nd accused person's suitcase.

80. When the 2nd accused was put on his defence, he gave sworn evidence. He stated that when in Seychelles, he was recruited by the owner of the yacht, the MV Baby Iris to steer her from Kenya to Madagascar. He traveled to Kenya but the trip aborted due to a faulty navigation equipment. He returned to Seychelles in January 2015. In March 2015 Bilal contacted him and told him that the yacht had been serviced. The 2nd accused stated that he returned to Kenya in mid March 2015. He further stated that the appellant was sent to him by Bilal who told him that he was the caretaker of the yacht. The appellant took him to Dallas Hotel in Bamburi, Mombasa. He interacted with the appellant several other times after that.

81. The 2nd accused recounted that on a day he could not recall, the owner of Kilifi Boat Yard by the name Peter called him and told him it was safe to remove the sail in readiness for sailing. The appellant picked him from the hotel and drove him to the said Boat Yard to prepare for departure. The 2nd accused indicated that the 4th and 5th accused persons were in the car when he was picked from the hotel. He stated that he was carrying a Nakumatt plastic bag containing his jeans trousers, 3 T-shirts and a pair of shorts. He put the bag in the boot. That the appellant told him that a suitcase given to him by Bilal was in the boot and it was empty. He unzipped the said suitcase and placed the plastic (bag) with clothes inside in the presence of the 1st, 4th and 5th accused persons. On the way to the boat yard, they picked the 3rd accused person at the pirates beach area. He sat at the co-driver's seat in the vehicle while the 3rd, 4th and 5th accused persons sat at the back seat of the car and they proceeded to Kilifi Boat Yard. They were arrested as they were offloading goods from the motor vehicle. The 2nd accused also said in his defence that the boot was searched and he told the police that the clothes were his but not the suitcase. He said that the police claimed that there were narcotic drugs in the suitcase. He maintained that his clothes were still in the bag.

82. To rebut the appellant's defence which implicated him to the drugs which were recovered in the suitcase in the boot of the car, the 2nd accused called a witness by the name Esther Wangari Muiruri, who testified as DW3. She stated that the 2nd accused was a customer at Dallas Hotel, Bamburi and that at first, he lodged at the hotel in the 2nd week of December, 2014. He again booked accommodation in March 2015 and checked out on 8th April, 2015. She indicated that on the said date, he left his suitcase with clothes with her and she kept it in her quarters in the hotel. She described her work at Dallas Hotel as that of cleaning, receipt of cash from guests and issuance of receipts. She quit the work in May 2015 and left the 2nd accused person's suitcase in the said hotel. She went to see him at Shimo - la - Tewa prison after he was arrested.

83. DW3 further stated that the appellant's brother had told her in May 2015 before she left the hotel that the suitcase was required in court. She picked it from the hotel, gave it to the appellant's brother and she also attended court. She indicated that Lawyer Magolo gave the bag back to her and the 2nd accused told her to keep the bag for him. On re-examination, she stated that she could not recall the name of the lawyer who returned the suitcase to her. DW3 stated that when the 2nd accused left his suitcase with her, it had some clothing inside and he carried some other clothing in a paper bag.

84. DW5 was the 4th accused in the lower court. In his defence, he stated that he was hired by Bilal as a crew member. He indicated that when they picked the 2nd accused from Dallas Hotel, he had a suitcase with clothes and that the appellant told the 4th accused to place the suitcase in the boot of the car. In cross-examination, he said that the colour of the suitcase the 2nd accused had was black and he saw it from the street lights which were on. He further said that he was in the car when he saw the 2nd accused with the bag.

85. DW6 was the 5th accused. He stated that he had been hired by Bilal to steer his yacht to Madagascar and that on 8th April, 2015, the appellant called him and told him that the car they were to use to take them to Kilifi was faulty. The 5th accused got a vehicle from his brother Abdul, which was given to the appellant to use. The 5th accused indicated that they found the 2nd accused waiting outside Dallas Hotel and that he had a bag but he did not find out what kind of a bag it was. He further said that he suspected that the black suitcase in the

boot of the car to be for the 2nd accused as he had seen him with a bag when he entered the motor vehicle. On cross-examination, he said that he heard the car boot being opened for the 2nd accused to put his bag in it.

86. An analysis of the above clearly demonstrates that when it came to the issue of ownership of the suitcase which was recovered in the boot of the vehicle that was being driven by the appellant, the 4th and the 5th accused persons sided with the appellant. It is not surprising that they sided with him for the reason that the 4th and 5th accused persons had been hired by Bilal as crew members of the MV Baby Iris for the voyage from Kilifi to Madagascar. It is evident from the evidence of PW2 and the appellant that he was known to Bilal. It is also evident to this court from the proceedings as a whole that the relationship between the appellant and Bilal ran deeper than that of a man who was supporting the other one by giving him work for transporting goods and people.

87. In his defence, the 2nd accused found support in DW3 who indicated that he left his suitcase with her at Dallas Hotel when he checked out on 8th April, 2015. Her evidence supported that of the 2nd accused that when he left the said hotel, he carried some of his clothes in a paper bag and left the others in a suitcase with DW3. He explained in his defence that he left his suitcase at the said hotel as he had a return ticket from Madagascar to Kenya.

88. In resolving the conflict between the claim made by the appellant and the 2nd accused person, the finding of the Trial Court was as follows-

"[83]. In the instant case, it is clear that Ahmed knew of the heroin found on 8/4/2015 or 9/4/2015 in the boot of the red car he was driving. He was the one who first took charge of the vehicle before he separately picked up his co-accused. Clements' witness (DW3) gave undiscredited testimony that Clement had left his hotel with only a paper bag containing some of his clothings and that he had left his suitcase with her. Indeed DW3 promised to avail the suitcase in court if required saying that Clement was yet to pick it following his arrest. I find Sharifu's and Hussein's evidence that Clement had the suit case when he entered the car unreliable. Whereas the former described the bag Clement allegedly carried as black, the latter said he couldn't tell what type or colour it was yet the two were in the same vehicle. Even the prosecuting Counsel in his submissions is persuaded that Clements's version of how the suitcase got into the car is more believable. As already noted Clement's evidence in this regard finds corroboration in the evidence of DW3.

*It is apparent that Sharifu and Hussein conspired with Ahmed to claim that the black suitcase belonged to Clement. The collusion is further demonstrated by DW3' evidence that Ahmed's brother asked her to take Clement's bag to court. While the case was ongoing claiming that the bag was required. The record herein does not show that the court ever asked for the bag either upon application by any of the parties or **Suo Motu**. Ahmed's advocate later returned the bag to DW3. There is further evidence that Ahmed's father tried to interfere with investigations in favour of his son and against Clement.*

The court in the premises finds that the suitcase found in the vehicle was already therein when Ahmed picked up Clement from the Hotel. Considering that the heroin subject of the 1st count was hidden inside false top and bottom parts of the bag. Ahmed knew of the presence of the narcotic drugs.

As regards Clement, the court for the foregoing reason exonerates him with respect to the 1st count. He has given consistent and credible evidence showing how his clothes were found in the bag. His defence which is backed by DW3 withstood cross-examination by the prosecution Counsel and his co-accused. There is no sufficient evidence showing that he knew the heroin was in the suitcase found in the red car.

Concerning Bakari, Sharifu and Hussein the court gives them the benefit of doubt. There is no sufficient evidence showing that they knew of the presence of heroin in the red vehicle when they boarded it seeing that the same was found in the boot. Ahmed confirmed that he was the one who picked each one of them separately. There is nothing to show that any one of them had possession of the suitcase before boarding Ahmed's vehicle. Indeed the evidence indicates that Bakari had only sought to be ferried up to Mtwapa before Ahmed convinced him to accompany them to the boat yard."

89. From the above extract, it is clear that the Trial Magistrate thoroughly analyzed the evidence adduced by the prosecution witnesses and the accused persons as well as DW3 and did not arrive at the conclusion that the appellant was found culpable for the offence in Count 1 solely for the reason that his passport and driving licence were recovered in the suitcase in the car.

90. In order to establish ownership of the suitcase which contained narcotic drugs, it is necessary to look for independent evidence. The said evidence is available from the testimony of PW14, Sergeant James Ochola, who said as follows in his evidence-

"My colleague checked a suitcase in my presence. We found a whitish substance suspected to be narcotics drugs. There were some clothes therein. The 2nd accused told us that they had borrowed the suitcase from the 1st accused...." (emphasis added).

91. When PW14 was cross-examined, no question was put across to him to test the veracity of his evidence that the 2nd accused told him that the suitcase in the boot of the car belonged to the appellant. In cross-examination, PW5 admitted that the 2nd accused requested to have his suitcase which was in a hotel in Mtwapa. The Police sent for it and took it to him. The suitcase had clothes and the 2nd accused person picked some. They kept the suitcase for him. PW5 further said it was a different suitcase from PMFI-6, in which narcotic drugs were recovered.

92. In view of the independent evidence by PW14 and PW5 which gave credence to the 2nd accused person's assertion that he left his suitcase with DW3 in a hotel, it is my finding that the Trial Magistrate did not give unnecessary weight to the evidence of the 2nd accused and his witness. In any event, the appellant in his evidence disclosed that he borrowed the car he was driving at his time of arrest from his friend Abdul who is a brother to the 5th accused. In his defence, the 2nd accused indicated that when he met Bilal for the first time in Seychelles, he was in the company of Abdul, whom he introduced as his business partner. It was therefore not surprising that the 5th accused

gravitated towards the appellant by alleging that it was the 2nd accused who put the suitcase in the boot of the car. The 5th accused said they found the 2nd accused waiting for them outside Dallas hotel. He further said the 2nd accused had a bag but he did not find out what kind of bag it was. At Kilifi Boat Yard, they were questioned about ownership of a black suitcase in the motor vehicle. He stated that he suspected the bag to belong to the 2nd accused as he had seen him with a bag when he entered the motor vehicle.

93. When addressing the issue of the said suitcase, the 4th accused said that when they picked up the 2nd accused outside Dallas Hotel, he was carrying a suitcase and that the appellant asked him (the 4th accused) to place the bag in the car boot. The said statement is a departure from the appellant's defence and contradicts it in that he said that when he picked the 2nd accused at Bamburi, he carried his bag into the car, yet according to the 4th accused, he was the one who put the bag the 2nd accused had in the boot of the car.

94. This court has no difficulty in arriving at a decision similar to the one which was made by Hon. Nang'ea, CM, when he found that the appellant had knowledge of the narcotic drugs which were stashed in the lining of the suitcase which was recovered in the boot of the car he was driving. This court has no doubt in its mind that the appellant deliberately told the 2nd accused to put his clothes in the said suitcase with an ulterior motive. It is the finding of this court that the prosecution proved its case in the 1st count, that the appellant was found trafficking by conveying heroin weighing 2028 grams with a market value of Kshs. 6,084,000/=. The conviction in the 1st count is hereby upheld.

If the charge in the 2nd count was defective.

95. The issue of the defect in the charge in the 2nd count was brought up by the appellant's Counsel who submitted that the yacht was moved from Kilifi Boat Yard where she was moored to the Mombasa Port. Needless to say that an objection on the defect in the charge should have been made at the first instance before the Trial Court. It was argued that since the appellant was in custody as from 8th April, 2015 he could not be said to have trafficked in heroin aboard the yacht on 20th April, 2015. The appellant was arrested on the night of 8th and 9th May, 2015 at Kilifi. On 14th April, 2015 the yacht was towed to the Mombasa Port. A search which was done aboard the said yacht on 20th April, 2015 revealed 10 packages of heroin concealed under a water tank in the front cabin. If one gives a cursory look at the charge in the 2nd count as regards the date when the appellant was arrested and the date when the heroin was recovered aboard the yacht, the conclusion would be that the charge in the 2nd count is defective.

96. For one to understand why the 2nd count was framed as it appears, one has to read the proceedings of the lower court as a whole. Prior to the search conducted on 20th May, 2015, the yacht had been subjected to searches conducted by the Kenya Police at both the Kilifi Boat Yard and Kilindini Port. According to the evidence of PW1 and PW8, a search done with the assistance of the UK Border Police using certain equipment revealed 10 packages of heroin underneath the water tank in the front cabin of the yacht.

97. Technically, the appellant could not have been charged with the offence of trafficking in narcotic drugs by conveyance on the yacht before the heroin had been physically located. In this court's view, although the appellant was in police custody at that time, the search was done in his presence and that of his co-accused persons. It is the finding of this court that the charge in the 2nd count was not defective.

If destruction of the heroin and the motor vessel, the MV Baby Iris rendered the trial a nullity.

98. The prosecution confirmed to the Trial Magistrate that the heroin which was recovered aboard the yacht and motor vehicle registration No. KCA 698H was destroyed together with the said yacht on the orders of the Executive. PW8 in his evidence confirmed destruction of the said exhibits. Section 74A of the Narcotic Drugs and Psychotropic Substances Control Act sets out the procedure to be followed from the time a suspect is arrested with substances suspected to be narcotic drugs and psychotropic substances. Section 74A(3), (4) and (5) provide as follows-

"(3) Upon receipt of the designated analyst's certificate and the samples analysed in accordance with the foregoing subsections the authorized officers shall, where the drug is found to be a narcotic drug or psychotropic substance within the meaning of this Act, arrange with a magistrate for the immediate destruction by such means as shall be deemed to be appropriate of the whole amount seized (less the sample or samples taken as evidence at any subsequent trial or any contemplated trial particularly where the accused person's identity is not yet known or the accused person is outside the jurisdiction of Kenya at the time of taking such samples).

(4) The destruction of drugs and psychotropic substances ordered under subsection (3) shall be carried out by the authorised officers in the presence of the Magistrate and the accused person, where practicable, and his advocate (if any) and thereafter the magistrate shall sign a certificate in the prescribed form relating to such destruction.

(5) The production in court by either one of the authorised officers at the trial of an accused person of the sample or samples together with the designated analyst's certificates and the magistrate's certificate of destruction shall be conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of its destruction in accordance with the provisions of this section."

99. The Court of Appeal in the case of **Moses Banda Daniel v Republic** [2015] eKLR addressed the issue of failure to comply with some of the requirements provided under Section 74A in the following words:-

"After the seizure an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done where practicable in the presence of the accused person, his advocate, if any and analyst, if any appointed by the accused person and the designated analyst. The use, in the Section, of phrases like "where practicable" and "if any" convey the reading that the procedure is not mandatory but directory and the use of the word "shall" must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure." (emphasis added).

100. As at the time of destruction, the narcotic drugs and the yacht had been produced in court. Under Section 74A(3) of the Narcotic Drugs and Psychotropic Substances Control Act, destruction of narcotic drugs and psychotropic substances is the preserve of the Trial Court, which has to witness such destruction and issue a certificate for the same. The foregoing never happened in this case. It is thus evident that the Executive encroached into the territory of the Judiciary by ordering for the destruction of court exhibits. That notwithstanding, this court's finding is similar to that of the Trial Court that there was substantial compliance with the provisions of Section 74A of the said Act. Bearing in mind the case of **Moses Banda Daniel vs Republic** (supra), this court finds that no prejudice was occasioned on the appellant.

Whether failure to call the UK Border Control Police Officers rendered a fatal blow to the prosecution's case.

101. The prosecution's failure to call the UK Border Police Officers who were present aboard the yacht when narcotic drugs were recovered was challenged by the appellant's Counsel who were of the view that the said officers played an important role. The evidence of PW1, Superintendent Vincent Egesa who was then in charge of Narcotics Police Unit at Kilindini Port, Mombasa was that the on 20th April, 2015 he was called by his boss, Hamisi, from CID Headquarters, Nairobi. He told him that 3 UK Border Police Force Officers would assist to search the yacht. The said witness further testified that the said Police Officers had specialized equipment for searching the yacht which included scanners. At the front cabin of the yacht, he discovered some wrapped materials under a water tank. The substances were in polythene bags. He recorded the substances one by one. They were 10 in number. Photographs of the substances and the yacht were taken. A search certificate was prepared as well as a seizure notice of the yacht and recovered substances.

102. Another Police Officer who was present aboard the yacht when a search was conducted on 20th April, 2015 was PW8, Corporal Ngate Samuel. He corroborated the evidence of PW1 that they were assisted by the UK Border Police Officers to search the yacht. He testified that after some time, some substances were recovered under the water tank of the yacht. He explained that the water was drained and 10 packages were recovered. PW8 prepared a search certificate but the appellant and his co-accused persons refused to sign.

103. The foregoing evidence is indicative of the fact that Kenya Police Officers were not just bystanders when the recovery of the substances which were later ascertained to be heroin, was made on the yacht. The UK Border Police Officers managed to locate the narcotic drugs using scanners and PW1 and PW8 did the actual recovery of the same.

104. Decisions abound on the issue of failure by the prosecution to call some witnesses to testify. One of them is the Court of Appeal decision in **Donald Majiwa Achilwa v Republic** [2009] eKLR. The court in the said case stated as follows:-

*"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See **Bukenya & Others v. Uganda** [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."*

105. In the present case, the evidence of PW1 and PW8 was sufficient in proving how the heroin was recovered from the space underneath the water tank in the front cabin of the yacht. Apart from the said evidence, photographs taken during the said recovery which were produced to support the evidence of the 2 witnesses as they illustrate how the recovery of the said heroin was done. It is the finding of this court that failure to call the UK Border Police Officers was not fatal to the prosecution's case.

If the charge in the 2nd count was proved beyond reasonable doubt.

106. In order to determine if the appellant was conveying the heroin which was recovered in the yacht, it is necessary to establish if he had knowledge of the existence of the said narcotic drugs which were recovered therein. PW2, James Bateman, a businessman in Kilifi and Botswana testified that in November, 2014 one Mike sold his boat named the MV Baby Iris to one Bilal who was in the company of the appellant herein. PW2 further testified that his company provided mooring services for the said yacht. He stated that the appellant herein was Bilal's representative when the yacht left its anchorage for an unknown destination. He later learnt that it was destined for Madagascar but it turned back due to unfavourable weather. PW2 further testified that the appellant would at times make requisite payments to the Kilifi Boat Yard, as Bilal's representative. He also said that he did not know the appellant's capacity in the yacht after it was purchased by Bilal. PW2 indicated that the crew had custody of the key to the yacht and that he had no control of the interior of the yacht.

107. The defence Counsel in their submissions alluded to the possibility of the heroin recovered in the yacht having been deliberately placed on board by police officers to implicate the appellant in the commission of the offence. The reasoning given by Mr. Kang'ahi Advocate was that the yacht had been searched 3 times before the 20th April, 2014 but no narcotic drugs had been recovered. He submitted that clear evidence was not given on the chain of custody of the yacht from when she was moved from Kilifi to Kilindini Port.

108. It is correct that the police officers who kept watch over the yacht were not called to testify. This court is however of the view that it is farfetched for the defence to suggest that the police looked for 7,600 grams of heroin which they placed underneath the water tank of the front cabin of the yacht. It is even more difficult to imagine that after supposedly doing so, they would go into the trouble of inviting the UK Border Police Officers to Kenya to stage manage a recovery of the heroin. This court finds that the police would not have gone into such pains as they had already recovered heroin in a suitcase that was in the car which was being driven by the appellant. From the evidence adduced, it is apparent that what piqued the interest of the Police to the yacht was the fact that they were told that she was due to sail to Madagascar on the day the heroin in the suitcase was recovered. The prosecution did not have to call a superfluity of witnesses to prove its case. The provisions of Section 143 of the Evidence Act and the case of **Keter v Republic** (supra) are applicable in this case. As Mr. Kemo, Senior Assistant DPP, correctly pointed out, in cross-examination, PW5 said that the yacht was under guard for the entire period it was under investigations.

109. In his defence, the 2nd accused stated that he returned to Kenya in mid-March 2015. He further stated that the appellant was sent to him by Bilal who told him that he was the caretaker of the yacht. The appellant took him to Dallas Hotel in Bamburi, Mombasa. He interacted

with the appellant several other times after that. He further said that he had given the appellant a list of food items to buy before their intended departure for Madagascar and the staff at the Boat Yard carried the food into the yacht. The appellant in his defence admitted that he had bought some food items for Bilal at Naivas supermarket.

110. The evidence of PW2 and what the 2nd accused indicated in his defence leaves no doubt that the appellant herein was working as a point man of Bilal and was his agent in so far as the yacht was concerned. At times, the appellant would pay mooring charges for the yacht to PW2 as a representative of Bilal. He also testified that the appellant had represented Bilal in the purchase of the yacht. According to the 2nd accused, the appellant was the caretaker of the yacht. The foregoing leaves no doubt that the appellant had unlimited access to the yacht.

111. There is no doubt therefore that there was a nexus between the appellant and Bilal's yacht. This court's finding is that the appellant was aware of the presence of the heroin which was aboard the yacht. This court holds that the appellant was not convicted because of his close association with Bilal but because of his complicity in the commission of the offence he was charged with in the 2nd count. Evidence has proved that the appellant offered more than transport business to Bilal. The appellant was therefore convicted on sound evidence for trafficking in 7,600 grams of heroin with a market value of Kshs. 22,800,000 as stated in the 2nd count. This court upholds the conviction in the 2nd count.

If the Magistrate shifted the burden of proof

112. The appellant's Counsel did not address the court on the above ground of appeal in both their written or oral submissions. It is therefore difficult for this court to decipher what they had in mind. Having considered the evidence as a whole and the Judgment delivered by the Trial Magistrate, this court notes that the appellant was convicted on the evidence that was adduced against him, after his defence was considered. This court has considered the said defence and is of the view that it could not hold ground in light of the overwhelming evidence that was adduced against him by the prosecution.

If the sentence was harsh or excessive.

113. Section 4 of the Narcotic Drugs and Psychotropic Substances Control Act provides as follows-

“4(a) 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

4.(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. (emphasis added).

(b)”

114. In the 1st count, the appellant was sentenced to pay a fine of Kshs. 3,000,000/- or serve 12 months imprisonment. He was also sentenced to 5 years imprisonment. The appellant in the 1st count was found guilty of trafficking in 2028 grams of heroin with a market value of Kshs. 6,084,00/=. That was the heroin that was recovered in the suitcase of the car he was driving.

115. In the 2nd count, the appellant was fined Kshs. 5,000/- and in default he was to serve 12 months in prison. He was also sentenced to serve 15 years imprisonment. The heroin which was recovered aboard the yacht weighed 7,600 grams. It had a market value of Kshs. 22,800,000/=.

116. Although sentencing is a matter that is left to the discretion of the Trial Court, the said discretion must be exercised judiciously. In this court's view, the fine of Kshs.5,000/- imposed on the appellant in the 2nd count was manifestly low taking into account the quantity of the heroin which was recovered.

117. In both the 1st and 2nd counts, the Trial Magistrate gravely erred when he failed to impose a fine which was equivalent to 3 times the street value of the heroin the appellant was found trafficking in, as provided by the provisions of Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. This court has no powers to enhance the sentences that were imposed by the Trial Court without being moved by the Director of Public Prosecutions to do so. No notice of enhancement of sentence was filed by the said office.

118. It is the finding of this court that the appellant was properly convicted in the 2 counts. This court notes that he was on bail pending trial in the lower court. The provisions of Section 333(2) of the Criminal Procedure Code are therefore not applicable to him. The appellant's sentences which were ordered to run consecutively shall be effective from the 31st October, 2018 when he was sentenced by the Trial Court. The appeal herein is dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of March, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present

Mr. P. Magolo holding brief for Messrs. J. Magolo and Kang'ahi for the Appellant

Mr. Muthomi, Prosecution Counsel holding brief for Mr. Kemo, Senior Assistant DPP for the respondent

Mr. Oliver Musundi- Court Assistant