



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.154 AND 155 OF 2019**

**(Appeal arising out of the conviction and sentence of Hon. L O Onyina (Chief Magistrate) in JKIA Chief Magistrate's Court Criminal Case No.119 of 2017 delivered on 2<sup>nd</sup> July 2019)**

**BRADLEY JUMA .....1<sup>ST</sup> APPELLANT**

**PETER OKOTH ODONGO .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The 1<sup>st</sup> Appellant, Bradley Juma and the 2<sup>nd</sup> Appellant, Peter Okoth Odongo were jointly charged with the offence of **trafficking in narcotic drugs** contrary to **Section 4 (a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act**. The particulars of the offence were that on 13<sup>th</sup> May 2017, at Kenol along Murang'a-Nairobi Road within Murang'a County, jointly with others not before court, trafficked in a narcotic drug named cocaine to wit 3,040.20 grams with a market value of Ksh12,160,800/- by transporting the same in a motor vehicle registration No. KCK 133 C Scania in contravention of the said **Act**. The 2<sup>nd</sup> Appellant was charged with two counts of **being in possession of a firearm and ammunition without a certificate** contrary to **Section 4(2) (3) of the Firearm Act**. The particulars of the offences were that on 13<sup>th</sup> May 2017, within Utawala area in Nairobi County, the 2<sup>nd</sup> Appellant was found unlawfully in possession of a CESKA Pistol and 14 rounds of 9mm ammunition without a Firearm Certificate. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged. In respect of the 1<sup>st</sup> count, each Appellant was fined Ksh 36Million or in default ordered serve one year imprisonment. In addition, the 1<sup>st</sup> Appellant was sentenced to serve 15 years imprisonment while the 2<sup>nd</sup> Appellant was sentenced to serve life imprisonment. In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> counts, the 2<sup>nd</sup> Appellant was sentenced to serve seven (7) years imprisonment on each count. The recovered cocaine was ordered destroyed. The firearm and ammunition were ordered forfeited to the State.

The Appellants were aggrieved by their respective conviction and sentences. The Appellants raised more or less similar grounds of appeal challenging their conviction and sentences. They faulted the trial magistrate for convicting them on the basis of contradictory and inconsistent evidence that was adduced by prosecution witnesses. They took issue with the fact that crucial witnesses were not called by the prosecution to testify in the case. They were aggrieved that the trial magistrate had considered extraneous factors in order to reach the verdict to convict them. They were of the view that the evidence adduced by prosecution witnesses did not establish their guilt to the required standard of proof beyond any reasonable doubt. As regard sentence, both appellants were of the opinion that the trial court had not taken into account their mitigating circumstances including the fact that they were first offenders before arriving at the impugned decision. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed on them.

Prior to the hearing of the appeal, the Appellants filed written submissions in support of their respective positions. During the hearing of the appeal, this court heard oral submissions made by Mr Enonda for the Appellants and by Ms Chege for the State. Whereas Mr Enonda submitted that the prosecution had failed to establish the charges brought against the Appellants to the required standard of proof, especially as regards the chain of custody of the bag that the narcotic drugs were allegedly found in, Ms Chege for the State was of the firm view that the prosecution had established its case against the Appellants to the required standard of proof beyond any reasonable doubts. This court shall revert to the submissions made by the parties herein after briefly setting out the facts of the case according to the prosecution.

On 13<sup>th</sup> May 2017, PW17 CPL Sheila Kipsoi based at the Anti Narcotic Unit at DCI Headquarters, was instructed by the In-charge to proceed to Makuyu area in Murang'a County on an assignment. Credible information had been received that there were suspects who were

transporting narcotic drugs in a public service vehicle. PW17 proceeded on the assignment accompanied by PW4 CPL Albashiir Ollow, PW9 PC George Odhiambo, PW10 Inspector Ruth Mwangangi and one PC Sitienei. They proceeded to Kenol area and at about 3.00 a.m., they saw the public service vehicle, a bus registration No. KCK 133C Scania that they had been informed had suspects who were transporting the narcotic drugs. The intelligence they received was specific: they were told that the suspect would be seated in seat No. 31. They stopped the bus. They entered the bus and requested the three passengers who were seated in seats No. 31, 32, and 33 to alight from the bus. They requested them to identify their luggage. The passenger on seat No. 31 was the 1<sup>st</sup> Appellant. On alighting from the bus, he pointed out a sack which had his name "Bradley Juma" with the destination described as "NRB". The police officers asked the 1<sup>st</sup> Appellant what was contained in the sack. He told them that it contained only his clothes and personal items. The sack was opened in the presence of the 1<sup>st</sup> Appellant. Inside was a bag. Upon inspection, the police realized that it had a false bottom. The false bottom was pricked with a sharp object. A white Powdery substance was seen. The police suspected it to be a narcotic drug.

PW1 Ibrahim Adan Guyo, the bus driver, PW2 Dominic Omondi Ogongo, the bus loader and PW3, Mahat Hassan Adan, the bus conductor confirmed that indeed the 1<sup>st</sup> Appellant had boarded the bus at Moyale destined for Nairobi. PW2 and PW3 told the court that the luggage that the white powdery substance was recovered from, belonged to the 1<sup>st</sup> Appellant. He had loaded the luggage in the luggage hold of the bus when the journey commenced at Moyale. PW1 told the court that at Isiolo, the 1<sup>st</sup> Appellant requested him to drop him at Githurai once the bus reached Nairobi. That's why PW1 was able to positively identify the 1<sup>st</sup> Appellant. The three witnesses testified that when they were stopped by the police at Kenol, and a search conducted, and the powdery substance recovered from the bag inside the sack containing the 1<sup>st</sup> Appellant's name, the 1<sup>st</sup> Appellant complained that the substance had been framed on him. He denied any knowledge of the substance being present in the bag.

PW17 and his colleagues interrogated the 1<sup>st</sup> Appellant with a view to establishing where he was taking the suspected narcotic drugs. He told them that the drugs belonged to the 2<sup>nd</sup> Appellant. The police asked the 1<sup>st</sup> Appellant to call the 2<sup>nd</sup> Appellant and request him to collect the drugs from his house situate at Utawala area. Before leaving the scene of recovery at Kenol, an inventory was prepared and photographs taken of the luggage and the recovered suspected narcotic drugs. The inventory and the photographs were produced into evidence. The 1<sup>st</sup> Appellant acceded to the request by the police. He called the 2<sup>nd</sup> Appellant to come to his house to collect the luggage. The police laid an ambush at the 1<sup>st</sup> Appellant's house. When the 2<sup>nd</sup> Appellant arrived, and collected the luggage, he was arrested by the police. The 2<sup>nd</sup> Appellant attempted to resist arrest. He was however overpowered. A CESKA Pistol and 14 rounds of ammunition was recovered from him.

After the recovery of the suspected drugs, the same were taken to the Government Chemist Department in Nairobi where PW6 Dennis Onyango, a Government Analyst, confirmed that indeed that the substance found in the bag was cocaine with a purity of 45%. He produced the report and memo form as exhibits in the case. The drugs were weighed. It was determined to be 3040.2grams. PW8 Chief Inspector Joshua Okallo, a Drugs Enforcement Office and a Gazetted Officer placed the market value of the narcotic drug to be Ksh 12,160,800/-. This was in accordance to **Section 86** of the **Narcotic Act**.

The CESKA Pistol that was recovered from the 2<sup>nd</sup> Appellant, was examined by PW5 SSP Lawrence Nthiwa, a Ballistics expert based at the DCI Headquarters. After test-firing the pistol, he confirmed that the pistol was a firearm within the meaning ascribed to the term in the **Firearm Act**. The ammunition could also be fired. He produced his reports as exhibits before the trial court. PW7 Chief Inspector Lilian Saka, a Forensic Crimes Scene Investigator, developed the CD into photographic prints that was availed to her by PW17. She produced the photographs thus developed as exhibits in the case. PW11 SSP Sammy Nyongesa attached to the Firearm Licensing Board, testified that he examined the firearm certificate that the 2<sup>nd</sup> Appellant claimed was issued by the board and confirmed that it was a forgery. He stated that the 2<sup>nd</sup> Appellant had no valid license to own a firearm. The Firearm Certificate produced by the 2<sup>nd</sup> Appellant as proof that he was a genuine holder of a firearm was examined by PW12 Inspector Vincent Chelongo, a document examiner, who confirmed that indeed the certificate was fake. PW13 John Ondiko, a government employee working at the Government Printer confirmed that the firearm certificate produced by the Applicant had not been printed at the Government Printer. It was therefore not authentic.

PW14 PC Everlyne Cherop based at the DCI Criminal Intelligence Unit, produced a log chart which showed that between the 12th May and 13<sup>th</sup> May 2017, the two Appellants had communicated via voice and SMS. This was prior to the arrest of the Appellants by the police. PW15 Anthony Wambugu, an Engineer working with Telkom Kenya confirmed that the 2<sup>nd</sup> Appellant had a mobile line from Telkom Kenya which was used in communicating with the 1<sup>st</sup> Appellant. Similarly too PW16 Vincent Mabu working with Airtel Networks Kenya as a Security Manager in charge of investigations, confirmed that the mobile phone number held by the 1<sup>st</sup> appellant was indeed registered to him. In the material period, he had communicated with the 2<sup>nd</sup> Appellant.

When the Appellants were placed on their defence, they denied being in possession or trafficking in the narcotic drugs. The Appellants admitted that they casually met in Addis Ababa in Ethiopia at the material time but denied that they were part of a drug trafficking syndicate. The 1<sup>st</sup> Appellant was emphatic that he was not aware of the drugs or the luggage that the drugs was recovered from. It was his testimony that the narcotic drugs was planted on him by the police.

On his part, the 2<sup>nd</sup> Appellant denied any connection with the narcotic drugs. He told the court that he had gone to the 1<sup>st</sup> Appellant's house on the material day after he (the 1<sup>st</sup> Appellant) had called him to seek his assistance in regard to a problem he had with the police. He disowned any connection with the luggage. As regards the CESKA Pistol and the ammunition, he was emphatic that he had a valid Firearm Certificate which was first issued to him in 2012. He had renewed the certificate annually until the time of his arrest. He denied the assertion by the Firearm Licensing Board to the effect that they had no records of having ever issued the Firearm Certificate to him. He attributed the failure to produce his records to poor record management at the Firearm Licensing Board. In that regard, the 2<sup>nd</sup> Appellant called DW2 Christine Wanjiru Wachira, an Administrative Manager at Kenya Bunduki Limited a company licensed to sell firearms. She confirmed that they sold the CESKA Pistol to the 2<sup>nd</sup> Appellant after they had confirmed that the Appellant had been issued with a Firearm Certificate. She confirmed this by making a call to the then Chief Licensing Officer. It was her evidence that the Firearm Certificate issued to the 2<sup>nd</sup> Appellant was genuine.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

**“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.**

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellants on the charges brought against them to the required standard of proof beyond reasonable doubts.

This court has carefully reevaluated the evidence adduced before the trial magistrate’s court in light of the submission made by the parties to this appeal. The main thrust of the Appellants’ appeal is that the prosecution failed to establish a nexus between the recovered narcotic drugs and themselves. The 1<sup>st</sup> Appellant was firm in his assertion that the bag that was recovered from the bus did not belong to him. It was his testimony that the only personal items he carried at the time were contained in a carry-on bag which he had with him at the time he was arrested by the police. The 1<sup>st</sup> Appellant disowned the bag stating that he had no knowledge of it. On its part, the prosecution presented evidence by the driver, the conductor and the loader (PW1, PW2 and PW3) of the bus who testified that upon embarking on the journey from Moyale, the 1<sup>st</sup> Appellant had a luggage which he labelled with his name. He further indicated the destination. It was apparent from the testimony of the three witnesses that the 1<sup>st</sup> Appellant interacted with them during the course of the journey. They were able to easily identify him. In fact, PW1 testified that the 1<sup>st</sup> Appellant, when they had a stop-over at Isiolo, requested him to stop at Githurai once the bus was about to reach its final destination at Nairobi. It was clear from the evidence adduced by the police officers from the Anti-Narcotics Unit who intercepted the bus, that they had obtained accurate and actionable intelligence which identified the 1<sup>st</sup> Appellant as a trafficker of the narcotic drugs from Ethiopia.

On the analysis of the evidence adduced, it was clear to this court the prosecution was able to establish to the required standard of proof beyond any reasonable doubt that the narcotic drugs were recovered in the luggage which the 1<sup>st</sup> Appellant had clearly labeled with his name and destination of the luggage. The evidence of PW1, PW2 and PW3 connects the 1<sup>st</sup> Appellant to the luggage. The 1<sup>st</sup> Appellant is the one who instructed PW2 to load the luggage into the luggage hold of the bus after he had marked it. The assertion by 1<sup>st</sup> Appellant that he had no knowledge of the luggage is therefore displaced by the strong, cogent, credible and collaborative evidence that was adduced by the prosecution witnesses.

The chain of custody of the narcotic drugs once it was recovered by the police was not interfered with until it was tested, weighed, and produced into evidence before the court. The prosecution was therefore able to establish to the required standard of proof, that the 1<sup>st</sup> Appellant was found in possession of the narcotic drugs in circumstances that clearly indicated that he had trafficked the same. The prosecution was also able to prove, to the required standard that the 2<sup>nd</sup> Appellant was the one who instructed and commissioned the 1<sup>st</sup> Appellant to transport the narcotic drugs from Addis Ababa Ethiopia to Nairobi Kenya. The prosecution was able to adduce evidence which established to the satisfaction of this court that the 1<sup>st</sup> Appellant travelled to Addis Ababa Ethiopia to obtain the narcotic drugs which he imported into the country for the purposes of distribution for profit.

From the time the 1<sup>st</sup> Appellant left Addis Ababa to the point where he was arrested, he was in constant communication with the 2<sup>nd</sup> Appellant. The testimony by the 2<sup>nd</sup> Appellant to the effect that he had no knowledge of the narcotic drugs is displaced by the fact that when he was called by the 1<sup>st</sup> Appellant to collect the narcotic drugs (the 1<sup>st</sup> Appellant was then under police custody at his house at Utawala), the 2<sup>nd</sup> Appellant went to the house and collected the narcotic drugs. He was arrested as he was attempting to get away from the 1<sup>st</sup> Appellant’s house. From the evidence adduced, the 2<sup>nd</sup> Appellant cannot deny that he communicated with the 1<sup>st</sup> Appellant for the sole purpose of ensuring that the 1<sup>st</sup> Appellant delivered the narcotic drugs to him.

The Court of Appeal in **Gabriel Ojiambo Nambesi Vs Republic [2007]eKLR** dealt with a case of a similar situation like the one present in this appeal. In that case, the Appellant was travelling in a bus which was stopped by the police. A search was conducted in the luggage hold of the bus and two nylon bags were recovered containing cannabis sativa, a narcotic drug. The police asked the passengers to identify their luggage after which the Appellants were arrested. On appeal, the question was raised whether the Appellants were in possession of the narcotic drugs while it was being transported in a bus. The Court of Appeal agreed with both the trial court and the High Court where it was established that the Appellants were the ones who loaded the luggage in the bus that the prosecution had established possession. The court held thus:

**“Thus, there were concurrent finding of fact, among other things, that the two appellants were jointly in possession of the bhang which they loaded in a Nairobi bound public vehicle which they also boarded. The findings of facts were amply supported by the evidence of Geoffrey and Eliakim. According to the evidence of Geoffrey, the two appellants stopped the bus near Bumala and each had a huge nylon bag and that no other passenger entered the bus after them. According to Eliakim, the two appellants stopped the bus between Matayos and Bumala and they had two pieces of luggage. He described in detail how he loaded their luggage in the left rear side of the boot. On our own analysis, we are satisfied that the concurrent findings of fact were based on ample and credible evidence.”**

In the present appeal, the circumstances described in the above case are similar to the above case pertaining to the case against the 1<sup>st</sup> Appellant. He cannot deny knowledge of the luggage yet PW1, PW2 and PW3 saw him load the luggage in the bus at Moyale. The chain of possession was not broken from the time the 1<sup>st</sup> Appellant boarded the bus at Moyale to the time he was arrested by the police at Kenol in Murang’a County. There was no evidence on record to suggest the bag was interfered with while on transit. That chain of possession

continued up to the time the 2<sup>nd</sup> Appellant sought to retrieve the narcotic drugs from the 1<sup>st</sup> Appellant's house at Utawala. That being the case, the Appellants' appeal against conviction on the charge of trafficking narcotic drugs lacks merit and is hereby dismissed.

As regards the firearm charges brought against the 2<sup>nd</sup> Appellant, it was the 2<sup>nd</sup> Appellant's case that he had the requisite firearm certificate to entitle him to hold the firearm that was found in his possession at the time of his arrest. According to the 2<sup>nd</sup> Appellant, he was issued with a firearm certificate in 2012 when he purchased the CESKA Pistol from a licensed firearm dealer. He produced a firearm certificate which in his testimony established his credentials as a lawful firearm holder. On its part, the prosecution proved to the satisfaction of this court that the firearm certificate that the 2<sup>nd</sup> Appellant produced before the court was not genuine it was fake. PW11, an Assistant Secretary at the Firearm Licensing Board, checked the records and confirmed that no such certificate was issued to the Appellant. He went ahead and stated that the certificate produced by the Appellant was an imitation or forgery. The certificate was examined by PW12 a Forensic Document Examiner who confirmed the certificate to be fake. PW13 an employee at the Government Press, where the firearm certificates are printed confirmed that the certificate in the 2<sup>nd</sup> Appellant's possession was not genuine as it did not originate from their office. That being the case, this court holds that the prosecution was able to establish to the required standard of proof that indeed the 2<sup>nd</sup> Appellant was found in possession of a firearm and ammunition without the requisite certificate as required under the **Firearm Act**. The 2<sup>nd</sup> Appellant's appeal challenging his conviction on those counts therefore has no merits and is hereby dismissed.

On sentence, it is trite law that this court cannot interfere with the exercise of sentencing discretion by a trial court unless it is established that the sentence was either manifestly excessive or the wrong principle was applied when the trial court was considering such sentence. This court is guided by the Court of Appeal decision of **Bernard Kimani Gacheru Vs Republic [2002] eKLR** where it was held thus:

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

In the present appeal, it was clear to the court that the sentence that was meted out by the trial magistrate was legal. However, the prosecution conceded that the custodial sentence meted on the 2<sup>nd</sup> Appellant was harsh and excessive. This court shall interfere with the sentence. In the circumstances therefore, the sentence of life imprisonment imposed on the 2<sup>nd</sup> Appellant is hereby set aside and substituted by the sentence of this court sentencing the 2<sup>nd</sup> Appellant to serve 20 years imprisonment with effect from 3<sup>rd</sup> July 2019. The 1<sup>st</sup> Appellant's sentence is hereby reduced from 15 years imprisonment to ten years imprisonment. This court took into account the fact that the 1<sup>st</sup> Appellant was a first offender and was a youth who appeared to have been misled into committing the offence. The other sentences were legal and shall continue to apply.

It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2020**

**HON L. KIMARU**

**JUDGE**