REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 47 OF 2019

JUMA RASHID MWAWANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate Court at Kwale Criminal Case No. 557 of 2016 by Hon. D. Nyambu (CM) dated 11th October 2013)

Coram: Hon. R Nyakundi

Mr. Mwongeka for Respondent

Mr. Odero for the Appellant

JUDGMENT

The Appellant was charged with three counts. On the first count, the Appellant was charged with 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 offence were that on 22nd May 2016 at about 0500hrs at Lunga Lunga border, Kwale County within Coast region, the Appellant was jointly found trafficking in narcotic drugs by transporting one kilogram of heroine valued at Ksh. 3,000,000/- in a motor vehicle registration No. KCC 875Z.

On the second count, the Appellant was charged with 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 offence were that on 22nd May 2016 at about 0500hrs at Lunga Lunga border, Kwale County within Coast region was found trafficking in narcotic drugs by transporting 124 grams of heroin valued at Ksh. 372,000/.

On the third count, the Appellant was charged with being in possession of narcotic drugs contrary to section 4(1)2(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on 22nd May 2016 at about 0500hrs at Lunga Lunga border, Kwale County within Coast region was found in possession of narcotic drugs to wit 124grams of heroin valued at Ksh. 372,000/-.

At the end of the trial, the Appellant was convicted and sentenced to 20 years imprisonment each on count 1 and 2 to run concurrently. He was further fined Ksh. 9,000,000/ on the first count and Ksh. 1,160,000/0 on the second count or in the alternative serve another year imprisonment.

Aggrieved by the sentence and the conviction of the trial court, the Appellant through his advocate on record, M/s Gunga & Co advocates lodged a petition of appeal on ten grounds which were to the effect that: -

1) ***The charge sheet was defective on both counts 1 and 2.***

2) ***The prosecution's evidence was riddled with grave discrepancies and material contradictions.***

3) ***The prosecution failed to call crucial witnesses.***

4) ***The learned honourable Magistrate introduced extraneous matters not adduced into evidence in her findings.***

5) ***The Appellant's defence was never considered.***

6) ***The prosecution's evidence was weak and grossly inadequate full of procedural gaps as no independent witnesses were called and that it was possibly a frame up.***

7) ***That the sentence was extremely harsh and excessive.***

Background

PW1 No. 71770 PC Isaac Muruiki was attached to Lunga Lunga CID performing general investigations and was the investigating officer. He stated that on the 21st May 2016 at around noon, **PW4** informed him of a tip from an informer that that two people were transporting narcotic drugs from Dar-es-salaam to Mombasa through Lunga Lunga. That on 22nd May 2016 at around 5am, a dark grey Toyota Vitz motor vehicle registration KCC 875Z arrived from Tanzania and parked at the custom yard where the Appellant and his co-accused entered the immigration office to clear.

That as the Appellant and his co-accused left the office, **PW1**, **PW3** and **PW4** intercepted them and informed them that they wanted to search their motor vehicle. That on searching the motor vehicle they found a black paper (Pexh3) with a consignment (Pexh4) in the glove compartment which they suspected to be narcotics. They took the Appellant and his co-accused to their offices where they conducted a body search and recovered 10 pellets of a brown substance (pexh5) hidden in the Appellant's private parts. They proceeded to prepare inventory (Pexh6) and search certificates (Pexh7a and b) which they signed together with the Appellant and his co-accused. **PW4** also prepared exhibit memos (Pexh 8a and b) for the consignment and pellets.

PW1 told the court that on the 23rd May 2015 in the company of **PW4** and the two suspects they took the consignment and pellets to the government chemist at Mombasa where they were weighed and sampled. He produced the certificate of weighing (Pexh11a and b) and certificate of Sampling (Pexh10a and b). He stated that the government chemist **(PW2)** analysed the exhibits and prepared his reports.

PW2 Yahya Hamisi Maingi was the duly gazetted government chemist. He told the court that on the 23rd May 2016 he received exhibits comprising of a transparent polythene bag containing 117 grams of whitish substance sampled from 1kg marked MF1. He tested the sample and found that it was heroin and he prepared his report (Pexh 9a). He also received 10 small polythene sampling bags containing 10.4gms of a brownish substance sampled from 10 pellets and conducted tests and established that the brownish substance was heroin and he prepared his report (Pexh 9b).

PW3 No. 46806 PC Kipsang Serem was attached to Lunga Lunga police station. He informed the court that on 21st May 2016 at around 11pm **PW4** informed **PW1** and himself of a Toyota Vitz registration KCC875Z headed from Dar-es-salaam that was ferrying heroin. That between 4 and 5am on the 22nd May 2015 the said vehicle drove up, parked and the occupants proceeded to go the immigration office. He reiterated the evidence of **PW1** save for the fact that he stood guard as **PW1** and **PW4** searched the vehicle where they recovered a black paper bag from the glove compartment, which they suspected to be narcotic drugs and that the 10 pellets were discovered in the Appellant's underwear. **PW3** was not involved in preparing the inventory and search certificates, nor did he accompany them when forwarding the narcotics to the government chemist.

PW4 No. 236740 Insp. Earnest Mua was based at Lunga Lunga DCI and the border together with **PW1** and **PW3**. It was his testimony that they had received information that the Appellant's co-accused was dealing in narcotics and that he had gone to Tanzania to fetch a consignment. He stated that they laid an ambush until at 4:30am when the Appellant and his co-accused drove up in motor vehicle registration KCC 875ZPW. **PW4** reiterated the evidence of **PW1**. He further stated that Inspector Mutiso valued the drugs and found them to have a street value of Ksh. 3,000,000.

At the close of the prosecution case, the Appellant and his co-accused were placed on their defence.

DW1 the Appellant gave a sworn statement and told the court that on the 22nd may 2016 he was travelling from Dar-es-salaam to Kenya in motor vehicle registration KCC875Z and that there were three people in it including himself. That near the Lunga Lunga-Horohoro border the third person alighted saying he had a stomach problem. That the Appellant moved from the back seat and sat at the passenger seat. That when crossed over to the Kenyan border a policeman asked them to stop and a group of 10 people inspected the car. That after 3-5minutes they did not find anything. They also searched the Appellant's bag but found nothing but he was arrested. He stated that at the police station one officer claimed that he had found something in his body. The Appellant stated that the one kilogram was never found on him and that the charges were false.

DW2 Mohammed Shaban Suleiman was the Appellant's co-accused and the owner and driver of the motor vehicle registration KCC875Z. He gave a sworn statement and told the court that on 20th May 2016 he travelled to Dar-es-salaam after he was hired by three people to ferry them to a wedding. That they arrived at 2am on 21st May 2016 and he rested. That on 22nd May 2016 when he was travelling back he carried a person he met at the wedding who offered to pay and he sat at the front passenger seat. **DW2** stated that he stopped at a petrol station where he met the Appellant and agreed to ferry him to Mombasa at a fee.

It was **DW2** evidence that when they reached the border, the 3rd person asked to alight claiming he had a stomach problem and that he would meet them at the immigration. **DW2** and the Appellant crossed over to the Kenya side at the border had their documents stamps. As they were going back to the car a police officer asked to inspect their vehicles. It was his testimony that a group of people came and searched for the vehicle with torches but found nothing. That after consulting with the police officers two people entered the front seats of the car and claimed they found something which they never showed **DW2.**

DW2 stated that the Appellant and he were searched but nothing was found on them but they were placed in the police cells. He stated that they were kept in the cells for 7days during which period they were beaten. **DW2** tried to explain about the third person but the police officers never took any action. He claimed that he was forced to sign a paper stating that something had been found in his vehicle. **DW2** refuted that the drugs were found in the car or on their person and stated that the charges were false.

Submissions

Appellant's written submissions

On appeal, the Appellant relied on his written submissions dated 30th January 2020 and filed on the 31st January 2020 and further submission dated 9th June 20202 and filed on the 12th June 2020. The Appellant submitted that the charge sheet was defective at it used the word transportation which is not an element of the offence of trafficking under section 4(a) of the NDPSCA. That the charge sheet was to general as it failed to specify in clear terms the act the Appellant had committed prejudicing the him as was held in **Barasa & Ano versus Republic (2007) 1 KLR 55** and **Wanjiku vs Repiblic (2002) KLR 825.** The Appellant faulted the trial Magistrate for misdirecting the interpretation of trafficking in her Judgement in finding that heroin had been conveyed from Tanzania to Kenya.

Secondly, it was the Appellant's submission that the prosecution case was riddled with discrepancies and inconsistencies. The Appellant faulted the storage of the exhibits claiming it was not clear who had stored the exhibits in the armoury and that samples that were delivered to the government chemist were packaged different from what was recovered during the search, casting doubt as to whether the exhibits were mishandled and interfered with. Reliance was placed on the case of **Wanjiku vs Republic (2002) KLR 825.**

Further, the Appellant submitted that the trial court failed to thoroughly analyse the defence case which he argued provided an honest version of events. Additionally, the Appellant faulted the trial Magistrate for failing to consider his mitigation and imposing a harsh and excessive sentence.

Finally, the Appellant submitted that the trial Magistrate failed to comply with the provisions of section 211(1) of the CPC infringing on his right to a fair trial as provided for in Article 50(2) (b) of the Constitution. He urged that the trial Magistrate ought to explain the substance of the charge in a language he understood as he was not conversant with English.

Respondent's submissions

The Respondent relied on its written submissions dated and filed on. In its submissions, the Respondent stated that the charge sheet was not defective, as the Appellant understood the nature of the charges facing him. The Respondent cited the case of **Mohamed Famau Bakari vs Republic [2016] eKLR** where the court found that Appellant was trafficking by transportation. On the issue of contradictions, the Respondent submitted that the chain of custody of the exhibits was well maintained and that **PW4** was the only one who handled the exhibits. It was urged that the prosecution's evidence was clear and credible that the narcotics were found on the Appellant's person and in the glove compartment of the motor vehicle he was travelling in.

Furthermore, the Respondent submitted that the trial Magistrate took into consideration the Appellant's in her defence and found it to be an afterthought. Finally, the Respondent urged that the sentence was commensurate to the nature of the offence taking into account the value of the drugs and prevalence of the offence.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and note issues for determination are whether the Appellant's rights were infringed, whether the charge sheet was defective, whether the prosecution proved its case against the Appellant and whether the sentence was excessive.

On the first issue, the Appellant contends that the charge sheet was defective as it used the term transportation which is not found under section 4(A) of the NDPSCA which states that ***"any person who traffics 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."***

Section 2 of the act defines "**trafficking**" as:

> **"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 –**
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> > **a) The importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence 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, or any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medial practitioner or veterinary surgeon or dentist or by any other 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 drugs or psychotropic substances by a registered pharmacist.

Dealing with the same issue in **Emmanuel Ochieng Awuondo alias Samuel Ochieng Otieno alias Ismael Odongo Ochieng & another v Republic [2016] eKLR** Omondi J held that: -

"38. The charge sheet here refers to transporting – I refer to past decision (see Wanjiru –vs- R (2002) 1 KLR 825, the court pointed out that the charge must specify clearly the conduct of an accused person which constitutes trafficking. I fail to detect the omissions alluded to which would render the particulars of the charge defective – the charge as drawn clearly conveys even to a lay person, and certainly to the persons charged that the element of trafficking in issue was transportation of the drug using a specific motor vehicle.

39. There was no embarrassment or confusion occasioned to the appellants in the manner the charge was drawn so as to make it difficult for them to prepare their defence. Conveying is an English word whose definition I shall refer to in the later part.

40. ....

41. The appellants now say that there is no word such as transport under the Act and the appropriate term ought to have been conveying.

42. Black's Law Dictionary Ninth Edition page 383 defines conveying as:-

"To transfer or deliver (something, such as... ppty ...) ... a means of transport, a vehicle."

The concise Oxford English Dictionary Twelfth Edition edited by Angus Stevenson and Maurice Waite page 313 defines convey as to transport or to carry to a place.

Section 2 of the Act defines conveyance to mean "any description used for the carriage of persons or goods and includes a vehicle." This is what has been referred to in the charge sheet.

43. I hold the view that the use of the word transport did not cause prejudice to the appellants so as to render the charge defective and they are simply splitting hours."

Similarly, in **Said Mohamed v Republic [2019] eKLR** I held that: -

"19. According to the charge sheet, the particulars of the offence that the Appellant was charged with indicates that the trafficking in narcotic drugs was by transporting it in a motor boat. Transportation can fall under "conveyance". Conveyance is part and parcel of transportation. Conveyance in the Act is defined as-

"a means of conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel."

20. Thus, conveyance and transportation therefore are interconnected. The prosecution in this case ought to have proved by way of evidence that the Appellant or his agents or servants was caught in the process of conveying the narcotics from point A to point B. in this case the conveyance was by boat."

Based on the foregoing it is evident that the Appellant was able to understand the charges brought against him with clarity and this ground fails.

On whether the prosecution proved its case, it is not disputed that the Appellant was travelling from Dar-es-salaam to Mombasa as a passenger in motor vehicle registration KCC 875Z and that he arrived at Lunga Lunga border on the 22nd May 2016.

On whether the narcotics were recovered from the motor vehicle and the Appellant's nether regions, it was the evidence of **PW1** and **PW4** that they searched the said motor vehicle and recovered a black polythene paper bag with a consignment that they suspected to be drugs from the glove compartment on the passenger side. **PW1** produced the search certificate(Pexh7b) and the inventory (Pexh6b) signed by the Appellant and his co-accused in support of their case.

In their defence the Appellant and his co-accused stated that the officers found the black polythene paper back in the car after they conducted

a second search though they claim that they were never shown what was recovered from the car. They further stated that they were forced to sign the inventory.

I have considered the evidence on record and there is no evidence that the Appellant was forced to sign the inventory or search certificate. This is underlined by the contrasting evidence of the Appellant and that of the co-accused. The co-accused stated that he had been beaten to the point that he was bleeding from the mouth while the Appellant never claimed to have been beaten raising doubts in the mind of the court. Additionally, there was there a dispute whether the said consignment was found in the glove compartment as the same was never put to the prosecution witnesses. The prosecution evidence was clear; there is no doubt that the said drugs was found in the glove compartment.

The only issue is whether the heroin recovered from the glove compartment belonged to the Appellant. In her Judgment, the trial Magistrate found that the narcotics belonged to the Appellant since it was found in the glove compartment located on the passenger's side while acquitting his co-accused. I find the benefit of the doubt given to the Appellant's co-accused was curious considering that he was the owner of the motor vehicle and at no one time did he part with physical possession of the motor vehicle. Additionally, the testimony of the co-accused was that the Appellant was sat at the back seat all the way from Dar-es-salaam to the border at Hororo where he switched seats after an alleged third party disembarked which corroborated the Appellant's own evidence. Moreover, it is highly improbable that the Appellant would be able to put a 1kg polythene bag in the glove compartment without the driver and the owner taking notice. Weighing the evidence of the Appellant against that of the co-accused, I find that the benefit of doubt should have been exercised in favour of the Appellant.

On whether the 10 pellets were discovered on the person of the Appellant, it was the evidence of **PW1**, **PW3** and **PW4** that when they conducted a body search, they discovered 10 pellets hidden in the Appellant's nether region/private parts. They produced the search certificate (Pexh 7a) and the inventory (Pexh6a). In his defence the Appellant stated that there was nothing found after the body search and was only informed later that drugs were found on him.

I have considered the evidence on record, there is nothing to rebut the evidence of the prosecution witnesses on record, the Appellant's defence is unsubstantiated and cannot displace the prosecution's evidence on record.

On whether the consignment and pellets found were narcotic drugs, **PW2**, the government chemist, told the court that he received a transparent polythene bag containing 117grams of a whitish substance. He analysed the sample using three techniques and established that it was heroin. He prepared his report (Pexh9a). Further, **PW2** received 10 small polythene-sampling bags containing 10.4grams of a brownish substance sampled from 10 pellets weighing 124grams. He analysed the samples using three techniques and establish that the samples were heroin and he prepared his report (Pexh9b). From the evidence on record, I find that the consignment and pellets were positively identified as heroin, a narcotic drug as specified in the first schedule of the NDPSCA.

Another ground raised by the Appellant was that the prosecution's case was riddled with inconsistencies and contradictions. The role of an appellate court in dealing with discrepancies was discussed by the Court of Appeal in **Naftali Mwenda Mutua v Republic [2015] eKLR** where it was held that: -

> ***"In Vincent Kasyla Kingo versus Republic Nairobi Criminal Appeal No. 98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See Josiah Afuna Angulu versus Republic CRA. No. 277 of 2006(UR) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellant's commission of the offence charged and proceeded to substitute conviction for the disclosed offence."***

In Jackson **Mwanzia Musembi Vs Republic (2017) eKLR** the Court of Appeal cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda, Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held that:

"with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case." (Emphasis mine)

In the present case, the Appellant submitted that **PW2**, the government chemist, received the exhibit for analyses in a transparent polythene bag which contradicted the evidence of **PW1**, **PW3** and **PW4** who testified that a black polythene bag was recovered from the glove compartment of motor vehicle registration KKC 875Z.

From the evidence on record **PW2** informed the court that he had sampled the 117grams from the 1kilogram in the black polythene bag and he prepared a certificate of sampling (Pexh10b). It is this 117grams that he received for analyses. This was corroborated by **PW4** who stated during cross-examination that he returned with the exhibits to the police station as the samples were left in the custody of **PW2** and returned at a later date.

Section 74A (1) of the NDPSCA outlines the procedure of handling seized narcotics drugs and it states that: -

> ***(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorised officers") shall, where practicable in the presence of —***
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> ***a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");***

b) a designated analyst;

c) the advocate (if any) representing the accused person; and

d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same. (Emphasis mine)

From a reading of the above section, it is evident that the sample in the transparent polythene bag was taken from the black polythene bag according to procedure laid out in statute and the Appellant's contention that there was a contradiction is not founded.

Furthermore, the Appellant submitted that there were material contradictions on the storage of the exhibits in the police armoury. It was his contention that **PW1** told the court that sergeant Muthisi was in charge of the armoury while **PW4** indicated that corporal Andawa was the officer in charge of the armoury.

I have considered the evidence of custody of the exhibits. **PW1** in cross-examination informed the court that it was **PW4** who stored the exhibits in the police armoury and that there was a steel box used to store sensitive items. **PW4** in his cross-examination stated that the exhibits were stored in the police armoury and that he was the one who handled the exhibits. At no point did either **PW1** or **PW4** state that the exhibits were handled by anyone else. It was the Appellant who inquired who was the in-charge of the police armoury during cross-examination of the witnesses.

Even if I was to assume that the in-charge of the police armoury was the one who stored the exhibits, the mere fact that **PW1** and **PW4** mention two different people is not fatal. This is because **PW4**, who had since been transferred from Lunga Lunga to Marsarbit stated that at the time of the arrest corporal Andawa was the in-charge. It is quite possible that corporal Andawa, being a police officer and subject to being transferred during his tenure of service, was transferred in the two years between the arrest and the date that **PW4** testified and that sergeant Muthisi was the new officer in-charge of the police armoury. In the event I was to find that there was a contradiction as to who was in charge of the police armoury, the same would me a minor contradiction that would not affect the substance of the prosecution case that the Appellant was caught trafficking narcotic drugs.

On compliance with section 211 of the CPC, it was the Appellant's submission that the trial Magistrate failed to read the substance of the charge to the Appellant and that the language used was English which he was not conversant with being a Tanzanian national.

The record shows that when the Appellant was put on his defence on 15th January 2018, the trial Magistrate indicated: -

Section 211 of the Criminal Procedure Coe explained to the accused persons who understand their rights as thereunder and opt to: -

1 Accused – sworn statement

However due to unavailability of the Appellant's counsel, the defence hearing was adjourned. On 2nd July 2018, when the matter was coming up for defence hearing, the record shows that Mr. Odero, counsel for the Appellant, informed the court that the accused persons would give sworn testimony with no witnesses.

Section 211 of the CPC states: -

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)

Various decisions of the courts have explained the import of the above section. The Court of Appeal in **Martin Makhakha v Republic [2019] eKLR** explained that: -

"19. The rights under section 211 of the CPC are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to appear on the court record. The accused is then called upon to proceed in the way he has elected."

In **DO v Republic [2020] eKLR** the Court of Appeal differently constituted stated that: -

"As regards the appellant's contention that he was not informed of his rights under Sec. 211 of the CPC, we find that nothing much turns on this. The record shows that the appellant made a sworn statement and although the record does not state that the appellant was informed of the 3 options in defending himself, he clearly opted to make a sworn statement of defence."

Similarly, the Court of Appeal in Kossam Ukiru v Republic [2014] eKLR pronounced itself thus: -

"15. The appellant also complained that the provisions of Section 211 of the Criminal Procedure code were not explained to him...

In our view, the appellant is hanging on straws. He was ably represented by counsel and unambiguously elected to give a sworn statement when the provisions of Section 211 were explained to him. After that statement, his counsel informed the trial court that that was the close of the appellant's case. We do not think that failure to record the exact words of Section 211 of the Criminal Procedure Code in any way prejudiced the appellant. There was, in our view, no failure of justice and the appellant's complaint in that regard lacks merit and we reject it."

Guided by the decision of the superior court and the record before this court, it is manifest that the Appellant elected to give a sworn statement being a clear indication that section 211 of the CPC was complied with.

The Appellant's further assertion that he was unable to understand his rights under section 211 of the CPC as it was explained in English is farfetched. As already shown earlier in this Judgment, the Appellant elected to give a sworn statement after the trial court had explained his rights. Additionally, from the trial court's record their court clerk, Mwero, was present in court and whose role was to interpret the proceedings from the language of the court to a language that the Appellant understood, in this instance Kiswahili. See **Mohammed Abdullahi v Republic [2019] eKLR.**

On whether the Appellant's defence was considered, it was the Appellant's defence that no drugs were found on his person and that he only changed seats at Hororo border on the Tanzania side after an unnamed third person, who was sat at the front passenger seat, alighted complaining of stomach problems before crossing over.

The trial Magistrate in her Judgement assessed the defence tendered and found it to be an afterthought intended to deceive the court. I have evaluated Appellant's defence and in agreement with the trial Magistrate. The Appellant's defence was raised late in the day as none of the issues in his defence was put to the prosecution witnesses to test their veracity. There is no evidence that at the time of his arrest the Appellant explained **PW1**, **PW3** and **PW4** the presence of a third party. The Appellant's defence despite being considered did not cast a shadow of doubt on the prosecution's case and was rightly dismissed.

On sentence, the Appellant has contended that the trial court did not consider his mitigation resulting to a harsh and excessive sentence being meted out. It is trite that sentencing is at the discretion of the trial court and an appellate court can interfere with the sentence where it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. See **Benard Kimani Gacheru vs Republic [2002] eKLR.**

During sentencing, the trial Magistrate considered the Appellant's consideration but found that the seriousness of the offence required a deterrence sentence. I have considered the Appellant's mitigation and the facts of the case on record. As earlier stated in this Judgement, I gave the Appellant the benefit of doubt for heroin in the black polythene bag found in the glove compartment. However, the prosecution proved that the Appellant was found with 10 pellets of heroin hidden in his private parts.

In the premises, I uphold the Judgment of the trial court and confirm the Appellant's conviction. The Appellant is acquitted on count one. However, he shall serve 7 years imprisonment with effect from the date of conviction in the trial court and shall pay a fine of Ksh. 1,160,000/- in count 2. The appeal partially succeeds.

Orders accordingly.

Right to 14 days.

Judgment delivered, dated and signed at Malindi this18th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mr. Onyango for the State