



**Muriithi v Republic (Criminal Appeal 9 of 2024)
[2024] KEHC 5083 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 9 OF 2024**

DR KAVEDZA, J

MAY 7, 2024

BETWEEN

DR. KINYUA MURIITHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against original conviction and sentence delivered by Hon. M.N Ogoro (R.M) on 18th August 2023 Milimani Chief Magistrate's Court Criminal Case no. E572 of 2021 Republic vs Kinyua Muriithi)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of carrying on the business of a Pharmacist in premises not registered by the Pharmacy and Poisons (4) Board C/S to Section 23(1) as read with Section 23 (6) of the Pharmacy and Poisons Act. The particulars of the offence were that on 26.3.21 at Watson Pharmacy located on an isolated plot in Kahawa Wendani, within Kahawa Wendani area, in Central region was found carrying on the business of a Pharmacist in premises which had not been registered by the Pharmacist and Poisons Board, otherwise in contravention of the aforementioned Act. After a full trial he was sentenced to serve three (3) years imprisonment.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In his amended petition of appeal dated August 31, 2023, he raised 12 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the sentence imposed was illegal and in contravention of section 333 (2) of the Criminal Procedure Code. In addition, the sentence imposed was manifestly harsh and excessive.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task



must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).

4. The prosecution called two (2) witnesses in support of their case. Inspector Elijah Mburu (PW1) of the Pharmacist and Poisons Board testified during the trial. He recounted receiving a call from a DCI Officer for technical support regarding a case. Acting on this, he proceeded to Kahawa Wendani to investigate Watson Pharmacy. Despite lacking any visible branding, the establishment held a business permit under the name of Watson Pharmacy. Upon inspection, PW1 discovered that the premises registration certificates of the appellant were expired. He proceeded to confiscate exhibits and documented them accordingly.
5. During cross-examination, the appellant's status as a registered pharmacist was acknowledged by PW1, but it was emphasized that the charges stemmed from operating in unregistered premises. It was clarified that the appellant's premises license had expired by December 31, 2017, and no 2018 license was obtained up to the time of arrest in 2021.
6. Police Constable Daniel Muiruri (PW2) stated that on March 26, 2021, he was summoned by his superior to the DCI and instructed to visit the appellant's pharmacy. Upon investigation, PW2 confirmed that the appellant lacked a valid premises license. Consequently, he completed a seizure form on that day and took the appellant into custody. He also corresponded with the CEO of the Pharmacist and Poisons Board, receiving confirmation that the appellant's premises were not registered. Under cross-examination, PW2 reiterated the appellant's status as a registered pharmacist, but clarified that the premises being operated from were not officially registered.
7. After close of the prosecution's case, the appellant was found a case to answer and was put on his defence. He gave sworn testimony and called one witness. Kinyua Muriithi (DW1) provided his testimony, attributing the charges against him to disputes with the Pharmacist and Poisons Board. He recounted the events of March 26, 2021, when PW1 and PW2 visited his premises and requested his practicing certificate, which he promptly provided. DW1 asserted that he had never been deregistered as a pharmacist. However, under cross-examination, he admitted that at the time of his arrest, he did not possess or display the required premises license.
8. DW2 Dr. Pius Masika, a pharmacist and colleague of the appellant, testified that on March 26, 2021, the appellant informed him of his arrest and subsequent detention at CID. Dr. Masika accompanied the appellant, PW1, and PW2 to the accused's pharmacy. He mentioned that the appellant showed him a letter from the Pharmacist and Poisons Board accusing him of insulting board officers on social media. Dr. Masika indicated that premises used to run a pharmacy are registered only once and not annually. During cross-examination, he admitted that the charges against the appellant pertained solely to the unlicensed premises and not to the appellant registration as a practicing pharmacist. He also acknowledged that the premises were registered only for the years 2016-2017.
9. The prosecution adduced evidence to the tune that the Appellant herein was found in the chemist by the pharmaceutical inspectors and the police officers and upon them requesting for the required operating licences from the Pharmacy and Poisons Board the Appellant she was unable to produce the same. The appellant did not dispute that he owned the pharmacy, and had not acquired the operating licence for 2018, 2019 and 2020 when he was arrested.
10. It is a fact that PW1 and PW2 were on a lawful course in inspecting outlets dispensing pharmaceutical drugs and that for such a business to operate as a Chemist in Kenya crucial documents and/or licences must be obtained from the Pharmacy and Poisons Board. PW1 and PW2 being Pharmaceutical Inspectors from the Board are charged with the duty of issuing licenses and had the requisite knowledge



and experience to reasonably interrogate any such documents which were not presented by the appellant.

11. In his defence, the appellant did not dispute that the premises were not registered. However, he maintained his innocence by trying to demonstrate his legitimate involvement in the pharmaceutical industry and adherence to regulatory guidelines.
12. Having considered the totality of the evidence presented before the trial court, I have applied the aforementioned reasoning and find that the Appellant was culpable for the offences charged. The conviction by the trial court was largely based on the understanding that the Appellant carried on the business of a pharmacy in premises not licenced for such a business. Indeed, it is not in dispute that the appellant was a licensed pharmacist. However, the premises under which he was operating the business was not registered according to the prosecution evidence as required under Section 23(1) *Pharmacy and Poisons Act* which provision states that:
 23. Premises to be registered
 - (1) It shall not be lawful for any person to carry on the business of a pharmacist except in premises registered in accordance with this section.
13. The above provisions are couched in mandatory terms. In criminal cases, the burden of proof lies with the prosecution. However, once that burden has been discharged, as in this case, the onus shifts to the accused to dislodge the prosecution's evidence (Section 111 of the *Evidence Act*). In such circumstances, the law deems it appropriate for the accused to confirm or deny the existence of those specific facts. (See *Woolmington V DPPC* (1935) AC 462 *Kioko R* (1983) KLR 289 and *Mbugua Kariuki R* (1976-80) KLR 1085) In this case, whether or not the premises were registered, was within the knowledge of the appellant. It was upon the appellant to provide evidence to prove the existence of this fact.
14. Counsel for the appellant has however argued at paragraph 44 of his submissions that the Pharmacy and Poisons Board created an impediment by increasing the registration fee from Kshs. 100 to Kshs. 10,000, hence, the failure by the appellant to comply.
15. At the outset, I wish to state that every professional organisation has its own regulatory mechanisms. In that regard, the role of the Pharmacy and Poisons Board (PPB) *inter alia*, is to implement the appropriate regulatory measures to achieve the highest standards of safety, by the laws regulating drugs in force in Kenya. Regulation involves monitoring which may be through physical inspection of premises. These activities cannot be done without resources, both human and financial. This may have informed the decision of the board to increase the registration fee from Kshs. 100 to Kshs. 10,000 per year.
16. While I may not be a scientist and with limited information in matters drugs and poisons, I cannot imagine a situation where premises dispensing drugs and poisons are not registered.
17. Importantly, the Kshs. 10,000 paid annually by pharmaceutical premises owners in my view, is meant to ensure realisation of the functions of the board which includes crackdown on quacks to ensure human safety. I would therefore be reluctant to agree that Kshs.10,000 per year is such a colossal sum that created a monumental impediment which led to non-compliance by the appellant.
18. Finally, there must be internal dispute resolution mechanisms available for the appellant to raise this issue. I do not think that, at the first instance, this court is the best forum to adjudicate this issue. The issue before this court is whether the appellant, a licensed pharmacist was found operating a



pharmaceutical business, in a premises that was not registered contrary to the law. As indicated herein, the issue is not in dispute.

19. For the foregoing reasons, the conviction of the trial court was therefore proper and is affirmed.
20. On sentence, the appellant challenged the sentence imposed as being harsh and excessive. Section 23 (6) of the *Pharmacy and Poisons Act*, Cap 244 provides as follows:

Any person contravening the provisions of subsection (1) of this section shall be guilty of an offence and shall be liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

21. During the sentencing proceedings, the court considered the mitigation and the applicable law. The sentence imposed was therefore legal. However, I find that the sentence was harsh and excessive since the trial court imposed the maximum sentence available and the yet the appellant was a first offender.
22. In the premises, I set aside the sentence of three (3) years imprisonment imposed by the trial court and substitute thereof with a fine of Kshs. 20,000 in default to serve three (3) months imprisonment.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Masika for the Appellant

Mr. Mutuma for the Respondent

Joy Court Assistant

