



**Ngarinda v Republic (Criminal Appeal 20 of 2023)
[2024] KEHC 5582 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 20 OF 2023
DR KAVEDZA, J
MAY 21, 2024**

BETWEEN

OBIOMA HARRISON IWUOFOR NGARINDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. L.O Onyina (C.M) on 27th July 2022 at JKIA Chief Magistrate's Court
Criminal Case No. E022 of 2020 Republic vs Obioma Harrison Iwuofor Ngarinda)*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of trafficking in narcotic drugs contrary to section 4 (a) of the *Narcotic Drug and Psychotropic Substances (Control) Act* No. 4 of 1994. He was sentenced to pay a fine of Kshs. 75,000,000 in default to serve 1-year imprisonment. In addition, he was sentenced to serve 25 years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence.
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 v Republic* [1973] EA 32).
4. The prosecution called eleven (11) witnesses in support of their case. Corporal Njeru Michuki (PWI) told the court that he is a police officer with the anti-narcotics unit at Jomo Kenyatta International Airport (JKIA). On October 7, 2020, while on duty with his colleagues Corporal Washiko (PW11) and PC Purity Wanja(PW2), they were alerted by Kenya Airports Authority (KAA) security staff



- around 9:30 PM about a suspicious passenger at the Terminal 1C departures screening point. The passenger, Iwuofor Ngarinda Obioma Harrison, a Nigerian national with passport number [particulars withheld], had two suspicious bags; one brown and one black.
5. PW 1 and Corporal Washiko (PW11) went to Terminal 1C, where KAA security staff pointed out the appellant and explained that the X-ray machine showed false bottoms in his bags. A multi-agency team, including KAA security staff, anti-narcotics police officers, and customs officers, assembled at the terminal. They escorted the appellant to the anti-narcotics office, where Corporal Washiko (PW11) searched the suitcases in his presence. PW1 and Inspector Daniel Kamuren (PW4) witnessed the search, which revealed false bottoms in both bags containing yellowish packages with a creamish substance suspected to be narcotics.
 6. PC Purity Wanja Kariuki (PW2) compiled an inventory, and the recovered items and the packages were handed over to Inspector Kamuren (PW4) for custody. The appellant was then taken to the JKIA police station for further action. During his testimony, Corporal Michuki identified the appellant's passport, the black bag, the brown bag, the yellow wrappings, and the packages of the suspected substance. He also noted that Harrison was traveling from Nairobi to Lagos via Addis Ababa and had a yellow fever card with the name Obioma Harrison Iwuofor, a requirement for international travel.
 7. On October 7, 2020, at Terminal 1C of Jomo Kenyatta International Airport (JKIA), both PW3, Esther Wafula, a security warden with the Kenya Airports Authority, and PW5, Denis Muli Nganu, a security supervisor, testified about an incident involving suspicious luggage. PW3 noticed two bags on the X-ray monitor displaying a dense orange substance. Despite emptying the bags, they remained heavy. PW5 called a multi-agency team, leading to the police taking the suspect, identified as the appellant, and the bags for further investigation. PW3 confirmed the appellant as the owner of the suspicious luggage. PW5 recounted that the bags were found with false bottoms, containing substances wrapped in yellow straps. The suspect was escorted to the anti-narcotics office for further processing.
 8. PW4, Inspector Daniel Kamuren, from the anti-narcotics unit at JKIA, testified about an incident on October 7, 2020. Around 10:00 PM, Corporal Luke Washiko (PW1) informed him of a suspect with two suitcases at Terminal 1C. At the anti-narcotics office, he found PW1 and other stakeholders with the suspect, who is appellant herein. Upon searching the suitcases, they discovered polythene-wrapped substances concealed in false bottoms. PW4 identified the suitcases and substances in court and noted that an inventory was signed by the suspect. The suitcases were stored securely, and the next day, the substances were weighed and sampled. PW4 identified the appellant as the suspect in the case.
 9. PW6, Margret Abae, the officer in charge of the anti-narcotics unit at JKIA, testified about events on October 8, 2020. Corporal Odhiambo requested her to weigh a suspected substance intercepted the previous night at Terminal 1C with suspect Harrison Obioma. Accompanied by PW4, they retrieved the two suitcases from the exhibit store. At the anti-narcotics office, they were joined by designated government analyst Denis Owino, scene of crime officer Corporal Derrick Kiprono, and anti-narcotics officers PC George Odhiambo and PC Alfrida Nora.
 10. PW6 explained the weighing procedure to the appellant. After removing substances from the suitcases, two packages in yellow wrappings were found. He weighed the empty packages, and then the substances with packages, recording net weights of Off1(d) at 4421.21 grams and OH2(d) at 4242.63 grams, totaling 8663.87 grams. The scene of crime officer documented the process, and PW6 prepared a Certificate of Weighing, signed by all present, including the appellant.
 11. PW6 also signed a Certificate of Sampling prepared by Owino. The exhibit was returned to the store, and samples were submitted to the government analyst. She wrote a letter to Ethiopian Airlines' security manager requesting Obioma's travel details, which were provided and dispatched to the anti-



- narcotics unit. She identified the weighed packages and testified about the weight of the samples taken by the government analyst, totalling 8.663.87 grams.
12. PW7, Chief Inspector Elizabeth Lumumba, attached to the anti-narcotics unit in the Nairobi Area, testified about events on October 8, 2020. She received a call from Corporal Luke Washiko (PW11) requesting a valuation of heroin weighing 8663.87 grams, valued at Ksh. 25,991,610. She arrived at this value by multiplying the weight by Ksh. 3000 per gram, the market value at the time. On February 2, 2021, PW1 presented a weighing certificate and government analyst report. The certificate indicated the weight of the substance and the analyst confirmed it as heroin, valuing it at Ksh. 25,991,610. PW7 prepared a Certificate of Valuation, produced as a prosecution exhibit.
 13. PW8, Denis Owino Onyango, a government chemist analyst, witnessed the weighing of a creamish granular substance on October 8, 2020. Samples totaling 5.95 grams were taken for analysis after preliminary tests indicated narcotics. On January 25, 2021, an exhibit memo referenced as Q82/2020 was prepared for the samples. Analysis using an ultra-violet visual spectroscopy machine confirmed the substance as heroin with 20% purity by weight. Onyango signed and sealed the Report of Government Analyst, presented as a prosecution exhibit.
 14. PW9, Chief Inspector Samson Ogutu, from the DCI's forensic unit, analysed CCTV footage retrieved from six cameras at JKIA, producing twenty-four still photographs and presenting them as prosecution exhibits. He supervised the process and provided a report and certificate, detailing his findings. This evidence was crucial in the case, offering visual documentation of the events under scrutiny.
 15. PW10, Corporal Derrick Kiprono, a scene of crime officer, documented the process of weighing suspected substances recovered from two traveling bags and a carry-on. On October 8, 2020, at 15:30 hours, he assisted Ms. Margret Abae at the DCI office. He took numerous photographs and produced them as prosecution exhibits, along with a certificate of documentation presented as a prosecution exhibit.
 16. PW11, Corporal Luke Washiko, the investigation officer, provided testimony consistent with other prosecution witnesses. He detailed his investigative role, including the collection of items from the accused and the preparation of relevant documents. His testimony provided critical insight into the investigation process and formed an integral part of the prosecution's case.
 17. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave sworn testimony and did not call any witnesses. In his testimony, the appellant stated that he travelled from Nigeria to Kenya for market research in 2020 and stayed for nine days before returning. At JKIA terminal 1C, a man claiming to be a security officer questioned him about his luggage, then proceeded to inspect it with two others. They allegedly destroyed the bag bottoms, accusing him of carrying something in his stomach. After a negative X-ray, they requested a urine sample, which he provided. Later, in an office, he claimed they falsely accused him, demanded money, and took him to a police station. He denied any involvement in trafficking of narcotic drugs. He also challenged the authenticity of evidence, and claimed coercion during the statement process. He expressed reliance on divine intervention and questioned the credibility of the security officer's testimony and the evidence presented.
 18. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the exhibits relied on by the prosecution failed the authenticity test. In addition, the investigating officer's chain of custody log produced was not adequate as the link between the narcotic substances and himself was never established. He maintained that he was not in possession of the grey suitcase where the narcotic drugs were allegedly found.



19. This court has re-evaluated the evidence adduced before the trial court, the Appellant's grounds of appeal as well as the rival parties' submission. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* provides as follows;

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

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

20. The term trafficking is defined in Section 2 of the *Act* 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...”

21. In *Gabriel Ojiambo Nambesi v Republic*, [2007] eKLR, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs. The court stated thus:

“It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.”

22. In this particular case, the prosecution contended that the appellant was involved in the trafficking of a narcotic substance. PW3 and PW5 who were security guards at the Airport, noticed an anomaly during the screening of the appellant's luggage. Upon a primary inspection of the two bags, nothing illicit was discovered. However, the empty bags were still heavy and it was noted that they had false bottom. Consequently, they referred the matter to their police officers for further action. Corporal Njeru Michuki (PW1) in the company of Corporal Washiko (PW11) received a call about suspicious luggage at JKIA. PW11 conducted a further search on the appellant's bags which were found to contain false bottoms. In the concealed sections, a creamish substance in a yellowish package was discovered. The substance was suspected to be narcotic. The search was witnessed by the appellant PW1 and PW4.

23. The weighing and sampling of the suspected narcotics were conducted by Margaret Abae PW6 in the presence of the appellant, the government analyst PW 8, and the crime scene officer PW10 who took photographs documenting the process.

24. On whether the substance recovered was narcotic, PW8, the government analyst testified that he conducted a preliminary test of the substance recovered from the appellant. The test confirmed that the creamish substance contained heroin with a 20 percent purity. The prosecution adduced evidence that established that the substance found in the appellant's possession was a narcotic substance within



the meaning ascribed to the term by Section 2(1) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* and the 1st Schedule thereof.

25. PW7 provided the valuation of the heroin weighing 8663.87 grams. The value was calculated at a market value of Kshs. 3000 per gram. He gave a valuation of Ksh. 25,991,610. PW9, Inspector Ogutu, confirmed the integrity of CCTV footage placing the appellant at the scene. PW11 Investigator Washiko detailed the events, presented an inventory, and introduced recovered items as evidence.
26. The chain of custody for the substances recovered in the case against the appellant is well-documented through the testimonies of various witnesses. PW2 prepared an inventory of the recovered items. PW4 took custody of the suspected narcotics for weighing and sampling. PW10, Corporal Kiprono captured photographic evidence, confirming the integrity of the weighing certificate during cross-examination. Chief Inspector Samson Ogutu, confirmed the integrity of CCTV footage placing the appellant at the scene. Finally, PW11, Corporal Luke Washiko the investigating officer, detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the appellant as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered from the appellant's possession.
27. The chain of custody of the exhibits was clearly explained by the prosecution witnesses. It is worth noting that the appellant never raised this issue with the prosecution witnesses as they testified. Given the well-corroborated evidence presented by the prosecution witnesses.
28. In his defence, the appellant maintained his innocence but did not dispute ownership of the luggage. The trial court considered his defence and found it to be baseless. Given the foregoing, I find that the appellant's statement in defence lacked credibility and did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating him from the offence.
29. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt that the appellant was travelling from Nairobi to Lagos via Addis Ababa. During the screening of his luggage which contained two bags, suspected narcotic substances were recovered. In addition, he was in possession of his passport, yellow fever card, and other travel documents. He also voluntarily signed the inventory of the recovered items produced as exhibits. Documentary evidence on record proved without a doubt that he was the owner of the luggage where narcotic substances were recovered.
30. There is no doubt in my mind, as I hereby find, that the appellant was the owner and or the one in control of the suitcase from which the narcotic drugs were recovered. I am further convinced that he intended to convey to his destination the said narcotic substances. The said narcotic drugs were duly weighed and found to be the value of a substance (heroin) weighing 8663.87 grams with a market value of Ksh. 25,991,610. All these factors put together convince this court that the prosecution duly discharged its burden and proved beyond any reasonable doubt that the appellant trafficked narcotic drugs. I agree with the trial magistrate on this finding.
31. On the sentence, the appellant was sentenced to serve 25 years imprisonment. In addition to pay a fine of Kshs. 75,000,000 in default to serve 12 months imprisonment. In the sentencing proceedings, the trial court considered that the appellant was a first offender, his mitigation, and the period spent in remand custody since his arrest before imposing the sentence.
32. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find that the



sentence meted out was lawful and in accordance with the trial magistrate's discretion. Although the sentence imposed by the trial court was lawful, I find that it was harsh and excessive.

33. The appeal on the sentence therefore succeeds. The sentence of 25 years imprisonment is hereby set aside and substituted with a sentence of fifteen (15) years imprisonment. The additional sentence of payment of a fine of Ksh. 75,000,000 in default to serve 12 months imprisonment is upheld. Consequently, the sentence is as follows:

- i. The appellant Obioma Harrison Iwuofor Ngarinda is sentenced to pay a fine of Kshs. 75,000,000 in default to serve 12 months imprisonment in accordance with section 28(2) of the *Penal Code*, Cap 63 Laws of Kenya.
- ii. In addition to the sentence in (I) above, the appellant Obioma Harrison Iwuofor Ngarinda is sentenced to serve fifteen (15) years imprisonment with effect from 9th October 2020, the date of his plea.
- iii. The sentences imposed shall run consecutively.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:-

Appellant present

Mr. Mong'are for the Respondent

Joy Court Assistant

