



**Mugo & another v Republic (Criminal Appeal E021 of 2024)
[2024] KEHC 12733 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E021 OF 2024
DR KAVEDZA, J
OCTOBER 23, 2024**

BETWEEN

JOSEPH MACHARIA MUGO 1ST APPELLANT

ANNE AKEYO MUSANDA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. C.M Njagi (PM) on 24th August 2023 at JKIA Chief Magistrate's Court Criminal Case no. 89 of 2019 Republic v Joseph Macharia Mugo and Anne Akeyo Musanda)

JUDGMENT

1. The appellants were charged with two counts of 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](#). After a full trial, the appellants were convicted of the two counts charged. In count I, they were each sentenced to pay a fine of Kshs. 2,301,840 in default to serve one (1) year imprisonment, in addition to serve an imprisonment term of two (2) years. In count II, they were each sentenced to pay a fine of Kshs. 1,000,000 in default to serve 1-year imprisonment, in addition to serve an imprisonment term of one (1) year.
2. Dissatisfied with the conviction and sentence, the appellants filed an appeal on 19th March 2024. In their petition of appeal, the appellants challenged the totality of the prosecution's evidence against which they were convicted. In addition, they contended that the trial court failed to consider their defence. They urged the court to allow this appeal, quash their conviction, and set aside the sentence imposed.
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 eight (8) witnesses in support of their case. PW1, Corporal Mohammed Guno from the Special Services Unit in Nairobi, recalled that on 14th June 2019, he received a tip-off of illegal trading at Kinoo Area. Subsequently, he in the company of his team was led by an informant to the appellants' residence, where he found both appellants together with a child who was getting ready for school. They identified themselves as police officers and proceeded to alert the Anti Narcotics Unit (ANU) team from Nairobi at around 9:30 am.
5. After searching the premises, they recovered a green sack containing 56 brooms of dry plant material, a cream powdery substance in the second appellant's bag, and cash amounting to Kshs. 43,660 in different denominations placed in various shopping bags under the mattress. Other recoveries were one broom of dry green plant material behind the co-driver seat of a motor vehicle registration number KCM 465X that was in the appellants' possession.
6. He prepared two inventories of the substances recovered, one for the substances found in the house and the other for the substances found in the motor vehicle. The two certificates were signed by all witnesses present except the appellants and they were produced as prosecution exhibits. On cross-examination, he stated that they recovered numerous dry brooms that were in both green and brown bags and that they were too many to count.
7. PW2, Joseph Mwangi stated that at the time of the tipping off and search, he had rented out his house to the second appellant in 2014. That she had been paying a rent of Kshs. 11,000. He produced the tenancy agreement to that effect. PW2 averred that he knew nothing of the case.
8. PW3, PC Dennis Fundi who was working at the Special Service Unit, recalled that he had accompanied PW1 and PW5 to the appellants' premises. His testimony corroborated that of PW1 and was able to identify the appellants herein as the persons arrested in possession of the suspected narcotics on their premises.
9. PW5, Corporal Nemuel Nyakundi testified that at the time of the tip-off, he working at the DCI ANU office in Nairobi. He recounted that he was part of the team that arrived at the appellants' house at 9:30 am after which they conducted a search of the premises. He corroborated the testimonies of the previous witnesses with regard to the substances recovered from the appellants' house.
10. PW7, Corporal Derricks Kiprono, documented the weighing and sampling of the suspected recovered narcotic substances by taking photographs of the same, which he adduced before court. He recalled that he took these photographs at the DCI ANU offices.
11. PW8, Corporal Caroline Karemba, who was attached to the DCI ANU Nairobi office, had accompanied the officers to the appellants' premises on the day of the search. She reiterated previously adduced evidence of the items recovered, and prepared exhibit memos of the same which she availed in court.
12. Additionally, she stated that she had obtained a copy of the sale agreement for the aforementioned vehicle from NTSA, which indicated that the car was owned by Rose Musanda, who signed as the purchaser in the presence of the second appellant who also signed. Aside from that, she recalled that the officers recovered various documents from the appellants' house, which include; a passport, mobile phones, the appellants' identity cards, a driver's license, ATM cards, and a request form from Sidian Bank.



13. PW4, Dennis Owino Onyango, an analyst with the Government Chemist Department, testified that after examining the creamish powdery substance, he discovered that it was heroin with a purity of 40%. Further, he discovered that the dry broom sticks were cannabis. He reiterated the testimony of both PW1 and PW3, stating that the appellants failed to sign certificates of weighing as drafted by PW1.
14. PW6, Chief Inspector Phillip Langat, stated that he was part of the officers who searched the appellants' premises. He suspected the creamish powdery substance to be narcotic in nature. Additionally, upon further investigation, he identified the creamish powdery substance as heroin valued at Ksh. 767,280, and the dry broom sticks at Ksh. 11,400, for which he prepared a valuation report.
15. The chain of custody for the substances recovered in the case against the appellants is well documented through the testimonies of various witnesses. 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 appellants' premises as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
16. On whether the substance recovered was narcotic, the government analyst Dennis Owino testified that she conducted a preliminary test of the substance recovered and later conducted a comprehensive test. The test confirmed that the creamish substance was heroin while the brooms recovered were cannabis. The prosecution adduced evidence that established that the substance recovered 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.
17. In the respective defenses, DW1, the first appellant, recounted that on the morning of the search at 7 a.m., he went to buy bread but returned home after realizing he had no money. On arrival, he found police officers, who claimed to be searching for a gun, rhino horn, elephant tusk, and cocaine. He said the officers assaulted him and his wife, covered their heads with yellow polythene bags, and took them to their bedroom. They later arranged for a taxi to take their child to school.
18. The first appellant averred that he believed that the officers were civilians as they did not identify themselves. They ransacked the house and found a sack containing sticks, powder, and Kshs. 43,000. He denied knowledge of the sack's contents and refused to sign the inventory. He claimed the money came from managing Sacco vehicles for his mother-in-law.
19. The second appellant confirmed her husband's account and added that the police acted unfairly, suspecting it was linked to workplace conflicts.
20. The trial court considered the respective defences tendered and found them to be incredible. After my independent appraisal of the evidence on record, I find that the PW1, PW3, PW5, and PW8 were consistent in their evidence regarding how the narcotics were recovered. In addition, the evidence of PW2 was not disputed that the premises where the narcotics were recovered were rented by the appellants and had therefore control over what was on the premises. In my view, the defence tendered by the appellants was properly dismissed by the trial court as an afterthought aimed at exonerating themselves from the offence.
21. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the two counts of offence charged. The conviction is therefore affirmed against the appellants herein.
22. On sentence, in count I, the appellants were each sentenced to pay a fine of Kshs. 2,301,840 in default to serve one (1) year imprisonment, in addition to serve two (2) years imprisonment. In count II, they were



each sentenced to pay a fine of Kshs. 1,000,000 in default to serve 1-year imprisonment, in addition to serve a further term of one (1) year. Cumulatively, they were each sentenced to serve a term of three years imprisonment.

23. In the sentencing proceedings, the trial court considered that the appellants were first offenders, the presentencing reports before imposing the sentence.
24. 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.
25. Notwithstanding the foregoing, I have thoroughly considered the pre-sentence report filed in this matter. From the report, it is evident that the appellants are husband and wife, and they have two minor children in their care and custody. One child is a pupil currently attending Grade Five, while the other is of tender age, being only two years old. These children, by virtue of their age, fall within the category of minors requiring care, protection, and guidance as contemplated under the *Children Act*. The report further discloses that the younger child is presently residing with the second appellant within the correctional facility, while the older child has been placed in a boarding school.
26. The sentencing policy guideline 2023, provides as follows:
 - 3.3.5 Non-custodial sentences – or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.
27. Having regard to the paramount principle of the best interest of the child, I deem it necessary that atleast one of the appellants' be considered for a non-custodial sentence. This is to ensure that the welfare and well-being of the children are adequately safeguarded. Such an approach will allow for continuous parental presence and care, ensuring the children's physical and emotional needs are adequately met. A non-custodial sentence would also mitigate the potential negative impact of the prolonged separation from both parents, thereby safeguarding the children's well-being in accordance with *the Constitution* and applicable statutory provisions.
28. In view of the foregoing considerations, I find that the second appellant, being the mother of the children, is best suited for a non-custodial sentence. This determination is guided by the recognition that the appellants' children are of tender years. Consequently, I hereby make the following orders:
 - i. The sentence imposed by the trial court against the first appellant Christopher Macharia Mugo is maintained in its entirety.
 - ii. The sentence imposed by the trial court against the second appellant Anne Akeyo Musanda is substituted with a probation order for a period of three (3) years.
 - iii. Additionally, the second appellant shall be subject to police supervision by the Anti-Narcotics Unit during the period under probation and shall report to the supervising authority every month.
 - iv. In the event the second appellant commits a related offence during her probation, she shall be re-arrested and required to complete the original sentence imposed by the trial court.
 - v. Motor vehicle registration number KCM 465X is hereby forfeited to the state.

Orders accordingly.



JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Ogutu for the Appellants'

Ms. Omurokha for the Respondent

Achode Court Assistant

