



REPUBLIC OF KENYA



KENYA LAW
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**Mahumbuka v Republic (Criminal Appeal E062 of 2021)
[2023] KEHC 552 (KLR) (Crim) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E062 OF 2021
CW GITHUA, J
FEBRUARY 1, 2023**

BETWEEN

MSAFIRI MUSA MAHUMBUKA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in JKIA Criminal Case
No. 139 of 2018 (Hon. C.M. Njagi (SRM)) dated 10th February 2021)*

JUDGMENT

1. The appellant, Msafiri Musa Mahumbuka, was tried and convicted of two counts with 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 (hereinafter the Act).
2. The particulars supporting the first count were that on 21st November 2018 at Tassia Estate within Nairobi County, jointly with others not before the court, the appellant trafficked by conveying in his rectum 73 pellets of a narcotic drug, namely, cocaine to wit 1360.96 grams, with a market value of Kshs.5,443,840 in contravention of the provisions of the [Act](#).
3. The particulars of the charge in count 2 were that on 21st November 2018, at Tassia Estate within Nairobi County, jointly with others not before the court, the appellant trafficked by conveying in his rectum, 5 pellets of a narcotic drug, namely, heroin to wit 81.84 grams with a market value of Kshs.245,520 in contravention of the provisions of the [Act](#).
4. Upon conviction, the appellant was in count 1 sentenced to pay a fine of Kshs.16,331,520 in default to serve 1 year imprisonment. In addition, he was sentenced to serve 20 years imprisonment. In count



- 2, he was sentenced to pay a fine of Kshs.736,560 in default to serve 1 year imprisonment. He was in addition sentenced to serve 20 years imprisonment. All the sentences were ordered to run consecutively.
5. Aggrieved by his conviction and sentence, the appellant proffered the instant appeal through his advocates, Messrs. Omondi Ogutu & Associates vide a petition of appeal filed on 15th July 2021. He relied on five grounds of appeal in which he complained that the learned trial magistrate erred in law and fact by convicting him on evidence which was inconsistent and insufficient to prove his guilt as charged beyond any reasonable doubt. He faulted the learned trial magistrate for relying on the evidence adduced by PW4 which, in his view, did not link him to the alleged offences.
 6. The appellant was also aggrieved that the learned trial magistrate failed to consider his defence and thereby shifted the burden of proof from the prosecution to him. He finally complained that the learned trial magistrate erred by meting out on him a harsh and excessive sentence. He prayed that his conviction be quashed and the sentences imposed by the trial court be set aside.
 7. At the hearing, the appellant was represented by learned counsel Mr. Ogutu. Both Mr. Ogutu and the respondent chose to prosecute the appeal by way of written submissions. The appellant's submissions were filed on 13th April 2022 while those of the respondent were filed on 27th June 2022.
 8. In his submissions, the appellant's learned counsel contended that the appellant was wrongly convicted as the evidence adduced by the prosecution was full of gaps and inconsistencies and did not meet the threshold of proof beyond reasonable doubt as required by the law. To expound on this submission, counsel averred that the investigating officers failed to adhere to the procedure set out in section 77 (1) of the *Act* regarding the seizure of suspected narcotic drugs or psychotropic substances in that according to the evidence of PW3, the seizure notice produced as Pexhibit 17 was prepared before and not immediately after emission of the suspected narcotic drugs.
 9. Counsel further averred that there were discrepancies regarding the colour of the alleged seized substances and whether the appellant was taken to hospital alone for an x-ray to be taken or whether he was in the company of other suspects. Counsel invited the court to note that although PW7's signature was on the weighing and sampling certificates, the witness denied being present when the seized substances were weighed and sampled.
 10. Relying on the authority of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR which highlighted the test to be passed by circumstantial evidence before it can form the basis of a conviction, counsel submitted that PW4's evidence did not directly connect the appellant to the charged offences. He urged the court to find merit in the appeal and allow it as prayed.
 11. The appeal is contested by the respondent. In her written submissions dated 8th June 2022, learned prosecution counsel Ms. Joyce Adhiambo supported the appellant's conviction and sentence. She submitted that the inconsistencies in the prosecution evidence alluded to by the appellant in his submissions were minor and immaterial and did not go to the root of the case. She asserted that the appellant was convicted on the basis of direct and not circumstantial evidence and that the said evidence proved the guilt of the appellant as charged beyond any reasonable doubt.
 12. On sentence, Ms Adhiambo argued that the sentence imposed by the trial court was lawful as it was in accordance with the law and urged this court not to disturb it. She instead invited the court to dismiss the appeal in its entirety for lack of merit.
 13. In support of its case, the prosecution called a total of eight witnesses. The brief facts of the prosecution case are that PW5, Sgt Alibashir Olow and PW8, Cpl Wyliffe Otando both police officers attached to the Directorate of Criminal Investigations (DCI) Anti-Narcotics Unit were on duty on 21st November



- 2018 at around 16:00 hours when they received a tip off that there were persons residing in a building located behind Tassia Police Post who were trafficking in narcotic drugs.
14. When approaching the identified building, they saw a lady alight from a taxi and was received by a gentleman who was at the gate of the building. PW5 and PW8 intercepted them and after introducing themselves and the purpose of their visit, the man who introduced himself as Richard Opondo led them to his house. In the house, they found Richard's wife and the appellant.
 15. Upon searching the house, no recovery was made of any narcotic substance. They however recovered the appellant's expired and valid passports which revealed that he was a Tanzanian national and he was set to travel to Hong Kong. The lady intercepted together with Richard, one Anita Ukondo was a Ugandan national and her passport indicated that she was due to travel to India. Richard was a Kenyan national. The two police officers decided to escort the three suspects to JKIA Anti-Narcotic Unit (ANU) offices for further investigations.
 16. On the following day, PW3 IP Luke Kinoti and PW8 among other Police officers escorted the appellant and the other two suspects to the National Spinal Referral Hospital for further investigations.
 17. According to PW4 Dr. Wendy Gecaga, a consultant radiologist in the hospital, an x-ray was done on the appellant's abdomen and the x-ray film was presented to her for interpretation. PW4 stated that the x-ray film revealed multiple shaped foreign items in the appellant's colon which looked like white pellets. She prepared her report which she produced as Pexhibit 13 and the x-ray film as Pexhibit 18. After the x-rays were done, the suspects were taken back to JKIA ANU offices for observation.
 18. PW1, Cpl Reuben Minialo, PW3 and PW8 who were the investigating officers in this case recalled that while at JKIA ANU offices between 22nd to 25th November 2018, they had the appellant under observation and they witnessed him emit from his anal orifice a total of 78 pellets suspected to contain narcotic drugs. They seized the pellets immediately they were emitted and prepared the requisite seizure notices which they produced in evidence.
 19. On 27th November 2018, PW2 Mr. Joseph Gitonga, a Government Analyst did sampling of the emitted 78 pellets which were presented in 78 small brown envelopes. On the same date, the pellets were weighed by PW3 and they weighed a total of 1442.8 grams. The sampling and weighing certificates were produced by PW2 and PW3 as pexhibits 9 and 11 respectively. Preliminary tests conducted by PW2 showed that 73 pellets weighing 1360.96 grams contained cocaine while 5 pellets weighing 81.84 grams contained heroin.
 20. PW2 recalled that he conducted a further and elaborate scientific analysis of the 78 recovered pellets after they were submitted to the Government chemist in small brown envelopes together with an exhibit memo form. After his analysis, he concluded that a whitish substance in 73 of the pellets was cocaine while the creamish/brownish substance in the remaining five pellets contained heroin which was 35% pure. He prepared his report which he produced in evidence as Pexhibit 8.
 21. The evidence on record shows that the recovered drugs were valued by PW6, C.I Elizabeth Lumumba, a gazetted proper officer appointed under section 86 (1) of the *Act*. According to PW6, the recovered cocaine had a total estimated value of Kshs.5,44,840 while the heroin had an estimated value of Kshs.245,520. After concluding his investigations, PW8 charged the appellant with offences subject of his conviction while he released Richard and Anita for lack of evidence.
 22. When put on his defence, the appellant elected to give a sworn statement and did not call any witness. In his statement, the appellant admitted that he was a Tanzanian national and that he was arrested in Richard's apartment on 21st November 2018 in a building which was behind a police station. He



denied having trafficked in narcotic drugs as alleged and claimed that he was a businessman dealing in spare parts, cars and cultural items; that he had gone to Richard's house on 20th November 2018 to do business and spent the night awaiting his flight to Hong Kong the following day. On 21st November 2018 police officers raided Richard's house and he was arrested. He was taken to JKIA Anti-Narcotics Unit offices where he was detained and was later charged with offences he had not committed.

23. As the first appellate court, I am duty bound to revisit the evidence adduced before the trial court and subject it to a fresh and exhaustive analysis in order to arrive at my own independent conclusion regarding whether or not to uphold the appellant's conviction and sentence. In doing so, I should remember that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses as they testified and give due allowance for that disadvantage. See: *Okeno v Republic* [1972] EA 32; *Kiilu & another v Republic*, [2005] eKLR.
24. After carefully considering the grounds of appeal, the evidence on record alongside the parties' rival written submissions, I find that only two key issues arise for my determination. These are:
- i. Whether the prosecution proved the guilt of the appellant as charged beyond any reasonable doubt;
 - ii. Whether the sentence imposed on the appellant was harsh and manifestly excessive in the circumstances of the case.
25. Before addressing the two main issues distilled above for my determination, I wish to briefly deal with the appellant's claim that the learned trial magistrate failed to adequately consider his defence and shifted the burden of proof from the prosecution to him.
26. A reading of the trial court's judgment clearly reveals that the learned trial magistrate gave due consideration to the appellant's defence but after comparing it with the evidence tendered by the prosecution, she concluded that the appellant's defence did not cast any doubt on the prosecution's case. There is no doubt that the learned trial magistrate fully appreciated the law on the burden and standard of proof and applied it before arriving at her conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt. Nothing therefore turns on that ground of appeal.
27. Turning now to the first issue, as stated earlier, the appellant was convicted in two counts with the offence of trafficking in narcotic drugs by conveying them in his rectum. 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...”
28. The Court of Appeal in *Gabriel Ojiambo Nambesi v Republic*, [2007] eKLR, when addressing the elements of the offence also addressed itself to the definition of the term “trafficking” and stated as follows:
- “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 clearly 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.” [Emphasis added]

29. In this case, the prosecution case is that the appellant was arrested in the company of two others by PW5 and PW8 in an apartment in Tasia Estate on suspicion of trafficking in narcotic drugs. On the day after his arrest, that is on 22nd November 2018, an x-ray of his abdomen taken at the National Spinal Referral Hospital revealed that he had foreign objects in his colon and later that day, he started emitting some pellets from his rectum and continued doing so under the observation of PW1, PW3 and PW8 till 25th November 2018. By the end of this period, he had emitted a total of 78 pellets which PW2 confirmed contained narcotic drugs.
30. Although the appellant denied having committed the offences facing him before the trial court, he did not expressly deny having signed the observation sheets and seizure notices which were prepared by PW1, PW3 and PW8 after each emission. These documents corroborated PW1, PW3 and PW8’s evidence that the appellant actually emitted the 78 pellets from his rectum during the period in question meaning that he was conveying them in his rectum before he was arrested. The appellant’s denial in his defence when weighed against the evidence adduced by the prosecution is clearly unworthy of belief.
31. I must say at this juncture that I have noted the discrepancies in the evidence adduced by some prosecution witnesses which were pointed out by the appellant in his submissions. In my considered view, the discrepancies were minor and immaterial and did not adversely affect the prosecution case. As submitted by Ms. Adhiambo for the respondent, the discrepancies did not go to the root of the case. I am guided in making this finding by the Court of Appeal’s decision in *Richard Munene v Republic*, [2018] eKLR where the Court observed as follows with regard to contradiction or inconsistency in the evidence of prosecution witnesses:

“ ... Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.... ” See also : *Philip Nzaka Watu v Republic*, [2016] eKLR,;

32. In view of the foregoing, I find no reason to fault the learned trial magistrate’s finding that the prosecution in this case proved the guilt of the appellant as charged in count 1 and count 2 beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted.
33. On the appeal against sentence, the appellant complained that the sentence passed by the trial court was harsh and excessive and ought to be set aside.
34. The Court of Appeal in *Robert Mutungi Muumbi v Republic*, [2015] eKLR cited with approval its previous decision in *Bernard Kimani Gacheru v Republic*, [2002] eKLR where it held thus:

“It is now settled law, following several authorities by this Court and by 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 sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that



the trial court overlooked some material factor, or took into account, some wrong material, or acted on a 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 sentence unless, anyone of the matters already stated is shown to exist.”

35. Section 4 (a) of the Act provides for a penalty of a fine of Kshs.1,000,000 or three times the market value of the trafficked narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life.
36. The trial court’s record shows that in sentencing the appellant, the learned trial magistrate considered his plea in mitigation; the fact that he was a first offender; the penalty prescribed by the law for the offence and the Judiciary’s Sentencing Policy Guidelines. The trial court also took into account the nature, quantity and value of the drugs in question. There is no indication in the court record that the learned trial magistrate applied wrong legal principles or considered extraneous factors in sentencing the appellant.
37. Considering the value of the drugs as certified by PW6 and the penalty prescribed in section 4 (a) of the Act, it is my finding that the sentence passed against the appellant in each count was lawful as it was in accordance with the law. I say this because it is now settled law that the prescription of life imprisonment as one of the punishments for the offence of trafficking in narcotic drugs was a maximum and not a mandatory sentence and trial courts retained discretion to impose lesser sentences depending on the circumstances of each case. See: Mobamed Famau Bakari v Republic, [2016] eKLR and Caroline Auma Majabu v Republic, [2014] eKLR.
38. The sentences of 20 years imprisonment imposed on the appellant in each count in addition to payment of the respective fines was therefore lawful. Considering the nature and quantity of the drugs and the manner in which the appellant was trafficking them, I am satisfied that the sentences were not manifestly harsh or excessive. I therefore find no reason to disturb the sentences imposed in each count save for the trial court’s order that the sentences, including the additional sentences of twenty years imprisonment should run consecutively.
39. Although the learned trial magistrate had discretion under section 14 of the Criminal Procedure Code to order that the sentences run consecutively, the Court of Appeal in the case of Peter Mbugua Kabui v Republic, [2016] eKLR gave guidance on the exercise of the said discretion and stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”
40. In the instant case, the offences charged in the two counts were committed in the course of the same transaction and the learned trial magistrate ought to have taken this into account and ordered that the additional sentences will run concurrently.
41. In addition, the trial court record shows that in sentencing the appellant, the learned trial magistrate did not comply with section 333 (2) of the Criminal Procedure Code which requires courts to take into account the period a convict had spent in lawful custody prior to the date of sentence. This was an error on the trial court’s part. The court record further reveals that the appellant was in remand custody throughout the trial and this period ought to have been factored into his sentence.



42. The upshot of this judgment is that the appellant's appeal against his conviction is hereby dismissed but his appeal against sentence succeeds to the extent that the order of the trial court that the additional term of 20 years imprisonment imposed in each count shall run consecutively is set aside. It is substituted with an order of this court that the sentences will run concurrently and that they will take effect from the date of the appellant's arrest, which is November 21, 2018.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2023.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ogutu for the Appellant

The appellant

Ms. Ntabo for the respondent

Ms. Karwitha Court Assistant

