Ali & another v Republic (Criminal Appeal E051 of 2021)
[2023] KEHC 2501 (KLR) (Crim) (20 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E051 OF 2021

JM BWONWONG'A, J

MARCH 20, 2023

BETWEEN

YUSSUF BILAL ALI ..... 1ST APPELLANT

HUSSEIN HASSAN IBRAHIM ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeals from the judgement delivered on 27th May 2021 by Hon.C.M, Njagi SRM, in JKIA Chief Magistrate's Court in Criminal Case No. 63 of 2019 Republic vs Yussuf Bilal Ali and Hussein Hassan Ibrahim))

The law as regards the sentence of a fine for trafficking narcotic drugs should be amended for it to be determined through the system of weighing the drugs

Reported by Kakai Toili

Evidence Law *- admissibility of evidence - hearsay - admissibility of evidence from informers and intelligence officers - whether the evidence of the monetary value of the narcotic drugs from informers and intelligence officers who did not testify in court was admissible - whether informer privilege was absolute - Penal Code (cap 63), section 28; Narcotic Drugs and Psychotropic Substances (Control) Act (cap 245) section 4(a).*

Criminal Procedure *- sentencing - sentencing discretion of a trial court - under what circumstances could an appellate court interfere with the sentencing discretion of a trial court - what were the purposes of issuing sentences?*

Criminal Law *- sentences - sentencing for the offence of trafficking narcotic drugs - considerations related to sentencing for the offence of trafficking narcotic drugs - whether the law should be amended to allow for the sentence to be based on the weight of the drugs in question as opposed to the monetary value of the drugs - Narcotic Drugs and Psychotropic Substances (Control) Act (cap 245) section 4.*

Brief facts

The instant appeal arose from the appellants' convictions for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act. Upon conviction, the trial court sentenced each appellant to thirty-five years' imprisonment and imposed a fine of Kshs 37,350,000, with a default sentence of one year's imprisonment pursuant to section 28 of the Penal Code.

The prosecution's case was that, acting on a tip-off from an informer, police officers intercepted a motor vehicle transporting narcotic drugs and arrested the appellants, who were both occupants of the vehicle. The 1st appellant testified in his defence that he had been engaged by a friend to drive the vehicle from Bute to Nairobi, claiming he was unaware of the contents of the vehicle. He stated that upon checking, he found nothing suspicious inside. He further testified that he invited the 2nd appellant to accompany him on the journey to Nairobi, where the vehicle was to be delivered to its owner.

The appellants' appeal challenged both the conviction and sentence. They contended, among other grounds, that the trial court erred in law and fact in imposing a sentence of thirty-five years' imprisonment and a fine of Kshs 37,350,000, arguing that the sentence was harsh and manifestly excessive. Additionally, they claimed the trial court erred by convicting and sentencing them despite the prosecution's evidence—when read and analyzed in totality—allegedly implicating persons other than the appellants in the commission of the offence.

Issues

i. Whether the evidence regarding the monetary value of the narcotic drugs obtained from informers and intelligence officers who did not testify in court was admissible.

ii. Under what circumstances may an appellate court interfere with the sentencing discretion exercised by a trial court?

iii. What is the underlying purpose of criminal sentencing in law?

iv. Whether the privilege accorded to informers is absolute in nature.

v. Whether the law ought to be amended to provide for sentencing in the trafficking of narcotic drugs based on the weight of the drugs rather than their monetary value.

Held

1. The 1st appellant was in control of the motor vehicle and had knowledge of the consignment he was transporting to Nairobi, having inspected the vehicle prior to departure. He was therefore engaged in conveying the narcotic drugs. Under the Narcotic Drugs and Psychotropic Substances Control Act, trafficking may be established by proof of any one of the enumerated acts, including sale, purchase, or supply. The prosecution proved all essential elements of the offence beyond reasonable doubt.
2. The sentence of a fine under the Narcotic Drugs and Psychotropic Substances Control Act was determined by the monetary value of the narcotic drugs. The investigating officer (PW4) testified that the valuation was based on market forces and intelligence information. However, the evidence he relied upon—sourced from informants and intelligence officers—was inadmissible hearsay.
3. The prosecution ought to have called the informant and intelligence officers as witnesses to testify on the valuation of the narcotic drugs. Intelligence information, without conversion into admissible evidence, could not be relied upon in court, pursuant to the hearsay rule.
4. PW4 explicitly declined to disclose the identity of his sources. As a result, the monetary value of the narcotic drugs was not proved. That failure directly affected the imposition of the fine. Accordingly, in the absence of admissible evidence of value, no fine could lawfully be imposed on the 1st appellant.
5. In addition to a fine, the penalty provision allowed for life imprisonment. In mitigation, the 1st appellant was a first-time offender, a young man, and the sole provider for his wife and two children. His role was secondary, limited to transporting the drugs. The quantity of the drugs, however—415,000 grams—necessitated a deterrent sentence. Sentencing remained a matter within the trial court's discretion, and appellate interference was warranted only where the court proceeded on wrong principles or imposed a manifestly excessive sentence.

6. Sentencing served the purposes of deterrence, incapacitation, and rehabilitation. A key consideration was the possibility of reform. In line with section 333(2) of the Criminal Procedure Code, the court properly considered the period the appellant had spent in custody when passing sentence.
7. The trial court imposed a sentence that was manifestly excessive in the circumstances. The fine of Kshs. 37,350,000 was based on inadmissible hearsay and an unverified valuation multiplied by three, contrary to the law. The trial court erred in this regard. As for the 2nd appellant, his defence was plausible, and the prosecution failed to prove his guilt beyond reasonable doubt.
8. The sentencing provisions under the Act should be amended to base fines on the weight of the narcotic drugs, measured in grams or kilograms, rather than on market value. The current valuation method—based on fluctuating market dynamics—often forced reliance on undercover operations and informant evidence, which may be inadmissible if informer privilege was invoked.
9. Best investigative practices in such cases would involve the use of undercover agents to establish the market value of narcotics. However, such operations were costly and would still necessitate the disclosure of informant identities in court, particularly where their testimony was crucial to establishing the innocence of an accused person.
10. Informer privilege was not absolute. It was for that reason that the use of undercover police agents was suitable in ascertaining the market price of the narcotic drugs, and whose evidence would be directly admissible. Nonetheless, such operations presented risks and challenges, including operational missteps, as illustrated by a reported case in New York where two undercover agents inadvertently arrested each other during a sting operation.

1st appellant's appeal against conviction dismissed; 2nd appellant's appeal allowed.

Orders

i. *The sentence imposed upon the 1st appellant was quashed and in its place a sentence of eleven years imprisonment to run from the date of his conviction was imposed.*
ii. *The conviction and sentence recorded against the 2nd appellant were quashed and he was set free unless he was held on other lawful warrants.*

Citations

Cases

Kenya

1. *Arog, Yussuf Dahar v Republic* Criminal Appeal 110 of 2006; [2007] KEHC 3747 (KLR) - (Explained)
2. *Gacheru, Bernard Kimani v Republic* Criminal Appeal 188 of 2000; [2002] KECA 94 (KLR) - (Explained)
3. *Ireri, John Kariuki & another v Republic* Petition 88 of 2020; [2021] KEHC 7187 (KLR) - (Explained)
4. *Republic v Jayani & another* [2001] KLR 593 - (Applied)

Regional Court

Okeno v Republic [1972] EA 32 - (Explained)

Statutes

Kenya

1. Criminal Procedure Code (cap 75) section 333(2) - (Interpreted)
2. Evidence Act (cap 80) section 132 - (Interpreted)
3. Narcotic Drugs and Psychotropic Substances (Control) Act (cap 245) sections 2, 4(a)- (Interpreted)
4. Penal Code (cap 63) section 28 - (Interpreted)

Advocates

Ms Mohamed h/b for *Mr Lakicha* for the appellants
Ms Joy Adhiambo for the respondent

JUDGMENT

1. The appellants have appealed against their convictions and sentences of thirty-five years imprisonment and in addition to a fine of Kshs 37, 350,000/- in default one-year imprisonment as decreed by section 28 of the *Penal Code* (cap 63) Laws of Kenya, in respect 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.

2. Both custodial sentences were ordered to run consecutively, which translates to a sentence of thirty-six years imprisonment.

3. Therefore, the total custodial sentence is 36 years imprisonment for each appellant.

4. Counsel for the appellants has filed seventeen (17) grounds of appeal.

5. In ground 1 the appellants have stated that the trial court erred in law and fact by imposing a thirty five (35) years sentence and a fine of Kshs thirty seven million three hundred fifty thousand (Kshs 37, 350,000/-) in default to serve one year imprisonment; which is harsh and manifestly excessive.

6. In ground 3 the appellants have stated that the trial court erred in law and fact in convicting and sentencing the appellants notwithstanding that the evidence tendered by the prosecution witnesses read and analysed together pointed to perpetration of the crime by persons other than the appellants.

7. For convenience, I will start with ground 3. Counsel for the appellants submitted based on *Okeno v Republic* (1972) EA 32 that this being a first appeal, this court has to re-assess the evidence afresh bearing in mind that this court did not see and hear the witnesses testify, and should give allowance for that. Counsel further submitted that the trial court knew that the appellants were mere conveyers of the consignment of the narcotic drugs.

8. Furthermore, counsel submitted that C I Philip Langat (Pw 4) confirmed that the owner of the drugs was one Yussuf Mohamed Kiya, who is still at large. Pw 4 testified that they are still tracing him.

9. Additionally, Boniface Mwenda Kimathi (Pw 6) also confirmed that Yussuf Mohamed Kiya, hired the subject motor vehicle from him (Pw 6).

10. In response to the foregoing, the prosecution submitted that they produced cogent and corroborative evidence that the appellants were found trafficking in narcotic drugs.

The Evidence for the Prosecution

11. The prosecution evidence through Sgt Robert Amke (Pw 1) in this regard was that the police acting on information from an informer intercepted motor vehicle registration No KBJ 502E, which was found carrying the narcotic drugs. It is from this vehicle that they recovered narcotic drugs and they arrested the appellants, who were the occupants of the said vehicle.

12. Dennis Owino Onyango (Pw 7) analysed these narcotic drugs and found them to be bhang. These drugs weighed 415,000 grams whose market value was Kshs 12, 450, 000/-.

13. According to the Evidence of C I Philip Langat (Pw 4), who was the investigating officer, the market value of the said narcotic drugs was Kshs 12, 450, 000/.- In respect of the value of the narcotic drugs, Pw 4 testified that:

> " I prepared a certificate of valuation. Gazette Notice No 9805 of 20/9/2017 I did a valuation certificate. The value came to Kshs 12,450,000/-." Pw 4 the produced a certificate of valuation as exhibit P 11 (a) and the Gazette notice was produced as exhibit Pex 11 (B).

14. In cross examination Pw 4 testified that he had been in the anti-narcotic unit for 18 years. Pw 4 also testified that the source of his pricing (valuation) was from informants. In his own words, he testified that:

> " No shop written bhang sold here and pricing. I get the information from my informants and sources. I work with intelligence reports which I can't reveal. No set amount of costs of bhang. It depends with supply and demand. Prices vary."

The Evidence for the Defence

The 1st appellant gave sworn testimony denying the offence.

15. He testified as follows. He has two wives. One lives in Nairobi and another in Wajir. On May 7, 2019 he travelled from Wajir to Bute. He was offered a job to drive the vehicle from Bute to Nairobi by his friend Abdi Adan. Abdi Adan told him that Yusuf Mohamed needed a driver. He testified that he never saw Yusuf Mohamed. He did not know what the vehicle was carrying. He checked the inside of the vehicle. There was nothing. He was paid Kshs 10,000/- for bus fare and fuel costs.

16. The 1st appellant asked the 2nd appellant to accompany him to Nairobi for the trip. He also testified that he was arrested on May 9, 2019 and was not told why he was arrested.

17. In cross examination the 1st appellant testified that he was driving the vehicle to Nairobi to deliver it to the owner (Yusufu Mohamed Giye).

18. The 2nd appellant also testified on oath and told the court as follows. His mother lives in Langata and his wife lives in Nairobi. He is a turn boy. He asked for a lift from the 1st appellant to Nairobi. He wanted to come to Nairobi to look for a job and to see his wife. The vehicle was at Bute. They checked the vehicle's oil and tanks and proceeded to travel to Nairobi. He was arrested with the 1st appellant in Nairobi and taken to Kasarani police station.

Analysis and Findings

19. I have re-assessed the entire evidence as required of a first appeal court by the persuasive decision in *Okeno v Republic*, supra. As a result, I find that the two appellants were arrested in Nairobi with the 1st appellant being the driver of the subject motor vehicle. The 1st appellant was in the company of the 2nd appellant in the subject motor vehicle.

20. The law requires that I re-assess the evidence against each appellant. I find that the 1st appellant was the driver. Before they left Bute the 1st appellant checked inside the motor vehicle. He also checked the water and the oil. After doing so, they left for Nairobi.

21. I find from the evidence that the 1st appellant was in control of the subject motor vehicle. I further find that he knew what he was carrying, which was to be delivered to Nairobi; since he checked the inside of the motor vehicle, before departure.

22. The issue as to whether he was trafficking in narcotic drugs lies in the definition of that term. The term trafficking in section 2 of the *Narcotic Drugs and Psychotropic Substances (Control) Act* is defined as follows:

> "trafficking" means 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,...."

23. I find that the 1st appellant was conveying the consignment of the drugs to Nairobi. I further that an accused person may commit the offence of trafficking by proving any one of the modes of commission as specified in the definition section of the act.

24. Prove of one element such as sale, buying or supplying amounts to trafficking in narcotic drugs.

25. After re-assessing the entire evidence, I find that the all the ingredients of trafficking in narcotic drugs were proved beyond reasonable doubt.

26. The 1st appellant's appeal against conviction fails and is hereby dismissed for lacking in merit.

On Sentence

27. The sentence of a fine to be imposed upon a convicted person depends on the value of the narcotic drugs. I find from the evidence of C I Philip Langat (Pw 4) that the monetary value of the narcotic drugs depends upon market forces. Furthermore, the sources of his own valuation is from informants (informers) and intelligence. This is clear from his evidence in which he testified as follows:

> "No shop written bhang sold here and pricing. I get the information from my informants and sources. I work with intelligence reports which I can't reveal. No set amount of costs of bhang. It depends with supply and demand. Prices vary."

28. It is clear from the foregoing passage that the evidence of C I Philip Langat as regards the monetary value of the narcotic drugs is inadmissible hearsay evidence. The prosecution should have called the informant as a witness to testify as to the value of the narcotic drugs.

29. Furthermore, the prosecution should have also called as witnesses the intelligence officers as witnesses in relation to the value of the narcotic drugs. Intelligence sources only provide information for further investigations. If the intelligence cannot be converted into admissible evidence, it cannot be used in court as evidence due to the rule against hearsay evidence.

30. Pw 4 testified that he was not ready to reveal the identity of his sources.

31. It therefore follows that the monetary value of the narcotic drugs was not proved. This has definitely affected the sentence of the fine imposed upon the 1st appellant.

32. Consequently, I am unable to impose any sentence of a fine upon the 1st appellant in the absence of the monetary value of the narcotic drugs.

33. In addition to a sentence of a fine, the penalty provision also provides for a sentence of life imprisonment. In this regard, the mitigation of the 1st appellant was that he was a first offender. He the sole provider of his family of two children and a wife. The role of the 1st appellant is secondary for he

only conveyed drugs of one Yusuf Mohamed Kiya. I have not lost sight that the drugs that were being conveyed was a huge quantity weighing 415,000 grams.

34. I have considered the need for a deterrent sentence and the need to have the 1st appellant reformed in view of his young age.

35. I have also borne in mind that sentencing is a matter for the discretion of the trial court, according to *Bernard Kimani Gacheru v Republic* [2002] eKLR and an appeal court may only interfere if the trial court acted on a wrong principle or if it imposed a manifestly excessive sentence.

36. Furthermore, I find as persuasive the decision in *Republic v Jayani & another* [2001] KLR 593 that the purposes of sentence is to deter the offender, to separate offenders from society and to assist in rehabilitation of the offender.

37. Additionally, I find as persuasive the decision of this court (Ojwang, J as he then was) in *Yussuf Dahar v Arog v Republic*, High Court Criminal Appeal No 110 of 2006, unreported, in which the court observed that among the principles of sentencing is a possibility that the offender may reform and become a law-abiding citizen.

38. I have also taken into account the period the 1st appellant has been in custody in sentencing him as is mandatorily required of this court by section 333(2) of the *Criminal Procedure Code* (cap 75) Laws of Kenya.

39. I have considered all of the foregoing factors. I find that the trial court imposed a manifestly excessive sentence in the circumstances of the case. I find that the trial court in imposing the sentence of a fine was influenced by relying on inadmissible hearsay evidence of the value of the narcotic drugs multiply by three the times its value, which the court found was Kshs 37, 350, 000/-.

40. In the circumstances, I find that the trial court erred in law to that extent.

41. Consequently, I hereby quash the sentence imposed upon the 1st appellant. And in its place, I impose a sentence of eleven years imprisonment to run from the date of his conviction.

42. I find that the defence of the 2nd appellant was plausible. His wife, whom he wanted to visit was in Nairobi. His mother was living in Langata. He also wanted to come to Nairobi to look for a job as a turn boy. Additionally, his testimony that he asked for a lift and was given by the 1st appellant is equally plausible.

43. In the circumstances I find that the prosecution failed to prove beyond reasonable doubt that he was trafficking in narcotic drugs.

    Consequently, the appeal of the 2nd appellant succeeds.

    The conviction and sentence recorded against him are hereby quashed.

44. He is hereby ordered set free unless he is held on other lawful warrants.

Recommendation

45. I recommend that the law as regards sentence of a fine be amended to be determined through the system of weighing the narcotic drugs in grammes or kilogrammes . The current system of using the market value that is based on supply and demand will necessitate the usage of an extensive usage of undercover agents in order to have admissible evidence. The reason is that the use of informers will leave the prosecution with no option but to rely on inadmissible hearsay evidence, where informer privilege is claimed as was the position in this case.

46. It is good investigation practice to use undercover agents, where the issue of the market value of narcotic drugs is involved.

47. The usage of undercover agents apart from being expensive, may also necessitate the informers giving evidence in court especially where it is required to establish the innocence of the accused. This court (J M Bwonwong'a, J) has had occasion to resolve a dispute involving the use of informers in the case of *John Kariuki Ireri & another v Republic*, Criminal Appeal Nos 30 & 31 of 2017 (Embu), in which the court stated as follows:

> " In ground 3 the appellant has faulted the trial court for failing to summon the informer as a witness pursuant to the court's power to summon a witness on its own motion under section 150 of the Criminal Procedure Code. The evidence of an informer is privileged in terms of section 132 of the *Evidence Act* (cap 80) Laws of Kenya. Although section 132 only appears to cover public officers, in my view it covers members of the public to whom disclosures of the commission of crimes has been made. This is universal rule, which may only be waived if the disclosure is to assist the accused to establish his innocence. See *Marks v Beyfus* (1820) 25 QBD 494. This is not the position in the instant appeal. Section 150 of the Criminal Procedure Code was not violated; since the informer's potential evidence was not required to establish the appellant's innocence. This ground lacks merit and is hereby dismissed."

48. It is clear from the foregoing that the informer privilege is not absolute. It is for this reason that the practice of using undercover agents (police), although it is expensive is suitable in ascertaining the market price of the narcotic drugs. In a situation of this kind, the prosecution may find it unnecessary to claim informer privilege. Usage of undercover agents also has its own problems. In one reported case in New York state in the USA two under cover agents arrested one another in a sting operation.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS MARCH 20, 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Ms Mohamed holding brief for Mr. Lakicha for the appellants.

Ms Joy Adhiambo for the respondent