



REPUBLIC OF KENYA



**Bristol v Republic (Criminal Appeal 109 of 2019)
[2023] KEHC 2080 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 109 OF 2019
FG MUGAMBI, J
MARCH 17, 2023**

BETWEEN

CLEMENT SERGE BRISTOL APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. J.M. Nang'ea
(CM) in Criminal Case No 732 of 2015 delivered on the 26th October 2018)*

JUDGMENT

Introduction

1. The appellant, Clement Serge Bristol was charged on two counts for 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. The particulars thereof were that on the 9th day of April 2015, at Kilifi Boat Yard in Mnarani areas within Mombasa county, jointly with others not before the court, the appellant trafficked by conveying a narcotic drug namely heroin weighing 2028 grams with a market value of Kshs 6,084,000/= in a motor vehicle registration No KCA 698H, make Totoya Raum, concealed in a false top and bottom of a black suitcase in contravention of the provisions of the said Act.
2. The particulars of the second count were that on the April 22015, at Kilindini Port within Mombasa county, jointly with others not before the court, the Appellant trafficked by conveying a narcotic drug namely heroin weighing 7600 grams with a market value of Kshs 22,800,000/= concealed under the water tank of Baby Iris Yacht in contravention of the provisions of the said Act.
3. The appellant pleaded not guilty. After a full trial, he was convicted on the 2nd count and sentenced to a fine of Kshs 5,000,000/= or serve 12 months and in addition to serve 15 years' imprisonment.



Aggrieved by the conviction and sentence, he filed an appeal to this court, on five (5) grounds. The same are contained in his Petition of Appeal filed January 5, 2023 and are as follows:

- a) That the learned trial magistrate erred in law and fact in finding and convicting the appellant on a charge whose particulars are not in tandem with the evidence on record, hence materially defective.
- b) That the learned trial magistrate erred in law and fact in believing the arresting and investigating officers while their credibility had long been tainted as unreliable, hence not proving their case beyond a reasonable doubt.
- c) That the learned trial magistrate erred in fact and law in finding that the appellant committed the offence of trafficking by conveying at a time when he had no access or control of the yacht/boat in question hence arriving at a wrong conclusion in law and prejudicing the Appellant.
- d) That the learned trial magistrate erred in fact and law by ignoring clear evidence on record which is in favour of the appellant by having ignored his defence and shifting the burden of proof to the appellant unjustifiably.
- e) That the learned trial magistrate erred in fact and law by preferring a harsh and excessive sentence under the circumstances and failure to exercise discretion in achieving the objectives of sentencing.

Summary of the evidence

4. I am mindful that this is the first appellate court whose duty is to re-evaluate the evidence and make independent conclusions. I am also conscious of the fact that I did not have the benefit of seeing or hearing the witnesses testify. See: *Okeno v Republic* [1972] EA,32 and *Kiilu & Another v Republic* [2005]1 KLR, 174. However, in order to reassess the evidence, a summary of the same is necessary.
5. The first witness to be called by the prosecution was PW1, the DCIO Samburu Central. It was his testimony that on April 20, 2015, he was involved in a search and seizure in a yacht christened MV Baby Iris. The yacht had been detained coming in from Kilifi on suspicion of drug trafficking. The search was conducted alongside 3 officers from the UK and another 2 local officers and five 5 suspects. PW1 discovered some wrapped materials under the water tank of the yacht. He signed the search certificate which the accused persons declined to sign. The following day the samples were taken to the government analyst for weighing and sampling witnessed by the suspects. The analysis confirmed that the substance was heroin. The yacht was produced as evidence.
6. PW2 was a businessman who provided mooring and storage services for the yacht at Kilifi Bay before the arrest and search. It was his evidence that unauthorized entry to the bay was not allowed although it was possible for one to swim to the yard. PW3 worked for PW2 and was present on the night of April 8, 2015 when the appellant and other accused persons were arrested by the police. PW2 saw the appellant in the company of other co-accused who had just arrived at the bay and wanted to access the yacht. He saw the police ambush and arrest them. PW2 was arrested with them but he was later released.
7. PW4, a police officer based at CID Kilifi at the material time was involved in the search and seizure. It was his testimony that his team laid an ambush on the road and trailed the motor vehicle which the appellant and other accused drove to the bay. They were arrested as they were removing loads from the motor vehicle. The police searched the vehicle and found substances suspected to be narcotics. PW4 prepared the inventory of the recoveries and the accused persons signed the same. It was his evidence



that they were not able to thoroughly search the yacht that night and so they took the vehicle into police custody and arrested the appellant and the other suspects.

8. PW5 was attached at the Anti Narcotic Unit in Nairobi and was one of the investigating officers in the case. He took part in searching the yacht at Kilindini port on April 13, 2015 but no recovery was made at this point. PW6, a Chief Immigration Officer at the Malindi Boarder Control investigated into the passports of the appellant and confirmed that the exit stamps and imprints on the passport were genuine. He also confirmed from the crew manifest that the appellant was named as the captain to the yacht which was scheduled to sail to Madagascar.
9. PW7 was the next witness, a marine pilot with the Kenya Maritime Authority, working as the Ports States Control Officer. He was part of the inspection for the yacht on April 14, 2015. He inspected the yacht and made out a report. PW8, a police officer based at the Anti-Narcotics Unit in Mombasa. He was present at the search on April 13, 2015 and also on 20th April when the recoveries were made. It was his testimony that he took the samples recovered in the yacht for weighing and sampling. He weighed the drugs in the presence of the appellant and the suspects and prepared the weighing certificates which he signed as did the appellant and other suspects. The certificate was produced in evidence.
10. PW9, then a police officer at the Anti Narcotic Drugs Unit valued the narcotics that were recovered and presented the valuation certificate. PW10 was an officer in the CID Scene of Crime section who took photographs of the motor vehicle and the substances found in the vehicle in a black suitcase. PW11 also an officer attached at the Scenes of Crime Unit, photographed the yacht and the packages that were found in the yacht suspected to be substances. PW12, a chemical analyst at the government chemist produced the certificates of analysis on behalf of the government analyst who had carried out the tests. The court allowed for the witness to do so following the retirement of the analyst who had carried out the examination.
11. PW13 then an officer at the Anti-Narcotics Unit produced the motor vehicle together with the suitcase that was found in the vehicle and other personal effects during their search. The final witness, PW14, was an officer based at the DCIO. He was the team lead of the team that laid the ambush for the appellant and his colleagues leading to their arrest.
12. The appellant was put to his defence. He testified under oath. It was his testimony that he had met the owner of the ship, Bilal, in Seychelles. He was looking for someone to sail the yacht named Baby Iris to Madagascar. The appellant agreed to sail the vessel and travelled to Mombasa with Bilal in December 2015. He saw the boat and in his assessment it was not ready for sailing so he returned to Seychelles. He came back later in March and preparations were made for the journey. It was during this time that he was introduced to the other accused persons who would be his crew during the voyage. Again, the journey was cancelled for a second time because of high tides. Later in March when the tides had cleared arrangements for the sail were made.
13. On the night of the arrest the crew were in a vehicle headed to the Kilifi Bay to get ready for departure. As they were unloading goods from the vehicle, police officers appeared and arrested them.

Analysis and determination

14. This appeal was canvassed by way of written submissions. Upon a careful re-evaluation of the evidence on record and consideration of the parties' respective submissions, I find that what arises for determination is whether the prosecution proved its case against the appellant beyond a reasonable doubt and whether the sentence was harsh and excessive.

Whether the prosecution proved its case against the appellant beyond any reasonable doubt.



15. On this issue, counsel for the appellant contended that the charge sheet was fatally defective as the place where the offence was alleged to have taken place was erroneously stated. In this regard, I find that the charge contained sufficient information for the appellant to be able to plead to. The charge sheet disclosed with precise information the offence that he had been charged with and he was able to defend himself and cross examine witness and therefore the error did not occasion a miscarriage of justice. I am guided in this decision by the case of *Samuel Kilonzo Musau v R* CR. App 153 of 2013. The same is buttressed in section 282 of the *Criminal Procedure Code*.
16. With respect to the date stated in the charge sheet, the Court of Appeal made an observation in Mombasa Criminal Appeal No 39 of 2020 which was an appeal from HCCRA 120 of 2018 relating to the 1st accused at the lower court. The court of appeal wondered ‘how then would the suspects traffic narcotics at Kilindini port on April 20, 2015 while they were in custody and more so when the said vessel was under 24hour police guard?’ This was clearly an error on the charge sheet although the Court did not go further to elaborate on whether the same was fatal or not.
17. The appellant also states that it was unsafe to convict him on the basis of circumstantial evidence which was based solely on the evidence of PW9. It was submitted that the testimony should have created a benefit of doubt.
18. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, 1994 criminalizes the trafficking in any narcotic drug or psychotropic substance or any substance represented or held out to be a narcotic drug or psychotropic substance. Section 2(1) of the said Act defines “trafficking” 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....
19. In the case of *Gabriel Ojiambo Nambesi v Republic* [2007] eKLR, the Court of Appeal when addressing what constitutes the offence of trafficking in narcotics observed 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)
20. The upshot of this is that for the offence of trafficking in narcotic drugs to be proved the court must be satisfied that the person who was charged with the offence had knowledge of the said narcotic drugs in the means of conveyance that was being used and was either in physical or constructive possession of the drugs.
21. In the instant case, it is not in doubt that the appellant herein was not the registered owner of the yacht. He was a captain paid to sail the vessel to Madagascar by one Bilal, the owner of the vessel. It is notable that although Bilal was known as the owner of the yacht, the investigations did not touch on him. The appellant testified that he met the other co accused persons for the first time in March 2015 when he came back to Kenya for the sail and the 1st accused when he first came in December. This fact was not controverted. His stay in Kenya was short on the occasions he had visited. He was not the caretaker of the boat and this means that he had limited access to the boat. This is evidenced by the fact that each time there was need to prepare for the voyage, he had to contact Ahmed, the 1st accused.



22. It was the 1st accused who had unlimited access to the yacht. From the evidence in the trial court, there was no other connection between the appellant and the other accused persons save for purposes of the voyage. While the appellant had met Bilal in Seychelles, other than being asked to sail the ship, there is no evidence of any other connection or prior dealings between him and Bilal.
23. The appellant's lack of mens rea is further supported by the finding of the High Court in HCCRA 120 of 2018, where the Judge found that the appellant had no knowledge of the drugs that were found in the suitcase in the car. This is the car that the appellant and co accused persons drove in to the yacht. The trial court also stated at p 34 of its judgment that 'it is apparent that Sharifu (4th accused) and Hussein (5th accused) conspired with Ahmed (1st accused) to claim that the black suitcase belonged to Clement (the appellant).' One would expect that if these transactions were related, the appellant would be well aware of the narcotics in the suitcase and the yacht as well. There is no reason as to why he would know about one and not the other. Further, the fact that the other co accused would think of conspiring against the appellant creates doubt about his knowledge of the drugs in the yacht. It is possible that the other co accused persons may have known more than the appellant knew.
24. With respect, I disagree with the learned trial magistrate that the appellant must have known about the narcotics because he was the vessel's captain and had been involved with the vessel between December 2014 when he came to Kenya and April 2015 when he was arrested. I am convinced that the appellant's business in the trip was to simply sail the ship and ensure that it got to its destination. The circumstances under which the narcotic drugs were recovered does not point to the appellant being aware of any plot.
25. The appellants have raised the issue that the 3 UK Border Patrol Officers who were said to have specialized equipment and who came in to assist in the search were not called to testify. On this issue I would again find recourse to the Court of Appeal's finding in Mombasa Criminal Appeal No 39 of 2020 that the Officers ought to have testified. This is particularly taking into account that the accused persons had raised an objection on the state of the vessel prior to the search. The appellant claims that the boat was neatly arranged when they went in for the search with the UK officers yet they had last left it in a mess after the previous search.
26. For the reasons given, I find that the doubts in this case should have been resolved in favour of the appellant. Accordingly, I allow the appeal, quash the conviction and set aside the sentence against the appellant. The appellant shall be set free forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED AT NAIROBI IN OPEN COURT (VIRTUALLY)

THIS 17th DAY OF March 2023

F. MUGAMBI

JUDGE

