



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Eid v Republic (Criminal Appeal 70 of 2019)
[2023] KEHC 2458 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 70 OF 2019
FG MUGAMBI, J
MARCH 17, 2023**

BETWEEN

HUSSEIN MASSOUD EID APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment and sentence of Hon. E.M. Kagoni
(SRM) in Criminal Case No 468 of 2008 delivered on the 11th June 2019)*

JUDGMENT

Introduction

1. The appellant, Hussein Massoud Eid was charged 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. The particulars thereof were that on the 16th day of March 2018 at Regency Park Hotel in Mombasa Town within Mombasa County, jointly with others not before the court, he trafficked by storing a narcotic drug namely 10.022 kilograms of heroin with an estimated market value of Kshs 30,066,000/= concealed in false bottoms of three suitcases in contravention of the provisions of the said Act.
2. He was also charged with a second count of being unlawfully present in the Republic of Kenya contrary to section 53(1)(J) read with section 53(2) of the *Citizens and Immigration Act*, 2011. This count was subsequently withdrawn by the prosecution under section 87(a) of the *Criminal Procedure Code*.
3. The appellant pleaded not guilty to the first count. After a full trial, he was convicted of the offence and sentenced to 30 years' imprisonment and a fine of Kshs 90,000,000/= in default of which he would serve a jail term of 5 years.



4. Aggrieved by his conviction and sentence, he preferred the instant appeal to this court raising ten (10) grounds of appeal in his Petition of Appeal dated June 19, 2019. The said grounds have been reproduced hereunder:
- a. That the learned trial magistrate erred in law and fact by proceeding with the trial and reaching a conviction based on a defective charge.
 - b. That the learned trial magistrate erred in fact and law in finding that the offence had been proved.
 - c. That the learned trial magistrate erred in fact and law in failing to find that the substance was found in a room said to be occupied by three (3) people, that the place of alleged recovery was accessible to many people and that the search and recovery was illegal as it involved illegal activities including forgery.
 - d. That the learned trial magistrate erred in fact and law by failing to note the weaknesses of the Prosecution case.
 - e. That the learned trial magistrate erred in fact and law by failing to make a finding on the CCTV and have it availed in court noting that the CCTV footage would have revealed the truth of what took place.
 - f. That the learned trial magistrate erred in fact and law by failing to note that the Appellant who was leaving Nairobi in less than 2 hours could not have booked an overnight room as he did not need it.
 - g. That the learned trial magistrate erred in fact and law in failing to find that as the Prosecution case was that all the 3 accused persons were together, it would beat logic to believe them with regard to the Appellant and disbelieve what they said about the other 2 accused persons.
 - h. That the learned trial magistrate erred in fact and law by shifting the burden of proof to the Appellant.
 - i. That the learned trial magistrate erred in fact and law in failing to consider the defence case.
 - j. That the sentence was manifestly excessive and arrived at without a clear understanding of the law.

Summary of evidence

5. This is the first appellate court whose duty is to re-evaluate the evidence and make independent conclusions. I am 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). In order to reassess the evidence, a summary of the same is necessary.
6. The first witness to be called by the prosecution was PW1, a receptionist at the Regency Park Hotel, Mombasa. He testified that he was familiar with the appellant who was a regular customer at the hotel. It was his evidence that on March 15, 2018, the appellant arrived at the hotel in a tuk tuk. It was around 5:30pm. He was carrying three (3) bags. He requested for a room and he was processed by PW1 who allocated him room 413.
7. PW2, an employee at the hotel, was also present on the material day and testified that he was called by the Hotel Manager, to take a guest's luggage to his room. The guest had three suitcases and he helped to carry one of the three suitcases. He escorted the guest to room 413 and checked that all the electronics



- in the room were working properly. PW3, also a hotel employee, testified that he carried a bag to room 413 on the request of the receptionist. He found PW2 with the guest in the room although he did not see the guest because he was on phone.
8. PW4, a cleaner, at the hotel, was on night shift on that material night when a man came in and identified himself as a police officer. He asked PW4 to accompany him to room 413. Here PW 4 found other people unknown to him including police officers. There were suitcases on the floor, which were open and the police were removing false bases from the suitcases.
 9. PW5 relieved PW1 for the night shift on that night. It was her evidence that at about 7:30pm some men came to the hotel and introduced themselves as police officers. They wanted to know if the appellant was staying at the hotel. She asked PW4 to escort the police officers to the appellant's room. The police were in the room up to about 1:30am when they came back downstairs with the appellant. One of the police officers paid for the appellant's room and signed the receipt.
 10. PW 6, a Police Constable attached to ATPU Mombasa was at the Regency Hotel where he witnessed the search and recovery. It was his testimony that they found three brown polythene bags with a brown substance inside. He signed the inventory that night as a witness. He also signed the search certificate. When the recoveries were weighed on March 7, 2018 in the presence of the appellant he also signed the certificate of weighing.
 11. PW7 was also in the search team. He witnessed the search and recovery in presence of PW6 and other officers in room 413. He is the one who recorded the inventory which was signed by the co accused persons on that day but later on by the appellant. The explanation given for the appellant signing the inventory the day after the seizure is that the appellant had claimed to be very sick on the day of the seizure.
 12. The next witness was PW8, an employee of Tahmeed Coach and the Manager in charge of the fleet and staff. The police spoke to him in the course of investigations for the names of the passengers on board the bus on the day in question. PW 9, a government analyst is the one who took samples from the three packages that were recovered from the appellant's room, for testing. The witness produced his report and the samples that remained. It was his finding that the substance contained 35% heroine. PW10 was a conductor with Tahmeed Coach whose evidence it was that the appellant boarded the bus in Dar es Salaam and alighted in Mombasa. PW11 was the driver of the Tahmeed Coach and PW12 was the conductor with the said bus company.
 13. PW13, who led the operation testified that he had received intelligence reports about the appellant and two others who were dealing in narcotics. With this information he led a team to the Regency Park Hotel. After introducing his team to the receptionist he was led to room 413 where they found the appellant and another accused person in the room. It is PW13 who discovered the false bottoms on the suitcases which he proceeded to remove. He found some white cream powder tucked in the false bottoms, which powder was then taken for analysis. He also called in a Scene of Crime officer who took photos of the substances as the search continued through the three suitcases.
 14. PW14 was an employee of the Drug Enforcement Agency at the US Embassy in Kenya. He was the one who valued the seized narcotics and prepared a certificate of valuation. PW15, was a senior immigration officer based at the Department of Immigration in Nairobi. He carried out a search based on the travel documents of the accused persons to confirm the nationality and prepared a certificate for the same information. PW16 was stood down as his witness statement had not been supplied to the accused persons.



15. The final witness for the prosecution was PW 17, the investigating officer who was recalled to the stand. It was his evidence that the seized narcotics were weighed in presence of PW13, the government valuer and the government chemist. Preliminary tests were carried out on the samples and they were sealed in the presence of the accused persons. He went back to the hotel to recover the appellant's passport and collected CCTV footage from the hotel and a DVD. The CCTV report indicated that the footage had been tampered with and could therefore not be used as evidence. He reconfirmed the value of the narcotics from the government valuer who gave the value at 30,066,000/=.
16. When put on his defence, the appellant testified that he was a national of Madagascar. It was his evidence that he was at the Tahmeed bus booking office getting a ticket to Nairobi. He was arrested while chatting with a conductor. It was his evidence that after the arrest, he was interrogated for 2 days and taken into a room where he saw the three suitcases for the first time. He denied being at the Regency Park hotel in room 413 and instead stated that he was arrested while waiting to travel to Nairobi from Mombasa.

Analysis and determination

17. 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 the question as to 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.

18. Before delving into proof of the charge, counsel for the appellant contended that the conviction was unlawful having been based on an illegal search without a search warrant. The illegality of the search was however challenged by the respondent. I am in agreement with the respondent that section 57(1) of the *National Police Act* allows search without warrants in particular circumstances detailed under the Act. The relevant section provides that:

Subject to *the Constitution*, if a police officer has reasonable cause to believe...

- (a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises.

19. Turning to the question of proof beyond reasonable doubt of the charges against the appellant. 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. "Trafficking" is defined under Section 2(1) of the said *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...



20. 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 that:

“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).

21. The appellant states that the trial court erred in not taking into account that the room where the narcotics were stored could have been accessed by anyone. The question is whether the appellant was in possession of the narcotics and whether he had the mens rea for trafficking the narcotics. There is overwhelming evidence that the hotel room was booked by the appellant. He was checked in and given the key to the room which gave him complete control and access to the room. It would have been unusual for the hotel to allow anyone else access into his room once he had been checked in. In any case, he and one co accused are the ones who were found in the room.
22. The appellant in his submissions denies being at the hotel at the material time. I find this to be utterly untrue. The appellant was known to some hotel staff who had worked at the hotel for a long time and they identified him by recognition. I find the testimony of the more than 5 witnesses who saw him at the hotel on that night to be plausible.
23. The manner in which the drugs were stored proved mens rea on the part of the appellant. The drugs were sewn into the bags to conceal the narcotics and were brought in under guise. In my view, even the circumstances under which the narcotic drugs were recovered from the appellant’s luggage clearly pointed to a plot which the appellant was well aware of. I cannot find any other explanation save that the appellant travelled to Mombasa and booked himself into the hotel. He had the 3 suitcases with him, they were carried to room 413. At least 4 members of staff interacted with him on the material day from serving him, booking him into the room and carrying each of the three bags to the room. He was found in the room together with his accomplices, with the same suitcases which had in them the stashed heroine.
24. This chain is so complete and the testimonies of all involved including the police officers is so concise and accurate that it couldn’t be wrong. I cannot say the same about the appellant’s testimony because the appellant’s defence was a mere denial and nothing beyond that. I find no reason to disturb this finding.
25. The appellants also took issue with the prosecution for not presenting the CCTV in evidence. I find that the inability to produce the footage was explained by the respondents to satisfaction. The appellant also raised concern that the respondent’s case was filled with inconsistencies such as the description of the substance seized as a cream, brown or white powdery substance or granules, and the question of how many people were found in the appellant’s room. To me, these inconsistencies were not substantial to challenge the well corroborated evidence of the prosecution. I am guided by the authority of *Philip Nzaka Watu Versus Republic* (2016)eKLR)(C.A), cited by counsel for the respondent in which the Court of Appeal held:

“However, it must be remembered that when it comes to human recollection, no 2 witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is infallible and no 2 people perceive the same phenomena



exactly the same way ... whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

26. On another ground, the appellant contended that there was no valuation certificate to authenticate the value of the narcotic drug. The same had only been marked for identification and was not produced. Although I see from the lower court records that the same was produced as exhibit 42, even supposing the same was not produced, does this create a void in the case? In *Kibibi Kalume Katsui v Republic* [2015] eKLR, the Court of Appeal opined that the failure to produce a valuation certificate was not fatal. The Court held as follows:

“There was therefore no real basis for ascertaining the value of the drugs so as to justify the sentence imposed. The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However, all is not lost, we take note that PW4 and PW2 were part of the Anti-Narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks”.

Consequently, the failure to produce the valuation report, although important, could not invalidate the conviction herein.

27. For the reasons stated, I find that the learned trial magistrate ably analysed the evidence before him and arrived at the correct decision in convicting the appellant on the offence charged. The respondent adduced cogent, corroborative and uncontroverted evidence and proved the offence against the appellant beyond any reasonable doubt.

Whether the sentence imposed upon the appellant was harsh, excessive and untenable.

28. Learned counsel for the appellant submitted that the trial court did not take into account the defence raised by the appellant and that the sentence was manifestly harsh under the circumstances. Section 4(a) provides the penalty for trafficking in narcotic drugs or psychotropic substance as follows:

“4. Any person who traffics 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—

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;”.

29. In light of this, in *Kabibi Kalume Katsui v Republic* [2015] eKLR, the Court held that:

“In the premises we shall state without tiring, that under the Narcotic Drugs and Psychotropic Substances Control Act, sentence is still discretionary. We are of course in no way suggesting that under this Act, this court or the High Court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the



court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous.

In an earlier decision in *Benard Kimani Gacheru Versus Republic* (2002) eKLR, the Court of Appeal also dealt with the issue of powers of the High Court on the issue of revision of sentences passed by the lower court and held that:

“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.”

30. PW14 estimated the street value of the narcotics seized to be Kshs 30,066,000/= The appellant was therefore liable to a fine of Kshs 1,000,000/= or three times the market value of the narcotic drug and in addition to imprisonment for life. The appellant was not sentenced to the mandatory life imprisonment. It is evident that the learned trial magistrate took into account the fact that the appellant was a foreigner away from home and from his country. The trial court also exercised its discretion while bearing in mind the quantity of the drugs and the value of the drugs.
31. The decision in *Benard Kimani* (supra) gives directions on the 3 elements that the court must consider in deciding on whether to interfere with the sentence of the lower court. I have considered the reasoning by the learned trial magistrate. I find the sentence legal, proper and within the law. I therefore find no reason to interfere with the same save to add that the sentence shall run from March 16, 2018 when the Appellant was arrested.
32. The upshot of this is that the conviction and sentence are upheld. The appeal is hereby dismissed. The appellant shall be repatriated to his home country after he completes his sentence.

SIGNED, DATED AND DELIVERED AT NAIROBI IN OPEN COURT (VIRTUALLY) THIS 17th DAY OF March 2023.

F. MUGAMBI

JUDGE

