



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed v Republic (Criminal Appeal E104 of 2021)
[2023] KEHC 2461 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E104 OF 2021
FG MUGAMBI, J
MARCH 17, 2023**

BETWEEN

FATUMA SICOBO MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. D. Odhiambo
(RM) in Criminal Case No 615 of 2019 delivered on the 15th December 2021)*

JUDGMENT

Introduction

1. The appellant, Fatuma Sicobo 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 April 2019, at Bakarani area in Kisauni sub county within Mombasa county, jointly with others not before the court, the appellant trafficked by storing a narcotic drug namely 2466.4 grams of heroin with an estimated market value of Kshs 7,399,200/= in contravention of the provisions of the said Act.
2. The appellant pleaded not guilty. After a full trial, she was convicted of the offence and sentenced to pay a fine of Kshs 22,197,650/= and to serve life imprisonment. Aggrieved by the conviction and sentence, she filed an appeal to this court, on seven (7) grounds. The same are contained in her petition of appeal filed on December 16, 2021 and are as follows:
 - a. That the learned trial magistrate erred in law and fact by proceeding to place the appellant on her defence and to a conviction based on a fatally defective charge.



- b. That the learned trial magistrate erred in law and fact in finding that the prosecution had proved its case especially when the facts showed that the place of the offence was not the one charged, that the items said to be narcotic drugs were not found in the appellant's house and that a 3rd person arrested was never charged or called as a witness and no explanations were given.
- c. That the learned trial magistrate erred in fact and law in finding the appellant guilty based on circumstantial evidence, without considering other possible explanations, thereby denying the appellant the benefit of doubt.
- d. That having found that the guilt of the appellant would be founded on circumstantial evidence, the learned trial magistrate erred in fact and law by failing to consider the possibilities available.
- e. That the learned trial magistrate erred in fact and law by making a finding that the appellant must have thrown the narcotic drugs through a hole in the window without having seen the so called hole or even a picture of it.
- f. That the learned trial magistrate erred in fact and law by giving a justification for an illegal search relying on the South African situation without seeking to consider corresponding South African legislation.
- g. That the sentence was manifestly excessive.

Summary of Evidence

3. 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. In order to reassess the evidence, a summary of the same is necessary.
4. The first prosecution witness was PW1, an officer stationed at Anti-Narcotics Unit in Mombasa. It was his testimony that he accompanied the appellant to the government analyst for the weighing of the narcotics after the arrest. PW2 was the appellant's landlady where the appellant lived with her 2 daughters. On the day in question at 6:00am, when the appellant declined to open the door for the police, the police used PW2 to get the appellant to do so. PW3, an officer based at the DCI Headquarters in Nairobi testified as a witness to the search at the appellant's home.
5. PW7, PW9 and PW11 were also present at the appellant's house. In their separate evidence they stated that they knocked on the door but she did not open. PW9 went to the rooftop so that he could see anything dropped from the appellant's apartment. PW7 stated that the appellant came to the window and then went back to the bedroom. PW9 from the rooftop saw something being dropped from the appellant's house and he alerted his colleagues downstairs to check. PW7 also stated that he saw 2 bags being thrown out of the window.
6. It was the evidence by PW9 that the window had a mosquito net with a hole and that it was on the 1st floor. He saw the net when he joined his colleagues to check what was in the bags that had been dropped. The officers found narcotic substances hidden in the bags that were dropped from the appellant's window. Meanwhile, at the house, about 30 minutes after the squabble, the appellant opened her door. Some police officers went in but did not find any drugs in her house. The appellant was arrested. An inventory was filled, witnessed by PW9 and PW11.



7. PW4 was the government chemist who witnessed the weighing of the narcotics and took samples for analysis. It was his evidence that the samples were analysed in the presence of the appellant and they tested positive for heroine. He produced the certificates of sampling as well as his report confirming this, before the court. PW5, the government valuer, confirmed the value of the narcotics and issued a certificate of valuation for the same. PW6, PW8 and PW10 all testified in relation to a separate simultaneous search in the house of the 2nd accused person, which the police believed was linked to the appellant. PW10 testified that he interrogated the accused and she admitted the offence. He then recorded her statement.
8. PW12 was the investigating officer. He produced the bags and the substances that were found inside the bags that belonged to the appellant. He confirmed that the search had recovered a weighing machine, small clear polythene bags, cellotape, an Mpesa transaction book, a passport, ID, phone, deposit slips and cheque book. PW10 was also present when the substances were weighed and sampled. According to him, when he interrogated the appellant, she stated that she was keeping the drugs and the money for the 2nd accused.
9. When put on her defence, the appellant confirmed that she heard a knock on the door at 5:30am on the material day. She did not open as she was afraid since her husband was out of the country. Her landlord came and sked her to open for the police and she complied. She stated that the police searched her house and did not find what they were looking for. Some of the officers went downstairs and after a few minutes they came back upstairs and called the appellant and her friend who was visiting her and was in the house. The appellant was interrogated about the bags. She was arrested. She confirmed that she had told her landlord about the small hole that was at the window. She further testified that she did not know the 2nd accused.

Analysis and Determination

10. The appellant submits that the charge sheet upon which she was convicted was defective as it did not correctly identify the alleged place where the offence took place. Even if this were the case, I find that the charge sheet disclosed with precise information the offence that she had been charged with and she was able to defend herself and cross examine witness. For this reason, I hold that the charge sheet was not fatally defective, and therefore the first ground of appeal fails.
11. Secondly, it is the appellants case that the conviction was premised on a search which was illegal. The appellant further took issue with the learned trial magistrate's reliance on South African jurisprudence to find that the search was legal. The illegality of the search was however challenged by the respondent. Besides the South African jurisprudence, 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...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."
12. The other grounds question whether the offence was proved beyond reasonable doubt. 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...”

13. In the case of *Gabriel Ojiambo Nambesi v Republic* [2007] eKLR, the Court of Appeal when addressing what constitutes the offence of trafficking in narcotic 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.”

14. Looking at the facts of the case and upon close interrogation of the circumstances, the drugs were discovered just below the window of the appellant. It is interesting that as soon as the package was seen being thrown out of the window, the appellant opened her door to the police. While this may be termed as circumstantial evidence, I have considered it alongside the circumstances taken as a whole including the hole that had been on the appellant’s window for a long time and the eye witness testimony of PW9 corroborated by other police officers who collected the substances that were dropped from the window. This evidence remained cogent, consistent and firmly established. It formed a chain so complete leaving no doubt that the crime cannot have been committed by any other person but the appellant. For these reasons, ground 2,3,4 and 5 fail.

15. Turning to the sentence, the appellant was sentenced to pay a fine of Kshs 22,197,650/= being three times the value of the drugs recovered from her and in addition to serve a life sentence. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994 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;”

16. During sentencing the learned trial magistrate was well aware of the provisions of section 4(a) going by the observation of the court that in this case my hands are tied and I have to serve [sic] full dose. The law is now well settled regarding discretion in sentencing and the fact that the courts hands are no longer tied to mandatory sentences.

17. For instance, 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."

18. In the case of *Benard Kimani Gacheru Versus Republic* (2002)eKLR, the Court of Appeal dealt with the issue of powers of the High Court on the issue of revision of sentences passed by the lower court. In the case of Court of Appeal held;

"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."

19. Finally, I find and hold that the sentence was harsh and excessive under the circumstances and that the justification given for the sentence by the learned trial magistrate led to an injustice on the appellant. I uphold the conviction but substitute the sentence. The appellant shall pay a fine of Kshs 22,197,650/ = or in default serve one (1) year imprisonment. She is in addition sentenced to serve fifteen (15) years imprisonment taking into account any period she may have spent in pre-trial custody.

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

THIS 17TH DAY OF MARCH 2023

F. MUGAMBI

JUDGE

