



REPUBLIC OF KENYA



KENYA LAW
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**Sabul v Republic (Criminal Appeal E042 of 2021)
[2023] KEHC 21162 (KLR) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 21162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E042 OF 2021**

SM GITHINJI, J

MAY 5, 2023

BETWEEN

MUSA SABUL ALIAS NYOKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence in Criminal
Case No77 of 2019 of the Senior Principal Magistrate's Court at
Lamu Law Court- Hon. T.A Sitati PM dated 6th December 2019)*

JUDGMENT

CORAM: Hon. Justice S.M.Githinji

Ms. Mkongo for the state

Appellant in person

1. The Appellant was charged with two counts of trafficking in narcotic drugs contrary to Section 4(a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No. 4 of 1994.
2. In count 1, the particulars as per the charge sheet, are that on the 7th day of May 2019 at around 03:30 hours at Kizingitini village in Lamu East Sub-County the Appellant was found trafficking in narcotic drugs by storing three sachets of heroin with a street value of Kshs. 600 which was not in medical preparation form, against the said Act.
3. In the alternative count, he was charged with being in possession of narcotic drugs contrary to Section 3 (1) as read with Section 3 (2) (b) of the narcotic drugs and psychotropic substances control Act No. 4 of 1994. The particulars of this offence being that on 7th may 2019 at around 03:30 hours at Kizingitini village in Lamu East Sub-County within Lamu County was found



in possession of narcotic drugs namely 3 sachets of heroine with street value Kshs. 600 which was not in medical preparation form.

4. In count 2 he was charged with trafficking by storing 2 rolls of cannabis sativa with a street value of Kshs. 1,000 which was not in a medical preparation form, contrary to section 4 (a) of the *Narcotic drugs and Psychotropic substances (Control) Act*. No. 4 of 1994.
5. In the alternative he was charged with being in possession of the two rolls of cannabis sativa which was not in medical preparation form, which value is Kshs. 1,000, contrary to Section 3 (2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994.
6. The accused person pleaded not guilty and the matter went to full trial. The prosecution called four witnesses in support of it's case.
7. The Appellant being aggrieved by the conviction and sentence of the learned trial Magistrate lodged this appeal on the following grounds;
 - i. That the learned trial Magistrate erred in law and fact by giving a blind eye to the fact that provisions of Section 74 A of the *Narcotic Drugs and Psychotropic Substances (Control) Act* were never complied with hence occasioning a severe miscarriage of justice.
 - ii. That the trial Magistrate erred in law and fact in failing to take into account that no certificate of valuation was produced as per Section 86 of the Act which ought to have guided the sentence of the court.
 - iii. The trial magistrate erred in law and fact by opting to assume Kshs. 214,700 was proceeds from sale of Narcotic drugs and yet no nexus was established between the said cash and any narcotics thereto.
 - iv. The trial magistrate erred in law and fact by failing to consider the defence and explanation as to the source of the Kshs. 214,700 as he already had a prejudged mind hence occasioning a mistrial.
 - v. The trial magistrate erred in law and fact by failing to consider that the serious doubts raised by the appellant automatically paralysed the prosecution's case.
 - vi. The trial magistrate erred in law and fact by failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt against the appellant.

Evidence at Trial

8. PW1 No. 236272 C.I Mumo Shadrack who at the time of testifying was based at Kizingitini Police Station as the OCS gave evidence that on 7th may 2019 at around 3.30 am, he summoned his officers to respond to a report of drug trafficking. They then visited one Famau Sabul who had been mentioned by the informers but found nothing on him.
9. He stated that they returned to kizingitini and went to the appellant's house and asked the appellant to take them to his room. That upon searching the room, he saw a small hole between the window frame and the wall where he pulled a plastic bag in which he found three sachets containing brownish substance which he suspected to be heroin which he seized and showed to the team.



10. He further stated that PC Matano found a batch of drugs under the bed which were 2 rolls of dry plant material about a foot in length each.
11. He stated that he then checked his bags and found cash in different denomination amounting to Kshs. 214,700. That on questioning the accused the source of the money, he told him that he sold mangoes but upon searching the house there was no evidence of the same.
12. He then prepared an inventory which the accused signed in his presence.
13. On cross examination, he stated that it was a police operation that is why they were not accompanied by the local chief and it was not true that he planted the drugs on the accused.
14. PW 2 APC Robert Matano who at the time of testifying was based at Ichudwa A.P post testified that on 7th May 2019 at around 3.30am he received a phone call from PW1 requesting him to accompany other officers and him for an operation. The operation was based on information about three people who were trafficking drugs.
15. He stated that the operation on the other two person's did not yield any results. That at the accused's house he was tasked with searching the bed where he found 2 rolls of dry plant material under the bed which they suspected was cannabis sativa.
16. He added that he saw PW1 retrieve two small bags where they found money totaling to Kshs. 214,700 in different denominations. That an inventory was prepared to which the accused signed.
17. PW3 112779 PC David Ouma who at the time of testifying was based at Kizingitini Police station stated that on 7th may 2019 at around 3.30 am he was summoned by PW1 to accompany him to an operation involving three suspected drug traffickers. That they searched the first two houses and did not recover any drugs.
18. He stated that at the accused person's house, they found 3 sachets of heroin, 2 rolls of dry plant material and money totaling to Kshs. 214,700 in different denominations.
19. PW4 PC Kelvin Ochieng testified on behalf of PC Alvin Odongo the original investigating officer. He produced his written statement together with exhibits.
20. He also produced the Analyst report prepared by one David Ngumbao a government analyst who carried out tests on the two sets of drugs confirming that the dry plant was cannabis sativa and the brownish substance was heroin.
21. DW1 Musa Saburi gave an unsworn statement stating that he denies the charges as the same are oppressive and meant to fix him. He called one witness.
22. DW2 Shee Sabur Musa the accused's brother stated that he recalled on 7th may 2019 at around 1 am he was awakened by a knock on the main door of their plot where he found PW1 alongside other 7 police officers.
23. He testified that the police officers searched his brother's (the accused) room where they found cash totaling to Kshs. 214,000 raised from coconut and mango sales and also a boat sale that had raised Kshs. 90,000/=, therefore the narcotic charges against the accused were framed.



Submissions on Appeal

24. The appellant submitted that the charge sheet was defective as it did not specify in what manner the appellant was trafficking drugs.
25. He submitted that no valuation report was attached to the seized drugs therefore there is no justification as to how the value was ascertained.
26. Further, he submitted that there was no evidence linking the money recovered from the house to the trafficking of narcotic drugs. In sum, his submissions are that the prosecution failed to prove their case beyond reasonable doubt.

Respondent's Submissions

27. The respondent submitted that the prosecution proved its case beyond reasonable doubt through the corroborative evidence of the prosecution witnesses.
28. It was submitted that noncompliance with Section 74A did not in any way prejudice the appellant. Further that Section 86 (1) was not complied with though the sentencing was done in line with Section 4 of the Act.
29. It was further submitted that the appellant did not give a consistent answer regarding the source of the Kshs. 214,700 that was confiscated during the operation. That there were inconsistencies which led to the conclusion that the money was from the proceeds of trafficking.

Analysis and Determination

30. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only make due allowance for that. See *Okeno v R* (1972) EA 32, *Eric Onyango Odeng' v R* [2014] eKLR.
31. I have considered the grounds of appeal, the record and submission of the parties. The issues for determination are;

1. Whether the provisions of the NPSCA were complied with and whether the prosecution proved the case beyond reasonable doubt?

32. The Appellants submitted that section 74 of the NPSCA was not adhered to as the police failed to weigh the drugs and they also failed to explain how the sample was obtained.

Section 74A of the NPSCA states as follows: -

“(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of police and the Directors of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorized officers”) shall, in the presence of, where practicable –

- (a) the person intended to be charged in relation to the drugs (in this section referred to as “the accused person”);



- (b) a designated analyst;
 - (c) the advocate (if any) representing the accused person; and
 - (d) the analyst, if any, appointed by the accused person (in this section referred to as “the other analyst”), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.”
- (2) After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts’ certificates for production at the trial of the accused person.
 - (3) ..
 - (4) ...
33. A reading of the above section shows the procedure to be followed when narcotic drugs are seized. The section requires that the drugs or substance be weighed by an authorized officer in the presence of the accused person, his advocate if any, an analyst, if any appointed by the accused person and the designated analyst before samples are released to the government (designated) analyst.
34. In the current case, it was the evidence of PW1, PW2 and PW3 that they arrested the Appellant with three sachets of brown powder substance of which they considered to be heroine and two rolls of dry plant which they suspected to be cannabis sativa of which were forwarded to the Government Analyst for testing.
35. From the evidence adduced, it is clear that neither PW1, PW2, PW3 nor PW4 weighed or valued the drugs begging the question whether such failure to adhere to the proviso of section 74A vitiates the proceedings.
36. In *Moses Banda Daniel v Republic* [2016] eKLR the Court of Appeal stated as follows:
- “After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like “Where practicable” and “if any” convey the meaning that the procedure is not mandatory but directory and the use of the word “shall” must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure.”
37. The Court of Appeal further looked at the purpose of section 74A of the Act as intended by the legislators and made a reference to the Hansard record of Parliament of 6th December



2000 where The Attorney-General, Amos Wako (as he then was) moved a motion for the amendment of the Act. The Court of Appeal went on to hold that: -

“Clearly the intention of Parliament was to ensure that the drugs or substance once recovered are not interfered with before the trial. That is why after ascertaining the nature and weight of the drug and obtaining the certificate of the analyst the rest of the drugs are to be destroyed immediately and only a sample and a certificate are presented as exhibits at the trial. The provision, in our view will be more relevant where a large haul of drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible.”

38. This position was further reiterated in *Joshua Atula & Another v Republic* [2016] eKLR where the Court of Appeal pronounced itself as thus: -

“Accordingly, the objective of this provision^{74A} was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances.”

39. Additionally, the failure to weigh drugs is not fatal as the weight of drugs is only considered in sentencing as was held by the Court of Appeal in *Kabibi Kalume Katsui v Republic* [2015] eKLR where it stated that: -

“The law is clear on the offence of trafficking, the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself.”

40. Guided and bound by the above precedents, it's evident that the proviso of section 74A is not mandatory but mostly applicable where it's practicable and where failure to comply given the quantity of the drug may prejudice the accused. In the present case, there is no evidence that the failure to weigh the drugs prejudiced the Appellant as there were no complaints of tampering. Furthermore, the drugs recovered were not of such a large quantity to infer any tampering and the same was produced in court as exhibits.

41. It was the Appellants further contention that the prosecution failed to adhere with section 86 of the NPSCA which states that: -

“Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.”

42. The question on the production of a valuation certificate has been aptly determined in our courts where it has been held that the value of drugs only arises during sentencing. See in *Kabibi Kalume Katsui v Republic* (supra).



43. In Antony Mbithi Kasyula v Republic [2015] eKLR the Court of Appeal held that: -
- “Finally, the appellant took issue with the failure by the prosecution to prove the value of the cannabis sativa. Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under section 4(a) of the Act, the value of the drugs do not constitute the ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs...”
44. Given the foregoing, failure by the prosecution to produce a valuation certificate as per Section 86 is not fatal to their case. For this reason, the ground fails.
45. On whether the sentence is lawful, it is trite that sentencing is at the discretion of the trial court and an appellate court can only interfere with it under very specific circumstances as was held by the Court of Appeal in Benard Kimani Gacheru vs Republic [2002] eKLR where it stated 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 state is shown to exist.”
46. The Appellant was convicted of trafficking in narcotic drugs contrary to section 4(a) of narcotic Drugs and Psychotropic Substances Control Act which provides that:-
- “Any person who trafficks 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—
- a. 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.”
47. I must confirm from the onset that the sentence is lawful and within the discretion of the court. It is not however a mandatory sentence as the term “shall be liable” provides for the maximum and not minimum sentence and it was open to the trial court to consider the proportionality of the sentence for the offence. See Caroline Auma v. Republic (2014) eKLR and Daniel Kyalo Muema v. Republic, (2009) eKLR.
48. It is trite that the court in sentencing should take into consideration the mitigating factors as well as aggravating factors.



49. The Judiciary’s Sentencing Policy Guidelines 2016 sets out a list of aggravating and mitigating factors in paragraphs 23.7 and 23.8 respectively while paragraph 23, 9 and 4 of the guidelines outlines the determination of a sentence where there are mitigating and aggravating circumstances.

50. Additionally, the court should be guided by purpose of sentencing as was considered by Dalmas Omboko Ongaro v Republic [2016] eKLR the court stated that: -

“ 10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:

“In determining what is the appropriate sentence to mete out...The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442) and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118).”

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.” (Emphasis mine).”

51. As regards whether the money found in possession of the appellant was proved to be proceeds from trafficking, I have considered the unsworn statement of the appellant where he did not explain the source of the amount. Rather, appalling is the evidence by DW2 who attempts to justify the source of the monies. It was not corroborated. I also do note that while cross examining PW2 he alluded to the fact that the money could have been planted by the police. I have no reason to depart from the finding by the trial court.

52. In the final analysis, the appeal on conviction and sentence lacks merit and is hereby dismissed. This Court so finds.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 5TH DAY OF MAY, 2022

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms. Mkongo for the state
2. Appellant in person

