



REPUBLIC OF KENYA



**Paez v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 18742 (KLR) (Crim) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E051 OF 2022

LN MUTENDE, J

JUNE 19, 2023

BETWEEN

MARIA ARTMELIS MEDINA PAEZ APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 02 of 2018 at the Chief Magistrate's Court JKIA by Hon. L.O. Onyina - CM on 18th December, 2020)

JUDGMENT

1. Maria Artmelis Medina Paez, the Appellant, was charged with the offence of Trafficking in a Narcotic Drug contrary to Section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No 4 of 1994. The particulars of the offence were that on December 25, 2017 at JKIA Terminal IE within Nairobi County, jointly with others not before court trafficked by conveying a Narcotic drug namely Cocaine to wit 2313.99 grams with a market value of Ksh 9,255,960/= concealed in the false top and false bottom of a purple suit case in contravention of the stated Act.
2. Upon being taken through full trial, the appellant was convicted and sentenced to pay a fine of Ksh 25 Million, and, in default to serve one-year imprisonment. In addition, to serve fifteen (15) years imprisonment. And, she would be repatriated to her country of nationality upon service of the sentence.
3. Aggrieved, the appellant proffered an appeal against the sentence basically on the ground that the sentence was harsh and excessive and, time spent in custody was not considered.
4. The appeal was disposed through written submissions. It is urged for the appellant that the trial court failed to properly exercise its discretion when passing sentence. That the trial court should have been



guided by Principles set by the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*, Petition No 15 of 2015 as follows:

“....[71] the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) Age of the offender;
- (b) Being a first offender;
- (c) Whether the offender pleaded guilty;
- (d) Character and record of the offender;
- (e) Commission of the offence in response to gender- based violence;
- (f) Remorsefulness of the offender;
- (g) The possibility of reform and social re-adaptation of the offender;
- (h) Any other factor that the Court considers relevant....”

5. That the court did not take into consideration time spent in remand custody as envisaged by Section 333(2) of the *Criminal Procedure Code* and to reduce the sentence proportionately in light thereof, as stated in the case of *Abamad Abolfathi Mohamed & Another v Republic* [2018] eKLR. And, further indicate the date the sentence would run from, to wit, whether it was from date of sentence or date of arrest.
6. Further, that the court failed to consider factors raised in mitigation. The fact of the appellant having submitted that she was 22 years old, that she had been deceived by her boyfriend and, that she did not know what she was carrying. That she pleaded for a non-custodial sentence or an order for repatriation, being a foreigner and a sole bread winner of a family of seven, relevant factors that the court failed to consider.
7. That the appellant also showed remorse to warrant a lesser or non-custodial sentence, and cooperated with the police during the proceedings and she was also first offender.
8. The State/Respondent through learned Principal Prosecution Counsel, Ms Adhiambo, opposed the appeal. It is argued that the penalty imposed was within the law. That the court considered the transnational nature of the crime, the appellant having trafficked the contraband from Brazil to Kenya.
9. To determine whether the trial court considered all factors prior to sentencing, it is imperative to look at the brief facts of the case. This was a case where the police acting on information received waited for flight ET302, an Ethiopian Airline from Sao Paulo Brazil scheduled to land in Nairobi, Kenya at 10:30 Hrs Upon the aircraft landing they profiled passengers and came across the appellant. She was allowed to pick her luggage, a purple suitcase, and was taken to the Anti-Narcotics Unit office where her suitcase was searched. The police found an empty suitcase concealed inside the purple suitcase. It seemed heavy and upon further search and investigations, the police team found a false bottom and an upper one. The suitcase was opened and white substance found to have been concealed in two packages. The substance was weighed. Sampling was done and certificates issued. Subsequently the substance was analysed and confirmed to be cocaine a narcotic drug. The purity level of the cocaine was assessed at 100%.



10. This appeal is limited to the sentence, but, it is trite that circumstances of the offence and the antecedents of the accused determine the sentence to be imposed.
11. An appellate court can only interfere with the sentence of the trial court where the appellant demonstrates that the sentence was either harsh and excessive or if there was misapprehension of law and facts or if the court failed to consider the right principles. (See *Ogolla s/o Owuor v Republic*, 1954 EACA 270 and *Macharia v Republic* [2003] KLR 115).
12. In the case of *Shadrack Kipchoge Kogo vs Republic*, Criminal Appeal No 253 of 2003 (Eldoret), the Court of Appeal stated that:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”
13. In passing the sentence the trial court delivered itself thus:

“... I have taken into consideration the nature of the offence and the sentences provided for, the youthful age of the convict, the quantity and value of the cocaine involved - that is Ksh 9,255,960/-. The value of the narcotic drug is relevant for purposes of sentencing also. The transnational nature of the crime is also relevant as the convict trafficked the 100% pure cocaine all the way from Brazil to Kenya. I have also taken into account the fact that convict is a first offender...”
14. Evidently, mitigating factors were considered. The youthfulness of the appellant being 22 years of age; the allegation of having a family of seven and that she played a critical role in their lives and the fact of the appellant being a first offender were all taken into account. The court discharged its duty in balancing mitigating factors put forth by the accused with circumstances of the case and aggravating factors.
15. As already stated, this court has restricted powers. The appellant must demonstrate that either the sentence was outside the law, that it was harsh and excessive or that the court proceeded on the wrong principle.
16. Section 4(a) of the *Narcotics Drugs & Psychotropic Substances (control) Act*, provides thus:

“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....”
17. According to the law, a convicted person ought to be fined three times the value of the narcotic drug. In addition, the court is obligated to sentence the offender to a sentence that may be enhanced to life imprisonment. The 15-year period imposed was within the law. The fine in the sum of Ksh 25 Million for cocaine valued at Ksh 9,255,960/- was lenient. From calculations, 3 times the value of the narcotic drugs was Ksh 27, 767, 880/- The court did not have the discretion to fine the appellant below the statutory provisions unless the actual value of the subject drugs was not determined, which was not the case herein. Had the respondent filed a cross appeal, and notice issued to that effect, then, the sum



- would have been enhanced. The one-year default period was within the law as per Section 28 of the Penal Code providing for 12 months incarceration for fines exceeding Ksh 50,000/=.
18. The issue as to whether the court erred by failing to deport the appellant, or consider non-custodial sentence. The offence herein was not a misdemeanour where a non-custodial sentence would be preferred. This was a serious offence with multinational interests at stake. It is also worth noting that a sentence must be commensurate with the offence or the appellant's participation. This was held in the case of *Omuse v R* [2009] KLR 214, where the Court of Appeal held that:
- “...the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise of discretion in sentencing, for the Court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence – See *Ambani v R* [1990] KLR 161.....”
19. The appellant was conveying large amounts of cocaine as depicted in the weight and valuation reports. The court considered that the purity levels were 100% heightening the aggravating factors. Considering the transnational nature of the offence, repatriation or deportation would not meet deterrence as an objective of sentence. Rehabilitation aspect of sentence would be better achieved the custodial sentence imposed.
20. Although the appellant stands to serve a greater part of her youthful age behind bars, the gravity of the offence compared to the 15-year sentence was not excessive.
21. With regard to time spent in custody, Section 333(2) of the Criminal Procedure Code provides thus:
- “...(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody...”
22. The judiciary sentencing guidelines make it mandatory for any court to indicate in its decision time spent in custody and also deduct this period by emphatically stating that the sentencing should run from the date of arrest.
23. In the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018]eklr The Court of Appeal held that:
- “...Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person...”
24. It is apparent that the trial court failed to comply with the requirement of the law in respect of time spent in remand custody. The appellant was arrested on the December 25, 2017, she was sentenced on December 18, 2020, the duration she stayed in remand custody should have been considered.



25. The upshot of the above is that the appeal on sentence is allowed to the extent that the time spent in remand custody is considered. The 15 years period will hence be effective from the date of arrest, the 25th day of December, 2017.

26. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 19TH DAY OF JUNE 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF

Appellant

Mr. Wanjala Allumano for Appellant

Ms. Adhiambo for ODPP

Court Assistant – Mutai

