



**Republic v Ahmed & another (Criminal Appeal 22 of 2020)  
[2023] KEHC 20292 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL 22 OF 2020**

**A. ONG'INJO, J  
JULY 13, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**SWALEH YUSUF AHMED ..... 1<sup>ST</sup> RESPONDENT**

**ASMA ABDALLA MOHAMED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment of Hon. F. Macharia (PM)  
delivered on 25th August 2020 in Shanzu Criminal Case No. 988 of  
2017, Republic v Swaleh Yussuf Ahmed and Asma Abdalla Mohamed)*

**JUDGMENT**

1. The Republic/State charged Swaleh Yusuf Ahmed and Asma Abdalla Mohamed for the offence of trafficking in narcotic drugs contrary to section 4(a) of the [Narcotic Drugs and Psychotropic Substance \(Control\) Act](#) No. 4 of 1994 in Mombasa CMC Cr. Case No. 988 of 2017.
2. The particulars are that the Respondent on the 26<sup>th</sup> day of July 2017 at Kikambala within Kilifi County trafficked in narcotic drug namely heroin to wit 201.1 grams with a market value of Kshs. 603,300 by storing in contravention of the said Act.
3. The trial court considered the evidence of the 8 prosecution witnesses as against the sworn testimonies of the respondents as well as submissions and determined that the prosecution failed to prove the charge against the respondents beyond all reasonable doubt and the respondents were acquitted.
4. The Prosecution was aggrieved by the acquittal and they preferred the appeal herein on the following grounds: -



1. That the learned Magistrate erred in law when she acquitted the accused against the weight of the evidence on record.
2. That the learned trial Magistrate erred when she failed to find that the defence did not shake the prosecution's evidence.
3. That the learned trial Magistrate misdirected herself in law in the interpretation of the ingredients to the offence of Trafficking on Narcotic Drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994.
4. That the learned trial Magistrate failed to consider the fact that once evidence was tendered in court it was her duty to impartially interrogate the same and to use it to arrive at a just decision.
5. The appellant/DPP prayed that appeal be allowed.
6. The prosecution case was that PW 6 IP Ali Bashir Olow and PW 8 Sergeant Francis Mjomba received intelligence that there were people who were to receive narcotic drugs at Kikambala area. That they proceeded to Kikambala in the evening and lay ambush and saw one of the vehicles whose registration number they had been given. They followed the motor vehicle until it stopped but 3 occupants alighted and escaped when they arrived. That 2 items were thrown from the suspect vehicle. That the Respondents were found in the suspect motor vehicle. That they searched the area and found 2 bags but there was no narcotics found. That Kshs. 503,400 was also recovered from the scene. That the accused persons led them to their house where search was conducted and a powdery substance suspected to be narcotic drug recovered.
7. That the Respondents were later taken to the police station where the substance was weighed by Chief Inspector Elizabeth Lumumba - PW 7 who prepared a seizure notice for the substance and the motor vehicle Registration KCH 429W. That seizure notice for money recovered was also prepared by PW 7. The Respondents denied having committed the offence. That 1<sup>st</sup> Respondent said he was with his wife - 2<sup>nd</sup> Respondent at the gate of Beach Apartment when suddenly they saw motor vehicle rushing towards them and because they had over 500,000 they thought the occupants of the vehicles were thugs. That he got scared and threw the bag containing the money. That the driver and his assistant ran away. That the vehicles which rushed to them arrived and people alighted claiming to be police officers and searched the motor vehicles and also recovered the bag with money. That 1<sup>st</sup> respondent was taken to his home but when he requested for the presence of his lawyer the police officers refused.
8. That police entered his house with him. That they went with him to his bedroom while other officers remained in the sitting room. That while they were in the bedroom the police officers who were in the sitting room claimed they had found something. That a powdery substance was shown to 1<sup>st</sup> respondent and he was taken to Bamburi Police Station where he found his wife.
9. 1<sup>st</sup> respondent produced an affidavit sworn by PW 6 and said that he was framed because police were not happy he had been released on bond in another case that was pending before court.
10. The 2<sup>nd</sup> respondent associated herself with the testimony of the 1<sup>st</sup> respondent her husband.
11. When appeal was admitted for hearing on June 20, 2022 directions were taken that appeal be heard by way of witnesses' submissions. The appellant was supposed to file and serve submissions before the Respondent could also file and serve. This situation prevailed up to December 19, 2022 when the court prepared several appeal files for Rapid response hearing by



visiting Judges between January 16, 2023 to January 27, 2023. A notice was again issued for filing of submissions for hearing on January 16, 2023 but as at January 23, 2023 the appellant had not filed submissions.

12. The visiting Judge fixed the matter on February 6, 2023 and Mr. Ngiri for the appellant indicated that a date for judgement could be fixed as he was going to file and serve written submissions within 7 days.
13. Mr. Magolo Advocate for the Respondents indicated he would require 14 days upon service to file and serve submissions. As at the time of writing this judgment the appellant had not filed submissions in this appeal which was filed on August 31, 2020 by Senior Prosecuting Counsel Mr. Musyoki and for which the court gave more than 6 months for the filing of submissions.

### **Analysis and Determination**

14. This being a 1<sup>st</sup> appeal this court has the duty to re-evaluate the evidence before the trial court as well as the judgement and arrive at its own independent conclusion on whether or not to allow appeal. In other words, a 1<sup>st</sup> appeal is by way of retrial and the principles governing such a retrial are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions while bearing in mind that it neither saw or heard the witnesses and make due allowance in this regard as set out in the case of *Okeno v Republic* [1972] EA 32 where it was held as follows: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424.”

15. Having considered the evidence on records and the judgement of the trial court the issues for determination are: -
  - i. Whether acquittal was against weight of the evidence.
  - ii. Whether the Respondents defence challenged the prosecution/Appellant’s evidence.
  - iii. Whether the trial Magistrate properly interpreted the provisions of section 4(a) of the [Narcotic Drugs & Psychotropic Substances Act](#) No. 4 of 1994.
  - iv. Whether the trial Magistrate was impartial in interrogation of the evidence tendered in court and thus arrived at the wrong conclusion.
16. The offence under which the Respondents were charged was premised on section 4(a) of the [Narcotic Drugs and Psychotropic Substance \(Control\) Act](#) No. 4 of 1994 which provides: -

Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her 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



- i. where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;
  - ii. where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;
17. The Respondents were acquitted on account of failure by the prosecution to prove that the police officers who went to the respondent's house including PW6 and PW8 had search warrants to conduct a search of the alleged narcotic drugs. The initial information was that the appellant's witnesses had information that there were drug traffickers who were to receive drugs at Kikambala area. When the officers intercepted the vehicle that was being used by the alleged drug traffickers, they recovered no drugs. They then decided to go to the 1<sup>st</sup> Respondent's house where PW6 and PW8 allegedly recovered 201.1 grams of heroin. The 1<sup>st</sup> respondent throughout the exercise of going to his house and searching protested saying he was denied the presence of his advocate and that it was the second time that the police officers were planting drugs on him. He refused to sign the inventory and search certificates that were allegedly made in his house in protest.
18. The prosecution did not refute the fact that there was no warrant issued for the search of the respondent's house and that the 2<sup>nd</sup> respondent was not even present when the alleged search was being conducted.
19. The appellant having failed to submit on the grounds raised on appeal, this court finds that the appeal cannot succeed and the same is therefore dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,**

**THIS 13<sup>TH</sup> DAY OF JULY 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Bebora- Court Assistant

Mr. Ngiri for the Appellant

Mr. Magolo Advocate for the Respondents

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

