



REPUBLIC OF KENYA



KENYA LAW
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**Amin v Republic (Criminal Appeal E035 of 2022)
[2023] KEHC 22264 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E035 OF 2022
SM GITHINJI, J
SEPTEMBER 18, 2023**

BETWEEN

SHIMAI MOHAMED AMIN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

CORAM: Justice S.M. Githinji

Appellant in person

Ms Mkongo for State

1. Shimai Mohamed Amin was charged in the lower court with two main counts and one alternative count.

The first main count is of Trafficking of Narcotic drugs contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No.4 of 1994.

The particulars of this offence are that on the 19th day of October, 2021 at around 10:00hours at Kijitoni area of Langoni location in Lamu Central Sub-County within Lamu County, the appellant herein was found trafficking by selling narcotic drugs to wit fifteen (15) sachets of heroin of street value of Kshs. 4,500/= in contravention of the said act.

2. To this offence there is an alternative count of being in possession of Narcotic drugs contrary to section 3 (1) as read with section 3 (2) (b) of the *Narcotic and Psychotropic Substances Control Act* No.4 of 1994.

The particulars of this offence being that on the 19th day of October, 2021 at around 10:00hours at Kijitoni area of Langoni location in Lamu Central Sub-County within Lamu



County, the appellant was found in possession of narcotic drugs to wit fifteen (15) sachets of heroin of street value of Kshs. 4,500/= in contravention of the said act.

The second count is of resisting arrest by a police officer, contrary to section 103 (a) of the *National Police Service Act*, 2011.

The particulars of this offence being that on the 19th day of October, 2021 at around 10:00 hours at Kijitoni area of Langoni location in Lamu Central Sub-County within Lamu County, the appellant resisted the arrest by No.113560 Pc Morris Otieno by wrestling him while in the due execution of his lawful duty.

3. The prosecution in this case called three witnesses, all police officers who at the alleged time of offence were attached, Pw-1 and Pw-3 to Lamu Police Station, and Pw-2 to Mokowe Police Station.

Their case is that on 19/10/2021 at 10.00am, Pw-1 and Pw-2 were on foot patrol in Langoni. A tipster alerted them of a drug peddler at Kijitoni area. The alleged peddler was described, as well as his location. The two officers went looking for him. When they got at Kijitoni area, they found a man matching the given description. They asked him to stop and he complied. They identified themselves as police officers. Pw-1 searched him and found a black sock in one of his pockets. Inside the sock they found 15 sachets of a brownish powder substance of which they suspected to be heroin. They confiscated the 15 sachets and arrested the suspect. Pw-1 made an inventory of which was signed by the suspect and Pc Morris (Pw -2). The suspect was taken to Lamu Police Station. The matter was investigated by Pc Mazera. He recorded witness statements and prepared an exhibit Memo Form on 20/10/2021 which forwarded the 15 sachets to government laboratory for analysis.

4. It was analysed in Mombasa and a report made to the effect that it was Diacetylmorphine (Heroin). The report was produced by Pw-3 as an exhibit.

The appellant gave sworn evidence and called three witnesses. His defence is that on 19/10/2021 at 10.00am he left his house and went to buy toothpaste. He operates Tuktuk in the area. While at the kiosk two police officers suddenly appeared. One of them placed his hand on his shoulder and greeted him. They requested to search him. He obliged. He was frisked and nothing was got. He was however handcuffed and taken to the police station. He did not resist arrest at all.

5. After 3 days he was charged. He denied the commission of the offence. His three witnesses indicated that they were present during his arrest. The officers searched him and nothing was recovered. He was however taken to the police station and charged.

The trial court evaluated the evidence and found the main count in count one proved beyond reasonable doubt. He was convicted of the same and sentenced to serve 10 years imprisonment and pay a fine of 10,000/= in default to serve 3 months imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

1. The report by Government analyst was produced by an incompetent witness.
2. The entire available evidence by the prosecution was not availed to the appellant prior to the hearing of the case, to wit, Exhibit Memo Form and the Government Analyst Report.



3. The defence case was not properly evaluated and if had, would have raised reasonable doubts on the prosecution case which doubts would have been utilized in his favour.
6. The prosecution does not oppose the appeal and the same was canvassed by way of written submissions.

In their submissions the appellant discloses contradictions in the evidence of Pw-1 and Pw-2 on how he was arrested, the failure by the trial court to properly weigh the weighty defence case, and production of government analyst report by an incompetent witness.

The prosecution on their part concedes to the appeal on the grounds that during the arrest there were civilians who witnessed the incident and prosecution should have called at least a civilian witness to corroborate their case. Prosecution case raises doubts as to whether the appellant had the alleged drug.

7. I have considered all the issues raised by the parties in this appeal. I do note from the evidence that the alleged informer was not called as a witness and neither was he or she disclosed. I have also noted that though the said informer is alleged to have given Pw-1 and Pw-2 the description of the suspect, the alleged given descriptions were not disclosed to weigh whether they were unique and would have led to a specific person, or were just general descriptions which would have led to anyone. We cannot also not tell whether the description fitted the appellant herein. The two police officers, Pw-1 and Pw-2 alleged they recovered from him 15 sachets of a brown substance which was later confirmed to be Heroin. There were civilian witnesses present but none was considered as a prosecution witness. For those allegedly present, at least three were called by the defence and stated he had nothing recovered upon search.

The defence had 4 witnesses who were not shaken by the prosecution during cross-examination. The judgment by the trial court is not clear on how the scale of justice tilted in favour of the prosecution case against that of the defence. There was a second count of resisting arrest, preferred by the prosecution and to which no evidence at all was offered in its support. Though the appellant was not convicted of this offence, the trial court wrongly observed that;-

“it was only Pc Otieno who gave evidence about alleged resistance by the accused person with particulars that the subject tussled with Pc Otieno and refused to be handcuffed.”

What P.C Otieno said was on cross-examination and reads as follow;-

“you were very hostile. I thus handcuffed you to restrain you.”

“It’s untrue for you to say that I was tussling with you over a woman. If you have evidence of this, please show the court.”

8. The information was not at all given in the witnesses’ evidence-in-chief. It was not therefore in the prosecution case. The appellant is the one who raised the issue of tussling and not Pc Otieno. The question is, if the police and prosecution had no evidence on the 2nd count or never wished to pursue it, why did they not withdraw it, or why did they prefer it in the first place? The way it was handled portrays bias against the appellant.

On sentence, the trial court wrongly observed that, “he was found selling hard drugs namely heroin – he was offering to sell and this constituted the offence.” I find no such evidence in the file. That was alleged to had come from the informer who was not called as a witness and is not therefore admissible. The trial magistrate in his judgment, under the heading “determination,”



observed that the quantity of drugs was quite considerable – 15 sachets – and this immediately negated the possible ground that it was for his personal use. The fact of concealment considered with the quantity of the hard drugs in the circumstances of arrest, led the court to draw the irresistible inference that he was a trafficker of the drugs within the meaning of section 2 as read with section 4 (a) both of the *Narcotic Drugs and Psychotropic Substances (Control Act* No.4 of 1994.”

9. The question which one would ask out of this observation is what is the dosage of heroin for personal use? No evidence was adduced in that respect. No one said 15 sachets of heroin of which the government analyst stated weighed 1.5 grams was beyond one person’s consumption within a reasonable period. The trial magistrate was definitely not an expert on the issue and would have deserved guidance in relation to it. The appellant in accordance to the evidence on record was not found trafficking in it. Illegal drugs whether for personal consumption or trafficking, sensibly, is concealed. The inference by the trial court that led to the conclusion that the drug was not for personal use is not justifiable given the circumstances.

In conclusion, the raised defence of which was not properly weighted by the trial magistrate raises doubts as to whether the appellant had, and was trafficking in the alleged heroin. The doubts should have been resolved in his favour. I have done so, and do therefore quash the conviction and the sentence meted against him. He is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF SEPTEMBER, 2023

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S.M.GITHINJI

JUDGE

In the Presence of;

1. The Appellant in Person
2. Ms Mkongo for the State

