



**Akwabi v Republic (Criminal Appeal 29 of 2024)
[2024] KEHC 14137 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 29 OF 2024
DR KAVEDZA, J
NOVEMBER 12, 2024**

BETWEEN

EMILY MBAYA AKWABI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on 13th July 2021 by
Hon. L.O. Onyina (CM) at JKIA Chief Magistrate's Court Criminal Case no. 148 of 2019)*

JUDGMENT

1. The Appellant Emily Mbaya Akwabi was charged and after a full trial convicted by the Subordinate Court for 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 of the offence as per the charge sheet are that on the 9th October 2019, at around 1900hrs along Lang'ata Road within Nairobi County, jointly with others not before court, was found trafficking narcotic drugs, namely heroin, weighing 915.5grams with a market value of Kshs. 2,746,500 by conveying while aboard motor vehicle registration number KCM 140N make Mercedes trailer reg. No ZF 4288 concealed in false sides of a grey laptop bag inside a black backpack bag. She was sentenced to serve fifteen (15) years imprisonment and an additional fine of Kshs. 8,000,000 in default to serve a further 1-year imprisonment.
2. In the petition of appeal and amended grounds of appeal, she raised the following main grounds: the prosecution failed to prove their case beyond reasonable doubt, and that the trial court failed to consider her mitigation.
3. This being the first appellate court, I am guided by the ruling in *Okeno v. R [1972] EA 32*. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.



4. This court has re-evaluated the evidence adduced before the trial court, the Appellant's grounds of appeal as well as the rival parties' submission. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* provides as follows;

“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;”

5. The term trafficking is defined in Section 2 of the *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...”

6. In *Gabriel Ojiambo Nambesi v Republic*, [2007] eKLR, the Court of Appeal addressed itself to the above definition and what is required to prove the offence of trafficking in narcotic drugs. The court stated thus:

“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 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.”

7. The prosecution's case against the appellant was as follows: On 8th October 2019, PW1, Franklin Mose Biyange, began his journey from Kampala after unloading cargo. At 3:00 a.m. in Kanduyi, Kenya, police on patrol stopped him, asking him to give a woman a lift. She boarded, and after some hesitation, paid him Kshs. 2000.

8. Upon reaching Nairobi, PW1's colleague (PW2) took over driving and parked behind a Probox in Lang'ata. CID officers from the Probox directed them to Lang'ata Police Station, where a search was conducted. A female officer examined the woman's belongings and discovered a smaller bag hidden in her clothes, stitched closed, and containing powdery substances. PW1 and PW2 both identified the woman, as the appellant.

9. On 9th October 2019, PW3, Snr. Sgt. Abel Bisera, and PW4, PC Mary Mwangi, from the DCI Transnational Organized Crime Unit, were briefed on intelligence regarding a suspected trailer. They set up an ambush along Lang'ata Road and found the appellant with PW1 and PW2 inside the vehicle. The officers informed them of their intention to search the vehicle, but as they could not conduct the search on the road, they directed the group to Lang'ata Police Station. Upon searching the luggage, PW4 discovered a whitish substance among the appellant's belongings. The officers seized this substance, along with the appellant's passport and yellow fever card, and handed them over to



- Inspector Oruko (PW9). PW3 then prepared a search certificate and an inventory of the seized items, which were produced in court.
10. PW10, PC Joseph Kipsamo, a scenes of crime expert, testified that on 9th October 2019, he took photographs of a Mercedes Benz Axle 2543 lorry and its trailer, which he later produced in court.
 11. PW7, Catherine Sera Murambi, a forensic expert with the government chemist, was called on 12th October 2019 to conduct a sampling exercise on two black polythene bags containing powder marked A1 and A2. She established that the substance was heroin, as it turned purplish when a reagent was added. She later confirmed the substance's purity level at 46.0% using ultraviolet spectroscopy. She also witnessed the substance being weighed by Inspector Oruko (PW9). Both the certificate of sampling and the report were signed and presented in court.
 12. PW6, Chief Inspector Phillip Langat, testified that on 12th October 2019, he received a call from PW9 instructing him to prepare a charge sheet related to the appellant. He was also informed that the estimated value of the seized drugs was Kshs. 2,746,500, and he presented the certificate of valuation in court.
 13. On 28th October 2019, PW5, Corporal Derrick Kiprono, received a sealed exhibit marked 'E' and an exhibit memo signed by PW9, containing a Compact Disk. He processed the CD and extracted 23 photographs, which he produced in court. These photos depicted the seized narcotics, packaged in an envelope, along with a scale showing the substance's weight.
 14. PW8, Emmanuel Simiyu, a Principal Immigration Officer, testified that on 6th April 2020, he received a letter requesting the appellant's travel history. The travel records revealed that the appellant had travelled using two identities: her national ID and passport. It showed that she departed from JKIA on 8th October 2019, but there was no entry stamp to indicate her return.
 15. PW9, Inspector Ishmael Oruko, corroborated the earlier testimonies. On 9th October 2019, he was instructed to proceed to Lang'ata Police Station, take over the matter involving the interception of narcotic drugs, and conduct a presumptive test, which confirmed the presence of narcotic substances. He prepared several documents, including the notice of seizure, the exhibit memo, and photographs taken during the weighing and sampling process. The trailer was released to its owner after being photographed and brought to court.
 16. The chain of custody for the substances recovered in the case against the appellant is well documented through the testimonies of various witnesses. The investigating officer detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the appellant as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered from the appellant's luggage. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
 17. On whether the substance recovered was narcotic, the government analyst PW1 testified that she conducted a preliminary test of the substance recovered from the appellant's luggage. The test confirmed that the substance contained heroin with 46 percent purity. The prosecution adduced evidence that established that the substance found in the appellant's possession was a narcotic substance within the meaning ascribed to the term by Section 2(1) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) and the 1st Schedule thereof.
 18. In her defence, the appellant testified that on 9th October 2019, she travelled from Entebbe to Kampala, where she was given a gift-like bag by a man named Mr. Ibrahim. He explained the contents were jewellery, gemstones, and gold, and accompanied her on her journey to Kenya. After their vehicle



broke down, Mr. Ibrahim arranged for her to board a lorry, where she found the driver (PW1) and a turn boy (PW2). They successfully crossed the border and stopped in Nairobi, where the turn boy was arrested. Shortly after, the police arrested her, the turn boy, the driver, and her son. The police conducted a search, and the appellant claimed the bag found by the officers was not the one she had received in Entebbe and denied knowledge of the items inside. She testified that PW1 and PW2 were later released. She maintained her innocence.

19. The court considered his defence and found it to be incredible. In view of the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating herself from the offence.
20. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
21. On sentence, On the sentence, the appellant was sentenced to serve fifteen (15) years imprisonment. In addition to pay a fine of Kshs. 8,000,000 in default to serve a further 1-year imprisonment. In the sentencing proceedings, the trial court considered that the appellant was a first offender, her mitigation, and the pre-sentence report before imposing the sentence.
22. The [Sentencing Policy Guideline 2023](#), provides as follows:
 - 3.3.4 When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.
23. Upon reviewing the pre-sentence report on record, I note that the appellant is 61 years old. Given the 15-year custodial sentence imposed, there is a significant likelihood that she will be released at an advanced age. In light of this, it is imperative that the appellant be afforded an opportunity for rehabilitation during her period of incarceration, to facilitate her reintegration into society upon release. While the sentence imposed is lawful, it is disproportionate and excessive when considered in the context of the appellant's age and the rehabilitative objectives of sentencing. Accordingly, a more balanced approach is warranted in these circumstances.
24. In the premises, I therefore find it appropriate to substitute the sentence imposed by the trial court and order as follows:
 - I. The fine of Kshs. 8,000,000 in default to serve one (1) year imprisonment is maintained.
 - II. The sentence imposed by the trial court of fifteen (15) years imprisonment is substituted with a sentence of ten (10) years imprisonment to run from the date of the appellant's conviction before the trial court.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:



Appellant present

Mburugu for the Respondent

Achode Court Assistant

