



REPUBLIC OF KENYA



**Kiburuma v Republic (Criminal Appeal 19 of 2024)  
[2024] KEHC 14351 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14351 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 19 OF 2024  
DR KAVEDZA, J  
NOVEMBER 19, 2024**

**BETWEEN**

**HASSAN MOHAMMED KIBURUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(being an appeal against the original conviction and sentence delivered by Hon. C.M Njagi (PM) ON 24th August 2023 at JKIA Chief Magistrate's Court Criminal case no. 49 of 2019 Republic vs Hassan Mohammed Kiburuma & Another)*

**JUDGMENT**

1. The appellant jointly with another other not before this court, was charged with 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](#). After a full trial, his co-accused was acquitted while the appellant was convicted. He was sentenced to serve twenty (20) years imprisonment. In addition, he was fined KShs. 23,490,000 in default to serve an additional one (1) year imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he raised 6 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the sentence imposed was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).
4. The prosecution's case was as follows: On 27th March 2019, Corporal Dennis Sitenei testified that he, Chief Inspector Elizabeth Lumumba, and others proceeded to the Inks Hotel based on intelligence



- that a foreigner was trafficking narcotics. Upon arriving at the hotel, they identified room 306 as the location associated with the appellant. After introducing themselves to the occupant, they discovered a navy blue bag during the search. Upon closer inspection, PW1 found false compartments in the bag containing suspected narcotics.
5. Photographs of the scene were taken, and an inventory of recovered items was prepared. The appellant was arrested and escorted to the police station. PW1 noted that while there was CCTV footage, no spot test was conducted on-site.
  6. PW2 Josephat Mongela Mumo, a receptionist at the Inks Hotel, testified that the appellant checked into room 306 on 24th March 2019 and stayed until his arrest on 27th March 2019. PW2 confirmed that police officers searched both rooms 305 and 306 and that he was present during the search of room 306. He submitted the hotel's booking records indicating the appellant's stay. However, PW2 admitted that there was no document proving his employment at the hotel.
  7. PW3 Inspector Luke Kinoti explained that he was conducting surveillance at the Heela Hotel on the same date. PW3 observed the second accused arriving at the hotel with a black suitcase, which he later took to his residence in South B. The officers followed him and conducted a search of his house. While no narcotics were found, PW3 prepared an inventory of items recovered. The second accused was arrested based on intelligence suggesting he had delivered narcotics to the appellant. However, no direct evidence, such as phone records or photographs, linked the two accused persons.
  8. PW4 Chief Inspector Elizabeth Lumumba, a gazetted officer confirmed her involvement in the operation. PW4 corroborated that the search of room 306 at the Inks Hotel yielded suspected narcotics concealed in a suitcase.
  9. PW4 outlined the procedural steps, including the preparation of an inventory and search certificates. The weighing and sampling of the narcotics occurred on 4th April 2019 in the presence of the appellant and witnesses, with the weight determined to be 2,610 grams. PW4 appraised the street value of the narcotics at Kshs. 7,830,000/=. Various exhibits, including the notice of seizure and valuation certificates, were also produced. PW4 noted that no fingerprint analysis was conducted on the suitcase.
  10. PW5 Eunice Wamuyu Njogu, the government analyst, testified that four samples were submitted for testing. PW5 examined the substances on 26th April 2019 and confirmed that each sample contained heroin with 60% purity. She documented her findings in a report dated 27th May 2019, alongside the sampling certificate.
  11. PW6 Corporal Derrick Kiprono, a gazetted scene of crime officer documented the search at the Inks Hotel. PW6 captured 39 photographs and prepared a detailed report. Photographs of the recovered bag, currency, and sampling process were included. However, PW6 acknowledged that none of the photographs displayed the name 'Inks Hotel.'
  12. PW7 Inspector Aggrey Obiero recounted his participation in the surveillance of the second accused. PW7 joined the operation at Heela Hotel, where they followed the second accused to his residence. Documents were recovered from the residence, but no narcotics were found. PW7 later joined the team at the Inks Hotel and noted that two people were initially arrested, with one being released, leaving only the appellant in custody. PW7 mentioned the existence of CCTV footage; however, it was not presented in court as evidence.
  13. In his defence, the DW1, Hassan Mohammed Kiburuma, testified that he was a Tanzanian farmer in Kenya to find a market for his produce. On 27th March 2019, while waiting for a passenger at Tahmeed, two individuals searched him and his belongings. He denied ever staying at the Inks Hotel, stated his



- passport number was AB0153874 (not AB053874), and claimed he was falsely accused of unrelated "wash wash" activities at the DCI headquarters. He denied any involvement with narcotics.
14. DW2, George Obinwanne Chibuzor, stated he was arrested at his home in South C, Olive Tree Estate, on the same date. A search of his house yielded no recoveries. He denied any connection to the Inks Hotel or the narcotics and testified that he only met the first accused when charges were read in court. Both witnesses denied the allegations and closed their respective cases.
  15. The trial court found the appellant guilty and sentenced him accordingly. However, the co-accused was found not guilty and was acquitted.
  16. This court has re-evaluated the evidence adduced before the trial court, the Appellant's grounds of appeal as well as the rival written submissions of the parties and there is no need to rehash them. Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act provides as following;

“ 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. The case against the appellant was that on 27th March 2019, police acted on intelligence regarding narcotics trafficking at the Inks Hotel. The suspect, the appellant, was found in room 306, which he had booked. A search of the room revealed suspected narcotic substances hidden in a false compartment of a bag.
  18. The appellant did not contest booking the hotel, a fact corroborated by PW2, the receptionist, who produced booking records confirming the appellant's stay in room 306. The Crime Scene Officer documented the search through photographs, reports, and certificates.
  19. The suspected packages were weighed with the first batch weighing 2,610 grams valued at Kshs. 7,830,000/=. The weighing and sampling process were witnessed by the appellant, and the government analyst, PW5. This was the value of the suspected narcotic substances based on the charge sheet, weighing certificate, and government analyst's report.
  20. 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 premises. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
  21. On whether the substance recovered was narcotic, the government analyst PW5 testified that she conducted a preliminary test of the substance recovered from the appellant's premises. The test confirmed that the substance contained heroin. He conducted a sampling exercise and determined the creamish substance to be heroin with a 60 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.



22. In his defence, the appellant denied knowing the existence of the heroin in his possession. He argued that he was likely framed by the Anti-Narcotic Unit. 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 himself from the offence.
23. 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.
24. On sentence, the appellant was sentenced to serve 20 years imprisonment in addition to pay a fine of Kshs. 23,490,000 in default to serve an additional one (1) year imprisonment. In the sentencing proceedings, the trial court considered that the appellant was a first offender, the pre-sentence report as well as the appellant's mitigation before imposing the sentence.
25. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find that the sentence meted out was lawful and in accordance with the trial magistrate's discretion. I am guided by the decision in *Wagude v R* (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag.JA. held that:

“The Court may interfere with the sentence only if it is shown that it was manifestly excessive....”
26. While the offence of trafficking in narcotics is grave and warrants a stringent and deterrent sentence to safeguard public health and the rule of law, the court must also consider the appellant's advanced age of 57 years. A custodial sentence of 20 years risks being tantamount to a life sentence hence foreclosing opportunities for rehabilitation and reintegration into society.
27. It is therefore imperative to strike a balance between deterrence and the appellant's potential for reform and rehabilitation. A tailored sentence reflecting both the seriousness of the offence and the appellant's prospects for rehabilitation may serve justice, enabling his eventual reintegration into the community as a reformed individual while preserving the integrity of the law.
28. The upshot of the above analysis is that the appeal partially succeeds. The sentence of twenty (20) years imprisonment is hereby substituted with a sentence of twelve (12) years imprisonment. The additional sentence of payment of a fine of Kshs.23,490,000 in default to serve 12 months imprisonment is upheld. The sentence imposed shall run from the date of the appellant's arrest 28<sup>th</sup> March 2019 pursuant to section 333(2) of the Criminal Procedure Code.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Hamisi for the Appellant

Mburugu for the Respondent

Achode Court Assistant

