



**Ware v Republic (Criminal Appeal E031 of 2023)  
[2024] KEHC 13592 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E031 OF 2023  
SM GITHINJI, J  
NOVEMBER 5, 2024**

**BETWEEN**

**ABDALLA HAMISI JUMA WARE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising from the Judgment of the Principal Magistrate's Court at Lamu by Hon M.Maina Wachira – Principal Magistrate on 13th October, 2022)*

**JUDGMENT**

1. Abdalla Khamisi Juma alias Ngala was charged in the first count with the offence of Trafficking in narcotic drugs contrary to section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act, 1994](#).
2. The particulars of this offence are that on the 13<sup>th</sup> day of October, 2020 at around 17.30 hours at Milano area, Langoni Location in Lamu West Sub-County within Lamu County, the appellant herein was found trafficking in narcotic drugs by storing to wit fifty-five (55) sachets of heroin of estimated street value of Kshs. 25,000/= in contravention of the said Act.
3. To this count there is an alternative of being in possession of Narcotic drugs contrary to section 3 (1) as read with section 3 (2) (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act 1994](#).
4. The particulars hereof being that on the 13<sup>th</sup> day of October, 2020 at around 17.30 hours at Milano area, Langoni Location in Lamu West Sub-County within Lamu County, the appellant was found in possession of narcotic drugs to wit fifty-five (55) sachets of heroin of estimated street value of Kshs. 25,000/= in contravention of the said Act.
5. The second count is of resisting arrest contrary to section 103(a) of the [National Police Service Act 2011](#).



6. The particulars of this offence are that on the 13<sup>th</sup> day of October, 2020 at around 17.30 hours at Milano area, Langoni location in Lamu West Sub-County within Lamu County, the appellant resisted the arrest of police officer Service NO.76232 Corporal Wesley Kigen and police officer Service No.250220 Pc Alfred Kwendo, who were acting in due execution of their duties.
7. The prosecution case is that Corporal Wesley Kigen (Pw-2), Pc Michael Ouma (Pw-1), Pc Alfred Kwedo (Pw-4), Pc Ruta, Pc Waithera, Pc Mungania, Pc Abdulkadir and Pc Gikonyo all attached to Lamu Police Station, were assigned patrol duties on 13/10/2020 within Milano area. At about 17.30 hours some members of the public informed them of a suspect who was selling narcotic drugs. They were given the name of the suspect as Hamisi Abdalla, alias Ngala. They decided to raid his house which was about 100 metres from where they were. When they arrived Pw-2 pushed the door open. He entered into the house in company of Pw-4. The appellant was near the door. There were two women in a different room. The appellant was searched by Pw-2. He had a porch suspended on his front, from the neck. It was khaki/cream in colour. It was searched. It had 55 sachets each with a Brownish powder suspected to be heroin. In it there was also cash Kshs. 4,790 suspected to be proceeds from sale of drugs. The house was searched and nothing was recovered. The two ladies were searched by Pc Waithera and nothing was found on them. The appellant was told he was under arrest. He said he was getting nowhere. He resisted arrest. Pw-2 told Pw-4 to handcuff him. When Pw-4 tried to, the appellant pushed him away. They used force and had him handcuffed. An inventory was prepared of which was signed by Pw-2. The appellant thumb printed it. He was taken at the police station with the recovered items.
8. The 55 sachets of brownish powder were forwarded to Government Chemist in Mombasa for examination. It was examined and a report made on 22<sup>nd</sup> day of October, 2020. The report shows that using Marquis Test and UV spectroscopy, it was established that the brownish granular substance is Diacetylmorphine (Heroin). The appellant was then charged with the offences carried in the charge sheet.
9. The appellant defence is that he lived at Mkomani in Lamu and was selling fruits at Pwani road, outside Bush Gardens Hotel. On 13/10/2020 at around 5.30 Pm he was at his place of work. Police went there and called him. He was taken to Mkunguni Square. They led him towards Langoni and at Galgalo road instructed him to follow them to the police station. One alleged he was snatching people's wives. At the police station he was locked up in cells and told he will be charged. He was told to sign documents but he refused. He was charged and the money and drugs were introduced. He denied commission of the offences charged with. The trial court evaluated the evidence and convicted him on the alternative count and the offence in Count II.
10. He was sentenced in the alternative count to a fine of 500,000/= in default to serve 7 years' imprisonment.
11. For the second he was fined Kshs. 50,000/= in default to serve one-year imprisonment; - sentences to run consecutively.
12. Dissatisfied with the said conviction and sentence he appealed to this Court on the grounds that; -
  1. The offence in the alternative count was not proved by the prosecution beyond reasonable doubt.
  2. Contradictions and Lacunas in the prosecution case were not weighed.
13. I have re-evaluated the charges, evidence adduced, judgment of the lower court and sentences meted; grounds of the appeal and submissions filed.



14. In this case there were three eye witnesses who are Pw-1, Pw-2 and Pw-4. Their evidence is consistent and firm that the appellant had possession of 9.5grams in 55 sachets, of Heroin, of which is a Narcotic drug under the Narcotic drugs and Psychotropic Substances Control Act, Cap 245 Laws of Kenya. It was in a porch that was suspended on his front, from the neck. Apart from the drug, it had money 4,790/=. The officers had no cause to fix the appellant and their evidence is credible.

15. Possession is defined under section 4 of the Penal Code, Cap 63 Laws of Kenya.

It reads; -

“being in possession of or” have in possession” includes not only having in one’s own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person.”

16. The appellant had the narcotic drug (heroin) on him and had actual physical possession. Definitely he knew that what he had was an illegal, prohibited narcotic drug. The offence was therefore established against him by the prosecution beyond reasonable doubt.

17. On the second count, when Pw-2 told him he was under arrest he stated that he will go nowhere. He resisted arrest and force was used to handcuff him. The evidence of Pw-1, Pw-2 and Pw-4 is to the said effect. He even pushed away Pw-4 to avoid arrest.

18. The appellant’s defence was an afterthought. It was not brought up during cross-examination of the witnesses. It does not cast a doubt on the truth of the prosecution case. It was thus rightly dismissed.

19. On sentence, the respondent argues the alternative count deserved a sterner sentence. The appellant was not a first offender having been convicted previously for a similar offence, and given the provision of section 3 (2) (b) of the Act which reads that; -

“In respect of a narcotic drug or psychotropic substances, other than cannabis, where the person satisfied the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for 20 years and in every other case, a fine of not less than one million shillings or three times the value of the narcotic drug or psychotropic substances, whichever is greater, or to imprisonment to life or to both such fine and imprisonment.”

20. In Bernard Kimani Gacheru-vs-Republic [2002] eKLR the Court of appeal held that;-

“It’s now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on the wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence, unless anyone of the matters already stated is shown to exists.”

21. The above observation would also apply where it’s felt by the appellate court that the sentence meted is lenient and probably the appellate court, itself, would have granted a stiffer sentence. The court cannot



interfere with the discretion of the lower court on sentencing unless the grounds shown to warrant such exists. In this regard I do not wish to interfere with the discretion of the trial court on sentence in both counts.

22. The bottom line is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Ms Mkongo for the State
2. Appellant at Shimo la Tewa

