



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 34 OF 2018

INYATHUMAN YUSUF ALL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(From the original conviction and sentence in the Principal Magistrate Court

at Lamu Criminal Case 645 of 2015, Hon. Njeri Thuku (PM) dated 2nd June 2017)

1. The Appellant (then Accused) was charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substance Control Act (NPSCA) No. 4 of 1994. The particulars of the offence were that on the 25th November 2015 at Langoni area in Lamu West Sub-County within Lamu County, the Appellant was found trafficking in narcotic drugs by selling it to wit in twenty-four pieces each tied in a clear polythene paper, suspected to be Heroin of estimated street value of Kshs. 6,000/-.

2. The Appellant pleaded not guilty and the matter went to full trial. The evidence before the trial court as captured in the record was as follows.

3. PW2, APC Isaiah Ochieng Odembo No. 244578, based at Lamu West Sub County Headquarters, was one of the arresting officers. He told the court that on the 25th November 2015 at 2:30 pm he was on patrol at Langoni area together with Sergeant Wario(PW5), APC Ngugi, APC Kaberia and APC Mungurangu. That PW5 was walking ahead of them when he saw the Appellant and one Famau besides a door. He noted that the two persons appeared shocked and that the Appellant had a transparent polythene paper bag while Famau had Kshs. 200 Bank note in his hands. That PW5 demanded the polythene bags and when he looked inside he found 24 tablets. That PW5 handed back the polythene bag to the Appellant. They then arrested the Appellant and Famau and took them to the station. At the station the Appellant was searched by P.C Shola who found Ksh. 7680/- on her. An inventory was prepared which they all signed.

4. PW5, Sergeant Mohamed Wario No. 193010830 from Lamu AP office was the arresting officer. He stated that on the 25th November 2015 at around 1:00pm he was informed that an officer would be attacked. Together with another officer, he went to follow up on the report. Together with his colleague, they came across five young men who were armed with stones and machetes. That the officer who had accompanied him, fired his gun in the air and the young men ran away. He called for backup and they went in search of the young men. That they came across a group of more than 200 men who started running away and the officers gave chase with him following behind.

5. PW5 further testified that as they gave chase, they came across a group of four women and three women whom the officers surrounded and arrested the Appellant. The officers informed PW5 that they had found the drugs on the Appellant. That the Appellant however told him that the officers had picked the paper from the ground. PW5 told the court that he believed his officers as they had arrived at the scene before him. That they arrested the Appellant and two other men whom his colleagues escorted as he, (PW5), returned to camp as he was unwell. He stated that he neither saw the drugs nor the money though he believed his officers.

6. In cross-examination by Mr. Olaba, learned counsel for the Appellant, PW5 stated that the officer who had been threatened was APC Ochieng (PW2). He further stated that when he came across the women, none of them was holding anything while PW2 was holding the black paper bag. He stated that it was PW2 who advised that the Appellant and one man be taken to the police station while the other three women and one man were left. He restated that he was not sure whether the items recovered belonged to the Appellant.

7. No.100755PC Shola Cherotich(PW3), stated that on the 25th November 2015 at 3:00pm while at Lamu Police station, she was instructed by Cpl Kiplagat(PW4)to conduct a search on the Appellant. She stated that she recovered Kshs. 7,690/= from the Appellant's short pockets and handed the money to Cpl Kiplagat. She stated that Cpl Kiplagat prepared and inventory which she signed.

8. No. 74682, Cpl Ben Rotich Kiplagat(PW4) based at Lamu Police Station crime branch was the investigating officer. He stated that on the 25th November 2015 at 3:00 pm the Appellant and another person were brought to him under arrest by PW5 and other officers who were on patrol at Langoni area. They had been arrested with a brownish substance in a brown bag which they suspected to be drugs. He ordered PW3 to search the Appellant and she recovered KSh.7,680/-. That he prepared the inventory (P.Exh7) which the all officers concerned and the Appellant signed.

9. PW1, John Njenga, the duly gazetted Government Analyst based in Mombasa, told the court that on the 2nd December 2015 he received a khaki envelope with 24 sachets with brown powder in a transparent paper, together with an exhibit memo form (P.Exh2) from C.I Fred Muganda from Lamu West. He analysed the brown powder which he found to be heroin and prepared his report (P.Exh1) dated the same day.

10. In her defence, the Appellant gave an unsworn statement that on 25th November 2015 while she was at her shop in Langoni she heard a commotion and gun shots. She was afraid and she took hold of some money, shut her shop and ran home. That on the way home, she met two other ladies and there was also a crowd heading towards them. That as the crowd passed, someone threw a parcel to the ground and an officer who was behind them arrested her and told her that the parcel on the ground was hers. She said that she was searched at the police station and she informed them that the money which was found on her was from her shop. She was subsequently charged with the offence.

11. At the end of the trial, the Appellant was found guilty of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) NPSCA and was sentenced to five years' imprisonment. She was aggrieved by the judgment of the trial court and lodged her appeal on two grounds namely that: -

(i) The prosecution did not produce in evidence a certificate of value of drugs as required under section 86(1) as read with subsection (2) of the NPSCA No. 4 of 1994. In the premise no street value of the drugs was proved.

(ii) The learned Principal Magistrate failed to appreciate that the testimony of P.W. 5 No. 30703 SGT. Mohamed Wario was wholly consistent with the Appellant's defence and completely absolved her from the offence as charged.

12. The appeal proceeded by way of written submissions as directed by the court. The Appellant filed her written submissions dated 13th February 2019 on the same date while the Respondent's submissions were dated 14th May 2020.

13. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR**.

14. I have considered the grounds of appeal, the record and submission of the parties. The only issues for determination are: whether the prosecution's failure to comply with the provision of section 86 of the NPSCA was fatal to the prosecution case, and; whether the prosecution proved the case beyond reasonable doubt.

15. I will first deal with the import of section 86 of the NPSCA. The Appellant submitted that no valuation certificate was produced by a proper officer in court in accordance with the mandatory terms of section 86 of the NPSCA. It was argued that the valuation certificate was meant to guide the trial magistrate in sentencing failure of which a proper sentence would not be achieved.

16. The Respondent on the other hand submitted that failure to comply with section 86(1) of the NPSCA, was not fatal as was held by the Court of Appeal in **Kijiji Kalume Katsui vs R (2015) eKLR**. Further, the Appellants contended that PW4, the Investigating Officer, was able to correctly estimate the value having dealt with numerous narcotic cases (and particularly heroine) at the crime branch at Lamu Police Station where he was based.

17. Section 86 of the NPSCA which provides that:-

Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.

18. The question on the production of a valuation certificate has been aptly discussed in Kenyan courts where it has been held that the value of drugs only arises during sentencing when issuing a fine. See **Kabibi Kalume Katsui v Republic (supra)**.

19. In **Antony Mbithi Kasyula v Republic [2015] eKLR** the Court of Appeal held that:-

"Finally, the appellant took issue with the failure by the prosecution to prove the value of the cannabis sativa. Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under section 4(a) of the Act, the value of the drugs does not constitute the ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs..."

20. I am guided by the above case law to find that the failure by the prosecution to produce a valuation certificate was not fatal. Furthermore, the trial magistrate while sentencing the Appellant did not issue a fine, which would have been based on the value of the drugs, but she only issued a custodial sentence. I therefore dismiss this ground.

21. The second ground of appeal relates to the evidence tendered. It is the Appellant's contention that the evidence was contradictory and even exonerated her. It was submitted by the Appellant that the evidence of the two arresting officers, PW2 and PW5, contradicted each other in material particulars. It was contended that the circumstances leading to the arrest of the Appellant did not tally as each witness gave contradicting evidence as to who and how the drugs were found and confiscated. The Appellant faulted the trial magistrate in attacking and dismissing the testimony of PW5 who, according to the Appellant was the leader of the officers in question, and relying on the evidence of PW2. It was further submitted that no other eye witness including fellow officers saw the Appellant holding the polythene bag containing the drugs. The court was urged to find the contradictions of the arresting officer raised reasonable doubt in her favour.

22. On their part, the Respondents submitted that the contradiction in the evidence of PW2 and PW5 were minor and could not lead to the evidence being rejected as was held in **Erick Onyango Odeng vs R [2014] eKLR**. It was submitted that the trial court had cited and overruled the contradictions and that the weight of the prosecution evidence against the unsworn testimony of the Appellant led to the conclusion that she was rightly convicted.

23. From my analysis of the evidence set out *in extenso* earlier in this judgement, there is no doubt or contention that the substance recovered by the police officer was narcotic drugs namely heroin. The Government analyst PW1 testified that he analysed the substance submitted via exhibit memo (Pexh 2) and found the same to be heroin, a prohibited substance. The contentious issue is whether the Appellant was found in the possession of the same.

24. The record shows that the trial magistrate appreciated the discrepancy in the evidence of PW2 and PW5 as pointed out by the defence. In dealing with the said discrepancies she stated that:-

“Sergeant Wario in his testimony said he does not recall seeing the money. He also said he never saw the drugs recovered. As I stated before, he never said he never went to the police station. This begs the question – what exactly happened? Though this is not the place of conjecture it is either his illness got the better of him or he lied under oath. The second conjecture carries it with far more serious consequences but this is not the forum nor the place to ventilate such issues”.

25. It is the view of this court that the learned trial magistrate disbelieved the evidence of PW5 and even suggested that he may have lied on oath. She should however have conclusively ruled on the issue of lying under oath and on the weight to be attached to his evidence. It should be remembered that unlike the Appellate court, the trial court had the advantage of seeing the demeanour of the witness. She was also under duty to conclusively resolve the discrepancy in the evidence.

26. However, the appellate court has a duty to examine any discrepancies not dealt with by the trial court as was held in **Naftali Mwenda Mutua v Republic [2015] eKLR** where the Court of Appeal held that:-

“In Vincent Kasyla Kingo versus Republic Nairobi Criminal Appeal No. 98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See Josiah Afuna Angulu versus Republic CRA. No. 277 of 2006(UR) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence.”

27. In principle, it is accepted that contradictions do occur in the testimonies of witnesses as no two witnesses would be expected to perceive facts in the same way. Generally, a trial court would ignore minor contradictions unless they point to untruthfulness or if the contradictions go to the root of the matter. See **Erick Onyango Ondeng' v Republic (Supra)** and **Philip Nzaka Watu v Republic [2016] eKLR**.

28. I have examined the evidence of PW2 and PW5. Neither of the officers admitted to being the one who recovered the drugs. PW2 stated that he was walking behind PW5 when they came across the Appellant and one Famau. He stated that the Appellant had a polythene bag and that he saw PW5 demand the bag from the Appellant after which he examined the contents and handed the bag back to the Appellant. On his part, PW5 stated that he was running behind PW2 and the other officers and on reaching where the other officers were, he saw the Appellant and other members of the public standing. He stated that he saw PW2 with the polythene bag but at no time did he see the Appellant with the said polythene bag. This raises the question as to which of the two officers recovered the drugs. Was the Appellant having the polythene bag or was the bag found on the ground as alleged by the Appellant?

29. To prove its case, it was imperative that the prosecution proves that the Appellant was in actual possession of the said drugs. This was not a matter for it to take lightly as the penalty for trafficking was a maximum life sentence. In the premise I find that the contradictions and inconsistencies go to the root of the matter.

30. In dealing with instances where the court has established the presence of contradictions, it is trite that the same are decided in favour of the accused. In **Richard Munene v Republic [2018] eKLR** the Court of Appeal stated that:-

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused”.

31. Additionally, though under section 143 of the Evidence Act the prosecution is not obligated to call a number of witnesses to prove its case, nothing prevented the prosecution for calling any of the other three officers, APC Ngugi, APC Kaberia or Cpl Mwakarambo, who were present at the time of arresting the Appellant to corroborate the evidence of PW2 and rebut the evidence of PW5. Further, nothing prevented the prosecution from applying to have PW5 declared a hostile witness and to cross-examine him on his apparent untruthfulness. It is indeed clear that the evidence demonstrated that it was as likely as it was not that the Appellant was found in possession of the bag containing the narcotic drugs. The case was not proved beyond reasonable doubt and the benefit of such doubt ought to have gone to the Appellant. In the circumstances, I find that this ground of the appeal succeeds.

32. In the final analysis, I find that the appeal has merit. The conviction is quashed and the sentence is set aside.

33. Orders accordingly

Judgment delivered dated and signed at Garsen on this 10th day of September, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of J.Kambi (Court Assistant) the Appellant, Mr. Olaba for the Appellant, and Mr. Sirima holding brief for Mr. Mwangi for the Respondent