



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.128 & 129 OF 2018

LEILA MUNYIVA MULI.....1ST APPELLANT

NNAMDI EGESIMBA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. L. O. Onyina SPM delivered on 6th July 2018 in Nairobi JKIA Courts Cr. Case No. 149 of 2016)

JUDGMENT

The 1st Appellant, Leila Munyiva Muli, and the 2nd Appellant, Nnamdi Egesimba, were jointly charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. The particulars of the offence were that on 25th November 2016 at Sarit Centre in Westlands within Nairobi County, the Appellants, jointly with others not before court trafficked in a narcotics drug namely Heroin to wit 2,121.29 grams with a market value of Ksh. 6,363,870/- by conveying it in a black suitcase concealed in a false bottom of the said suitcase in contravention of the said Act. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged. They were each sentenced to pay a fine of Ksh.18 million and in default serve one (1) year imprisonment. In addition, each Appellant was sentenced to serve a custodial sentence of fifteen (15) years. Aggrieved by their conviction, each Appellant filed a separate appeal challenging the conviction and sentence.

In their petitions of Appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved by their conviction stating that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. They faulted the trial court for convicting them based on circumstantial evidence which did not meet the required legal threshold. They took issue with the fact that the prosecution failed to avail crucial CCTV evidence as well as material witnesses to give evidence. They pointed out that the value of the heroin as particularized on the charge sheet was inaccurate since the purity level of the narcotic substance was found to be 30%. The Appellants complained that the trial court relied on prosecution's evidence which was inconsistent and full of contradictions. They asserted that the trial court failed to exhaustively consider their defence in arriving at its decision. They were aggrieved by their sentence stating that the same was harsh and excessive in the circumstances. They faulted the trial court for violating their rights under Articles 10, 25(c), 50(1)(2)(4) & 159 of the Constitution. They were of the view that the trial court drew wrong inferences which were not supported by evidence hence arrived at an erroneous decision. In the circumstances therefore, the Appellants urged the court to allow their appeals, quash their conviction and set aside the custodial sentence that was imposed on them.

During the hearing of the Appeal, the Appellants presented to court written submissions in support of their respective appeals. This court also heard oral submissions made by Mr. Ondieki for the 1st Appellant, Ms. Mwenesi for the 2nd Appellant and Ms. Akunja for the State. Mr. Ondieki submitted that failure by the prosecution to avail the CCTV footage that was requested by the Appellants prejudiced the Appellants' rights to fair trial. He was of the view that the trial court ought to have ensured that the same was presented before the court. He averred that PW1 testified that the purity level of the narcotic substance was 30%; hence the trial court ought to have considered the same during sentencing. He stated that the sentence was manifestly harsh and excessive in the circumstances. He submitted that the bag containing the narcotic substance was found on the floor when the 1st Appellant was arrested in a restaurant that was full of people. He asserted that the bag was not recovered from the 1st Appellant's possession. He was of the opinion that this was a case of mistaken identity.

Mr. Ondieki pointed out that the prosecution failed to discharge its burden of proof to the required standard beyond any reasonable doubt. He asserted that the trial court convicted the Appellants on the basis of mere suspicion. Ms. Mwenesi shared similar sentiments as Mr. Ondieki. She added that the prosecution failed to comply with the procedures laid down under Section 74A and Section 79 of the Act. She asserted that the prosecution failed to produce a certificate of destruction. In the premises, counsels for the Appellants urged this court to allow the Appellants' appeals.

Ms. Akunja for the State opposed the appeals. She stated that evidence of PW1 and PW2 was corroborative. She averred that the 1st Appellant was arrested in possession of the bag that contained the narcotic substance. PW3 confirmed that the narcotic substance was heroin which was 30% pure. PW6 who was a gazetted officer valued the drugs. He testified that the purity levels did not affect the drug's street value. She was of the view that the prosecution established its case against the Appellants to the required standard of proof beyond any reasonable doubt. She submitted that the prosecution complied with Section 74A of the Act and produced the relevant certificates before the trial court. She stated that the prosecution failed to produce the CCTV footage since the same was not in its possession. The prosecution was required to produce evidence that was in its possession. She asserted that the prosecution availed all the crucial witnesses necessary to prove its case. She was of the view that the sentence meted by the trial court was proper and legal. She therefore urged this court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: PW1, PC Esther Anyango Omburo, was on duty at Sarit Centre on 25th November 2016 with her colleague Salva Mutisya (PW2). At about 11.00 a.m., they got a tip from an informer that there were two people at Java Restaurant located in Sarit Centre who were suspected of trafficking in narcotic drugs. They proceeded to Java Restaurant and located the two suspects, a man and a woman. PW1 and PW2 introduced themselves. They informed the suspects that they wanted to talk to them outside the restaurant at the security offices. The suspects obliged. The lady picked up a black suitcase which was beside her. PW1 and PW2 escorted them to the security offices at Sarit Centre Building. At the office, they interrogated the two suspects. They also requested for their phones and national identification cards. The lady was the 1st Appellant. She was a Kenyan citizen. She surrendered her identity card. The gentleman (2nd Appellant) was a Nigerian National. He surrendered his passport.

Police officers based at the Anti-Narcotics Unit arrived at the security offices. They took over the case. The officers interrogated the suspects. They inquired from the suspects what was in the black suitcase. The 1st Appellant told them that the bag was empty. The officers searched the bag. They only found a scarf. However, the bag was heavier than usual. The officers discovered two bulges at bottom of the suitcase. They pricked the bulges on the suitcase with a sharp object. There was a cream-yellow powdery substance oozing from the prick point. The suspects as well as PW1 and PW2 signed a certificate of search prepared by the Anti-Narcotic officers. PW2, PC Salva Mutisya, testified to the events of that day as narrated by PW1.

PW3, Dennis Owino Onyango, was an Analyst working at the Government Chemist. On 26th November 2016, he received a clear sachet containing a creamish coloured powder from the Anti-Narcotics Unit. He was required to ascertain whether the substance was a narcotic or psychotropic substance. He examined the substance and discovered that the same contained heroin with a 30% purity level. He testified that he was also present during the preliminary tests conducted at the DCI headquarters where he did the sampling of the substance recovered from the Appellants.

PW4, Cpl. Francis Mjomba and PW8, Corporal Albashir were based at the Anti-Narcotics Unit at the DCI Headquarters. PW8 was the investigating officer in the present case. On 25th November 2016, PW8 received an intelligence report in respect of persons suspected to be trafficking in narcotic drugs. The source indicated that the parties would meet at Sarit Centre. He alerted security officers at Sarit Centre to effect arrest of the said suspects. He proceeded to Sarit Centre accompanied by PW4. On arrival, they found the two Appellants being held at the security offices. They were also shown a black suitcase which was found in the Appellants' possession when they were apprehended. They interrogated the Appellants. The 1st Appellant informed them that the 2nd Appellant had instructed her to pick the suitcase for him from town. He asked the Appellants what was inside the suitcase. They informed him that apart from a scarf, nothing else was inside the suitcase since it was new.

They searched the suitcase and only found a scarf inside. However, the suitcase was heavier than usual. It also had two bulges on each side. PW4 pricked a hole on one of the bulges that was at the bottom of the suitcase using a screw driver. There was a creamis-white powdery substance from the prick point. He prepared a certificate of search which was signed by the Appellants, the two arresting officers as well as himself and PW8. The 2nd Appellant informed them that he was taking the suitcase to his fiancé who was staying at Oasis Executive Suites Room No. 502. They went to the said hotel accompanied by the 2nd Appellant. The hotel management confirmed that the 2nd Appellant was staying at the said hotel. The hotel management gave PW8 the room booking documents. The documents showed that the 2nd Appellant and a Charlene Kennedy checked in on 18th November 2016 and were to check out on that material day of 25th November 2016. The 2nd Appellant led them to Room No.502. They found the said Charlene Kennedy in the room.

PW4 interrogated her. She confirmed that the 2nd Appellant was her fiancé. She informed them that she was waiting for the suitcase since she was travelling to Canada using the Ethiopian Airlines on that same day. She surrendered her passport. They also found cash Kshs.70,000/- belonging to the 2nd Appellant in the hotel room. They arrested the said Charlene Kennedy. A certificate of search was also prepared. They escorted the three suspects to Muthaiga Police Station. PW4 and Inspector Agnes Mutune conducted a search at the 1st Appellant's house. However, nothing was recovered from the said house apart from her phone. The next day on 26th November 2016, PW4 and PW8 assembled the government analyst, the scene of crime officer, the three arrested persons and Cpl. Joseph Wafula at the DCI headquarters.

They then searched the suitcase and discovered a false bottom. They recovered a creamish powdery substance in a black polythene bag concealed in the false bottom. The scene of crime officer photographed each step of the process. PW8 weighed the narcotic substance. The substance weighed 2121.29 grams. He prepared a weighing certificate for the same. Sampling was done by the government analyst (PW3) and a certificate of sampling prepared. PW3 also carried out a preliminary test and his findings indicated that the substance was heroin. Cpl. Joseph Wafula (PW5) was the seizure officer. He seized the narcotic substance and prepared a notice of seizure and a certificate of inventory. The suspects declined to sign the same. The documents were witnessed by the police officers who were present.

PW8 prepared a notice of intention to tender records in evidence, and an exhibit memo. He forwarded samples of the narcotic substance to the Government Chemist for analysis. He later arraigned the Appellants before court. After he got results from the Government Chemist, he instructed PW6, Chief Inspector Joshua Ogola, to value the seized narcotic substance on 27th November 2016. The substance which was found to be heroin weighed 2121.29 grams. PW6 valued the same at Ksh.3,000/- per gram. The total value was Ksh.6,363,870/-. PW6 produced the valuation certificate in evidence. PW7, Chief Inspector Nancy Ekaroro was requested by PW8 on 26th November 2016 to assist

in documentation of exhibits recovered from the Appellants. She produced the photographs and a report into evidence. She stated that both Appellants were present as she took the said photographs.

The 1st Appellant was put on her defence. She stated that on the material day, she had scheduled an appointment with an immigration lawyer who was processing her sister's son visa documents. Her lawyer's office was opposite Sarit Centre. When she got to his office, she was informed that he had stepped out and would be back after two hours. She decided to go to Java Restaurant to take some tea. Her sister called her and informed her that she was at Java Restaurant in Sarit Centre. When she got there, she located a table that was available. There was a man seated at the table. However, the other seats at the table were unoccupied. She signaled her sister to come to that table. As she pulled out a chair, two ladies and one man approached her. They informed her that they were security officers. She gave them her national identification card. They also asked the man who was seated at the table to introduce himself. They then requested her and the said man to accompany them to the security office.

At the security office, two other men came. One of them stated that he was the security manager of Sarit Centre. The men took her identity card. They asked the man who was apprehended alongside her whether he had a passport. He told them that his passport was at Oasis Executive Suites where he was staying. The men asked him to take them to the said hotel. They left. After a few minutes, two men arrived and took her to a grey vehicle. They drove to Oasis Executive Suites. She followed them to one of the hotel rooms. She found the police officers who had arrested her, the man she met at Java and a white lady. After about fifty minutes, they left the hotel with the said man and the white lady. The three of them were taken to Muthaiga Police Station. At about 9.00 p.m., the police officers requested her to take them to her house in Ruaka. They searched her house. They found nothing of significance to the case.

The 1st Appellant told the court that PW1 and PW2 were not the arresting officers. She saw them in court for the first time. She also testified that she had not seen the black suitcase before her arrest. She denied being in possession of any narcotic drugs. She stated that she saw the heroin sachets for the first time at the DCI offices. There was also a scarf inside the suitcase. The sachets were inside a paper bag which was discovered in a false bottom of the suitcase. The police took photographs of the same. They brought in documents and asked them to sign. She stated that she was not present when all the prosecution's documents produced in evidence were prepared. She declined to sign the same. She was later arraigned in court on Monday, 28th November 2016. The 1st Appellant pointed out that the prosecution failed to produce in evidence the CCTV footage from Java Restaurant. She produced in evidence a letter from her advocate addressed to the management of Sarit Centre dated 25th November 2016. The same was requesting for the CCTV footage. However, the management of Sarit Centre did not avail the same to his advocate.

The 2nd Appellant was also put on his defence. He told the court that he was a Nigerian National. He stated that he was in Kenya on holiday with his Canadian girlfriend (Charlene Kennedy). They were staying at Oasis Executive Suites. On the material day of 25th November 2016, he went to Java Restaurant located at Sarit Centre at about 10.30 a.m. He was going to buy a cup of coffee. He placed his order and took a seat as he waited for the same. The 2nd Appellant approached him. She was not known to him. She asked if she could join him at the table. Immediately after, two ladies and a man approached the lady. They informed her that they were security officers at the mall. She gave them her national identification card. They also asked him to identify himself.

The 2nd Appellant gave them his Nigerian driving licence. They asked for his passport and he informed them that it was at the hotel where he was staying. They asked to speak to him at the security offices. They kept him and the 2nd Appellant at the security offices for about half an hour. Thereafter, two police officers arrived. They interrogated them. They asked for his passport. He informed them that it was at Oasis Executive Suites where he was staying. They asked him to escort them there. He took them to the said hotel. They went to his room. The officers searched his bags as well as those of his girlfriend (Charlene Kennedy). They found his passport and cash Kshs.70,000/-. His girlfriend informed them that she was leaving the country at 4.00 p.m. They however insisted that they wanted to question them. They took them to Muthaiga Police Station.

The following day, the police officers took him, Charlene Kennedy (co-accused) and the 2nd Appellant to the DCI headquarters. They were taken to a room. A man came in the room with a black suitcase. The investigating officer (PW8) asked them who owned the said suitcase. Another police officer came in and started taking photographs of the suitcase. The 2nd Appellant requested for an advocate but his pleas fell on deaf ears. The officers asked him to sign some documents but he declined. He was taken back to Pangani Police Station. He was later arraigned before court and charged with the present offences. The 2nd Appellant complained that the prosecution failed to avail the CCTV footage of Java Restaurant. He stated that the arresting officers who testified were not the same officers who arrested them at Java Restaurant. He denied being arrested in possession of the black suitcase that contained the narcotic substance.

DW3, Juliana Muli is the 1st Appellant's sister. She stated that on 25th November 2016, she called the 1st Appellant who informed her that she was in Westlands. She had an appointment with her lawyer. They agreed to meet at Java Restaurant located at Sarit Centre as the 1st Appellant waited for her lawyer. She got to Sarit Centre before the 1st Appellant. The restaurant was busy. She joined some people who were at a table as she waited for the 1st Appellant. The 1st Appellant later entered the restaurant. The 1st Appellant signaled her to join her at a table near the entrance. There was one man seated at the said table. Immediately thereafter, two ladies and one man approached the 1st Appellant. They started conversing. She decided to seat back and wait for the 1st Appellant to finish talking to the said people. After sometime, the 1st Appellant and the said people left the restaurant. She decided to follow them. They entered a security office located near the Sarit Centre exit. One of the security guards informed her that she was not allowed to enter the security offices. She called the 1st Appellant's phone several times. The 1st Appellant did not receive any of the phone calls. She decided to wait for the 1st Appellant outside.

After a few minutes, a vehicle stopped near the security office. Some of the officers and the man who was seated at the table at Java entered the said vehicle and left. Later, another vehicle approached the security offices. She saw the 1st Appellant enter the said vehicle with a group of four men. She got worried. She decided to go home and wait for the 1st Appellant. She however informed her elder sister that she was not able to reach the 1st Appellant. At about 9.30 p.m., the 1st Appellant came to the house accompanied by three people. They searched the 1st Appellant's bedroom. They informed her that the 1st Appellant was being taken to Muthaiga police Station.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32).

In the present appeal, the issue for determination is whether the prosecution adduced sufficient evidence which established the Appellants' guilt on the charge of trafficking in narcotic drugs to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court, the Appellants' 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.”

The Appellants denied being found in possession of the narcotic substance. They told the court that they were not arrested in possession of the black suitcase where the narcotic substance was recovered. They stated that they only saw the black suitcase at the DCI headquarters. PW1 and PW2 were the arresting officers. They were on patrol at Sarit Centre. They told the court that they received information that two persons suspected of trafficking in narcotic drugs were at Java Restaurant located at Sarit Centre. They proceeded to the said restaurant. They found both Appellants seated at the entrance of the said restaurant. They were facing each other. They were talking while taking tea. They asked to speak to them outside at the security offices. The two Appellants agreed. They paid their bill. The 1st Appellant took a black suitcase that was beside her. They proceeded to the security offices. The narcotic substance was found hidden in the said black suitcase which was recovered from the Appellants. The evidence of PW1 and PW2 was corroborative. PW4, PW5 and PW8 arrived at Sarit Centre after the Appellants were apprehended. They testified that they found the Appellants at the security offices with the black suitcase. The Appellants' defence that they were not arrested in possession of the black suitcase which contained the narcotic substance was therefore not plausible. This court holds that the prosecution established that the narcotic substance was found in the Appellants' possession.

The prosecution adduced evidence which established that the substance found in the Appellant's possession was a narcotic substance within the meaning ascribed to it by Section 2(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act and the First Schedule thereof. This confirmation was contained in the report from the Government Chemist produced by PW3 (Government Analyst). PW3 analyzed the substance found in the Appellants' possession and confirmed that the same contained heroin with a purity level of 30%.

The other issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellants "trafficked" the narcotic drugs. The particulars of the charge alleged that the Appellants were trafficking the narcotic substance by way of conveyance. From the evidence adduced, it was apparent that the Appellants were jointly trafficking the narcotic substance. The same was recovered from a false bottom of a suitcase found in the Appellants' possession. The 2nd Appellant, who is a foreign national, was staying with his girlfriend, Charlene Kennedy, (who was a co-accused) at Oasis Executive Suites. The said Charlene Kennedy had a scheduled flight to Canada on that same day that the Appellants' were apprehended in possession of the narcotic substance.

This court is in agreement with the trial court's finding that the prosecution adduced strong circumstantial evidence to the effect that the 2nd Appellant's girlfriend (Charlene Kennedy) was to be used to ferry the said narcotic drugs to Canada. It is trite that a court can rely on circumstantial evidence to find a conviction as was held in R v. Taylor, Weaver & Donovan [1928] 21 Criminal Appeal CA 20, to wit:

“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”

The test to be met with regard to circumstantial evidence was laid out in the case of Sawe vs Republic [2003] eKLR, where the Court of Appeal stated thus:-

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.”

In the present appeal, the said Charlene Kennedy was staying with the 2nd Appellant at Oasis Executive Suites. When the Appellants were apprehended, the 2nd Appellant led the police to his hotel room where they found the said Charlene Kennedy. She was set to travel to Canada that evening at about 4.00 p.m. via the Ethiopian Airlines. The same was admitted by the 2nd Appellant in his defence. The 2nd Appellant's possession of the drugs as well as this circumstantial evidence linked him with involvement in the conveyance of the drugs. The circumstance under which the Appellants were found in possession of the narcotic drugs clearly points to the fact that they were trafficking the said narcotic drugs from Kenya to Canada. This court holds that the prosecution did establish that the Appellants trafficked in the said narcotic substance. In a joint enterprise, all the persons involved are deemed to have committed the offence as provided for under Section 21 of the Penal Code.

This court is of the view that the evidence presented before the trial court irresistibly pointed to the Appellants' guilt with regard to the present offence. The defence adduced by the Appellants was correctly dismissed by the trial court as self-serving and meant to exonerate the Appellants from a crime which they were found red-handed to have committed. This court too finds no merit with the Appellants' defence that they had been framed by the police.

The Appellant contended that the narcotic substance was erroneously valued since the purity level of the said heroin was found to be 30%. PW6, who was a qualified gazetted officer, valued the heroine at Ksh.3,000/- per gram. He produced a certificate of valuation to that effect.

He explained that the purity level of the narcotic drug was not a determinant in valuation of the narcotic drug. He stated that the value was based on the identity and weight of the narcotic drug. It was his testimony that the value was determined from the street market value of the narcotic substance. PW6 was a qualified officer as envisaged in Section 86 (1) of the Narcotic Drugs and Psychotropic Substances Control Act. The same was not disputed by the Appellants. The said Section provides that 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. This court therefore holds that the narcotic drug in the present appeal was properly valued.

The Appellants submitted that their rights to fair trial were violated since the CCTV footage from Sarit Centre was not availed before the trial court by the prosecution. This court is of the view that even in the absence of the CCTV footage, the prosecution adduced sufficient evidence to establish that at the time of the Appellants' arrest, they were in possession of the narcotic substance. That being the case, the investigating officer (PW8) told the trial court that he requested for the CCTV footage from Sarit Centre. The management informed him that the footage was not available as same had been overwritten. The defence also tried to obtain the same but was unable to do so. The prosecution was required to avail to the defence all the evidence in its possession which they intended to rely on during the trial. They did the same. The Appellants' right to a fair trial was therefore not violated. That ground of appeal lacks merit and is disallowed.

The upshot of the above reasons is that the Appellants' appeal against conviction lacks merit and is hereby dismissed. On sentence, the Appellants were each sentenced to pay a fine of Ksh.18 million and in default serve a one (1) year custodial sentence. The Appellants were additionally sentenced to serve fifteen (15) years imprisonment. The penalty provided under Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act is 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. The sentence meted by the trial court was therefore not harsh or excessive in the circumstances. The same was proper and legal. The Appellants' appeal on sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2019

L. KIMARU

JUDGE