



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.52 OF 2017

NELSON NAMUNYU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. C. C. Oluoch SPM

delivered on 9th September 2016 in Nairobi Chief Magistrate Court

Cr. Case No. 481 of 2013)

JUDGMENT

The Appellant, Nelson Namunyu Mwangi, was 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 10th April 2013 at Sagret Equatorial Hotel in Nairobi, the Appellant trafficked by conveying in a motor vehicle Registration No.KAU 308V make BMW narcotic drugs namely heroin to wit 268.5g with a street value of Ksh.537,000/- in contravention with the said Act. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged. He was sentenced to pay a fine of Ksh.1 million or in default serve one (1) year imprisonment. In addition, the Appellant was sentenced to serve a custodial sentence of seven (7) years.

In his petition for Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the evidence presented by the prosecution was not sufficient to sustain a conviction. He was aggrieved that his conviction was based on a defective charge sheet. He faulted the trial magistrate for failing to put on record the sentence meted out by the trial court. He took issue with the fact that the trial court failed to abide by the Provisions of Section 200(3) of the Criminal Procedure Code when the convicting magistrate took over proceedings from the previous magistrate. He was aggrieved by his conviction stating that the arresting officer's testimony indicated that he was not in the motor vehicle subject matter of the present appeal at the time of the alleged search took place. The Appellant was of the opinion that the trial magistrate improperly analyzed the evidence on record and subsequently drew wrong inferences from the same. He was further aggrieved that the trial court failed to properly analyze his defence in arriving at its decision. He asserted that the trial magistrate erred in shifting the burden of proof to the defence. He was of the view that the sentence meted by the trial court was manifestly harsh and excessive in the circumstances. He faulted the trial magistrate for making an order for the Appellant's motor vehicle to be forfeited to the State without following the laid down procedure. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, this court heard oral submissions made by Mr. Oundu for the Appellant and Ms. Kimiri for the State. Mr. Oundu submitted that the evidence presented by the prosecution was not sufficient to sustain a conviction. He asserted that the evidence of PW1 was uncorroborated. He was of the view that the informer ought to have been called as a witness. He stated that the evidence of PW1 was that the Appellant was found in possession of the narcotic substance. However, PW4 contradicted this evidence when he told the court that narcotic drugs were found at the back of the car. Counsel for the Appellant maintained that PW1's evidence was hearsay evidence. He averred that the prosecution witnesses gave contradictory statements.

Mr. Oundu further submitted that the trial court failed to comply with Provisions of Section 200 of the Criminal Procedure Code. He asserted that the Appellant was not informed of his right under the said Section when a new magistrate took conduct of the matter. He averred that the procedure followed in forfeiture of the motor vehicle subject matter in the present appeal was irregular. He stated that the trial court ought to have considered the fact that the Appellant was not the registered owner of the said motor vehicle. Counsel for the Appellant further stated that a valuation certificate of the seized narcotic drugs was not produced before the trial court. He submitted that the value quoted on the charge sheet was not based on a valuation done by an authorized officer. He was of the view that the sentence meted by the trial court was illegal in the absence of a valuation report. He implored this court to substitute the custodial sentence with a fine. In the premises therefore,

he urged this court to allow the Appellant's appeal.

Ms. Kimiri for the State opposed the appeal with respect to conviction and sentence. She stated that the Provisions of Section 200 of the Criminal Procedure Code were observed by the trial court. She submitted that the Appellant's counsel told the court that he wished for the matter to proceed from where it had reached. The Appellant, who was present in court, confirmed the same. There was therefore no prejudice occasioned on the Appellant. Learned State Counsel made submission to the effect that the charge against the Appellant was established to the required standard of proof beyond any reasonable doubt. She stated that PW1 got information from suspects arrested in Mombasa that the Appellant and his sister were suppliers of narcotic drugs. He was introduced to an informer who agreed to pose as a potential buyer in a bid to help in the arrest of the Appellant. The Appellant and the informer met at Sagret Hotel where the deal was to take place. The Appellant was arrested in possession of the narcotic substance. Ms. Kimiri further submitted that PW4 corroborated the evidence of PW1. She asserted that the narcotic substances were weighed and sampled in the presence of the Appellant. On forfeiture of the motor vehicle, Learned State Counsel averred that the motor vehicle belonged to the Appellant. She pointed out that the proceedings where the court made the order of forfeiture were missing from the trial court's record. She was of the view that the irregular disappearance of the proceedings was interestingly in favour of the Appellant. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, PC Moses Githuathi, was based at the Flying Squad Unit in Nairobi. On 1st March 2013, he and other police officers were dispatched to Mombasa by the then DCI Ndegwa Muhoro. They had instructions to track down and arrest persons suspected of trafficking in narcotic drugs. Most of the arrested suspects informed them that they were getting the narcotic drugs from Nairobi. The suspects named the Appellant and his sister Schola as their suppliers. The suspects also introduced them to an informer who was to lead them to the Appellant. PW1 and the other officers travelled back to Nairobi on 4th April 2013. PW1 arranged a meeting with the informer on 5th April 2013. The informer confirmed that he knew the Appellant and his sister. He however informed PW1 that the Appellant's sister had been arrested and charged with the offence of trafficking in narcotic drugs.

PW1 and the informer agreed that the informer would engage the Appellant as a potential buyer for the narcotic drugs. The Appellant agreed to meet the informer at Sagret Hotel in Nairobi. PW1 was at the said hotel. The Appellant arrived at the hotel in a motor vehicle make BMW Registration No.KAU 308V. PW1 sat at a nearby table and watched them converse. After their meeting, the informer told him that they had agreed that the Appellant would supply him with 250g of heroin. The Appellant was to buy the narcotic drugs from a person by the name Adebeyi at Ksh.1,500/- per gram and sell the same to the informer at Ksh.1,700/- per gram. They agreed to meet on 10th April 2013 at about 10.00 a.m. when the Appellant would deliver the heroin.

PW1 went to Sagret Hotel on 10th April 2013. The Appellant arrived at about 10.20 a.m. in the same motor vehicle Registration No.KAU 308V. The informer was already inside the hotel. PW1 called for reinforcement and five police officers arrived. PW1 went inside the hotel and his colleagues waited outside. He sat a few meters from where the Appellant and the informer were seated. At about 11.00 a.m., the informer and the Appellant stood up to leave. The informer pretended to go to the washroom as the Appellant left. The informer quickly came back and informed PW1 that the Appellant was in possession of the drugs he was supposed to sell to him. The Appellant and the informer entered the Appellant's car. After about three minutes, PW1 and his colleagues moved in to arrest the Appellant. PW1 stated that the Appellant was seated at the driver's seat, the informer at the co-driver's seat and a CID officer who pretended to be the informer's friend sat at the rear passenger seat. The Appellant was holding a black polythene bag.

PW1 recovered the black polythene bag that was in the Appellant's possession. He opened the bag and found a khaki envelope. Inside the envelope were four sachets which contained a brownish powder substance. He prepared a search certificate for the items recovered. After the arrest they escorted the Appellant to the Anti-Narcotic Offices at the DCI Headquarters in Nairobi. At the Anti-Narcotic Offices, PW1 liaised with PW5 PC Albanus Mutunga, who guided him on the procedure to be followed after seizure of narcotic substances. PW5 weighed the powdery substance which was recovered from the Appellant. The same weighed 268.5 grams. He prepared a weighing certificate which was signed by the Appellant and other police officers who were present. The Appellant was afterwards taken to Kilimani Police Station.

PW1 forwarded the recovered powdery substance to the Government Chemist for analysis. The substance was analyzed by PW2 Catherine Murambi, who was then a Government Analyst. She sampled the substance and analyzed the same. The Appellant was present during the sampling. She told the court that the substance contained heroin. She prepared a sampling certificate as well as the analysis report which she produced in evidence.

PW3 PC Obed Bulesa, was a Scene of Crime Officer attached at the DCI Headquarters in Nairobi. He was instructed by PW1 to take photographs of the motor vehicle recovered from the Appellant which was being held at the DCI Headquarters. The motor vehicle was make BMW Registration No. KAU 308V. He took photographs of the car and produced the same in evidence.

PW4 PC Benjamin Chemjor, was attached at the DCI Nairobi Flying Squad. He was one of the arresting officers. He stated that he was on patrol on 10th April 2013 at Kilimani Area. At about 10.00 a.m., PW1 called in for back up from Sagret Hotel where there were suspected drug traffickers. The Appellant arrived in motor vehicle Registration No.KAU 308V. He went inside the hotel. He afterwards came out with another person and they entered his vehicle. PW1, PW4 and other officers arrested the Appellant inside the said motor vehicle. They recovered a black polythene bag from the Appellant's possession. They afterwards escorted the Appellant to the DCI Headquarters.

The Appellant was put on his defence. He gave an unsworn statement. He stated that he was at Sagret Hotel on the material day of 10th April 2013. He parked his car at the hotel. He went to the hotel's washroom. When he came out, three men approached him and arrested him. They searched him and took his car keys. Two of them went outside and drove his car to where he was standing. They took him to a police station. The following day he was taken to the government chemist. He was later arraigned before court. The Appellant stated that he did not know the reason for his arrest. He denied the charges against him.

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 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 Appellant's 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 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;”

It was the prosecution's case that the Appellant was arrested in possession of the narcotic substance. PW1 told the court that on 1st March 2013, he was sent to Mombasa to apprehend persons suspected of trafficking in narcotic substances. The arrested persons stated that they got their supply of the narcotic drugs from the Appellant and his sister. They gave PW1 the contact of an informer from Nairobi who knew the Appellant. PW1 got in touch with the informer. The informer agreed to pose as a potential buyer of the narcotic drugs from the Appellant. The informer contacted the Appellant and they met at Sagret Hotel on 9th April 2013. PW1 was at the said hotel. He witnessed the said meeting. The Appellant agreed to deliver the narcotic drugs to the informer the following day.

On 10th April 2013, PW1 went to Sagret Hotel. The informer was to meet the Appellant at 10.00 a.m. for delivery of the narcotic drug. The Appellant arrived at 10.20 a.m. He was driving a BMW Registration No.KAU 308V. The informer was already inside the hotel. PW1 called for reinforcement. Police officers including PW4 arrived at the scene. PW1 went inside the hotel and sat close to where the informer and the Appellant were seated. After a few minutes, they stood up to leave. They went to the Appellant's vehicle. PW1, PW4 and the other officers raided the vehicle. PW1 stated that the Appellant was found in possession of a black polythene bag. PW1 searched the black polythene bag. There was a khaki envelope inside the polythene bag. Inside the envelope, he recovered four sachets containing a brownish powdery substance. PW4 confirmed that the black polythene bag was recovered by PW1 from inside the Appellant's vehicle.

The Appellant denied being found in possession of the narcotic substance. In his defence, he confirmed that he was arrested at Sagret Hotel. He also admitted that he had parked his car at the said hotel. He went inside the hotel to use the washroom. When he was walking out, three men approached him and arrested him. He stated that he did not know the reason for his arrest. This court is not convinced that the Appellant's version of events was true. PW1 and PW4 confirmed that the narcotic substance was found in the Appellant's possession when he was arrested. The defence offered by the Appellant was merely evasive and did not dent the otherwise strong cogent evidence adduced by the prosecution. This court holds that the prosecution established that the narcotic substance was found in the Appellant's 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 1st Schedule thereof. This confirmation was contained in the report from the Government Chemist produced by PW2 Catherine Murambi, who was the Government Analyst. PW2 analyzed the substance found in the Appellant's possession and confirmed that the same contained heroin.

The other issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant trafficked the narcotic drugs. The particulars of the charge alleged that the Appellant was trafficking the narcotic substance by way of conveyance. From the evidence adduced, it was apparent that the Appellant was trafficking the narcotic substance. The drugs were recovered from the Appellant's possession. He was arrested inside motor vehicle registration number KAU 308V. PW1 and PW4 testified that the Appellant arrived at the hotel driving the said car.

The circumstance under which the Appellant was found in possession of the narcotic drugs clearly points to the fact that he was trafficking the said narcotic drugs. He was doing so with a view to benefiting financially from the delivery of the said narcotic substance. This court holds that the prosecution did establish that the Appellant trafficked in the said narcotic substance. The defence adduced by the Appellant was correctly dismissed by the trial court as self-serving and meant to exonerate the Appellant from a crime which he was found red-handed to have committed. This court too finds no merit with the Appellant's defence that he had been framed by the police.

The Appellant submitted that the trial court failed to observe provisions of Section 200 of the Criminal Procedure Code. He stated that he was not informed of his right under the said section when the convicting magistrate took over conduct of the matter. This court has perused the trial court record. There is no record of the trial magistrate telling the Appellant that he had a right to request that his trial start afresh. However, the Appellant's advocate, Mr. Oundu, is on record addressing the issue. Mr.Oundu told the trial court that;

“Four witnesses were heard. There is one more witness. He will be ready to proceed from where the matter reached.”

The Appellant then stated;

“I confirm.”

The trial court then made an order for the matter to proceed from where it had reached. The above responses from the Appellant's advocate as well as himself clearly show that the Appellant's right to request that the case starts afresh was within their knowledge. To pre-empt the right from being read to the Appellant, his counsel told the court that the Appellant had no objection to the case proceeding from where it had reached. The Appellant's advocate informed the court that the Appellant wished to continue with the case from where it had reached. The Appellant confirmed his advocate's averments. No miscarriage of justice was therefore occasioned on the Appellant. This ground of appeal must therefore fail.

The Appellant faulted the trial court for making an order that the Appellant's motor vehicle registration number KAU 308V be forfeited to

the State without any lawful justification. Counsel for the Appellant submitted that the trial court failed to consider that the Appellant was not the registered owner of the said vehicle. He asserted that the forfeiture was therefore invalid. Learned State Counsel maintained that the vehicle belonged to the Appellant and that forfeiture of the same to the State was valid. This court notes that the trial court's proceedings relating to the forfeiture of the motor vehicle registration number KAU 308V are missing from the trial court file. This court is therefore not in a position to ascertain what considerations were made by the trial magistrate in making an order for the forfeiture of the vehicle to the State.

Section 20 of the Narcotic Drugs and Psychotropic Substances Control Act provides for forfeiture of conveyance used in commission of offences under the said Act. PW1 testified that he conducted a search at KRA with regards to ownership of motor vehicle registration number KAU 308V that was used by the Appellant. He stated that the registered owner was one Naima Nyakinyura Mohamed. However this court also notes that the Appellant used the said motor vehicle on the two occasions he met with the informer at Sagret Hotel. In addition, the Appellant on page 16 of the trial court proceedings made an application through his advocate to have the motor vehicle in question released to him. His advocate informed the trial court that the Appellant used the stated motor vehicle every day. He therefore needed the vehicle to be released to him for his everyday use. This is proof that the Appellant was in possession of the motor vehicle at all material times. He was the equitable owner of the motor vehicle. He used the said vehicle as a conveyance to traffick in narcotic drugs. No application has been made before this court or the trial court by the registered owner for the motor vehicle to be released to him or her. This court therefore holds that the Appellant was the equitable owner of the motor vehicle for purposes of this appeal. The order of forfeiture of the motor vehicle registration number KAU 308V to the State made by the trial court is therefore upheld.

The upshot of the above is that the Appellant's appeal against conviction lacks merit and is hereby dismissed. On sentence, the Appellant was sentenced to pay a fine of Ksh.1 million and in default serve a one year custodial sentence. He was additionally sentenced to serve seven (7) 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. In the absence of a valuation report from an authorized officer, the trial court was properly guided in imposing the minimum fine of Ksh.1,000,000/- and in default of the same, the Appellant was required to serve one year imprisonment.

The Appellant was not in remand during the hearing of the trial case. This court has also considered the quantity of the narcotic drugs seized from the Appellant as well as the Appellant's mitigation in the present appeal. This court is of the view that the sentence meted by the trial court was harsh and excessive in the circumstances of this case. The Appellant's appeal on sentence is therefore allowed. The custodial sentence imposed on the Appellant is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. **It is so ordered.**

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2019.

L. KIMARU

JUDGE