

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION (APPELLATE SECTION)
CRIMINAL APPEAL NO E048 OF 2025

FESTUS CHIBUEZE ELEMU
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No 40 of 2019 of the CMs Court at JKIA)

JUDGEMENT

1. The appellant together with four others were charged with two counts of trafficking in narcotic drugs contrary to section 4(A) of the Narcotics Drugs and Psychotropics Substances(Control) Act No 4 of 1994 , the particulars of which were that on the 9th day of march 2019 at Denholm Area within Nairobi County jointly with others not before court, trafficked in Narcotic drugs namely heroin to wit 25kgs with the market value of Kenya shillings 75,000,000 by conveying in contravention of the provision of the Act .
2. In count 2 they were all charged with the offence of conspiracy to commit a felony contrary to section 393 of the Penal code, the particulars of which were that on the 9th day of March 2019 at Donholm area of Nairobi

conspired together to commit a felony , namely trafficking by conveying a Narcotic drug namely heroin to wit 25kgs with a market value of Kshs 75,000,000.

3. The appellant on count 5 was charged with the offence of trafficking in narcotic drugs contrary to section 4(1) of the Act, the particular of which was that on 28th March 2019 at Kayole estate within Nairobi County jointly with others not before the court trafficked in narcotic drug namely heroin to wit 3,700 grams with a market value of kshs 11,100,000by storing in contravention of the act.
4. They pleaded not guilty were tried and convicted on the 5th count of trafficking in narcotic drugs with a market value of kshs 1, 100,000 and sentenced to pay a fine of Kshs. 33,300,000 (Kenya shillings thirty-three million three hundred thousand) in default to serve one-year imprisonment and in addition to serve twelve (12) years imprisonment. This sentence was to run from the date of arraignment in court on 26th march 2019. In case the appellant failed to pay the fine he was to serve in addition twelve (12) months imprisonment and to be repatriated to his country of origin upon serving the sentence.
5. Being dissatisfied by the said conviction and sentence, the appellant filed this appeal initially at the High Court Criminal Registry at Kibera being criminal appeal no E 027 of 2024 and raised these issues on the petition of appeal dated 28th may 2024:

- a) The trial court erred in law and fact by failing to consider adequately or at all the defence by the appellant.
- b) The court erred in law and fact by shifting the burden of proof to the accused to prove who the tenant in house number D19 was.
- c) The court failed to follow the mandatory procedure laid down in section 213 of the Criminal Procedure Code
- d) The court failed to consider adequately or at all that the chain of custody of the evidence of narcotic was fundamentally and irreparably broken hence the conviction was unsafe.
- e) The court erred in fact and law in arriving at a finding that the narcotic drugs were found in the appellants house .
- f) The court failed to consider adequately or at all the glaring inconsistencies in the information contained in the statutory documents produced in court.
- g) The court erred in convicting the appellant on a charge whose particulars varied from the evidence provided.
- h) The court erred by failing to consider adequately or at all that there was significant variance in the spot test and finding of the government analyst as well as the variance in the police file numbers hence it was unclear what was actually recovered.

- i) The court failed to consider adequately or at all the effect of overlooking the failure by the prosecution to produce the blue jerrycan since the particular of the charge was that the mode of trafficking was by storage.
- j) The court erred during sentencing of the appellant, resulting in a manifestly harsh sentence in the circumstances.

SUBMISSIONS

- 6. Directions were issued on the disposal of the appeal by way of written submissions. The appellant initially filed his submissions on 21st January 2025 in which it was contended that the ingredients of the offence were not proved as was stated in the case and on behalf of the appellant it was submitted that storage and ownership of the alleged contraband drug was not sufficiently established as required in law as was stated in the case of ***Gabriel Ojiambo Nambesi versus Republic [2007] eKLR*** where the court stated that particulars of the charge sheet must specify clearly the conduct of the accused person which constitute trafficking and must be proved by evidence the conduct of the accused that constitutes trafficking.
- 7. It was stated that there was no evidence that the appellant owed the house wherein the drugs were found and that he had control thereof. It was the

evidence of PW1 that the appellant lived in the said house with his brother and that it was his evidence that no lease agreement was produced to confirm if the appellant was the tenant thereat. It was contended further that no photographs were taken from the scene to connect the appellant and the seized items and in support thereof the cases of: **Joseph Kinyanjui & another versus Republic [2019] eKLR, Melisa Mary Lawrence versus Republic & 2 others [2011] eKLR and Omar Said Omar versus Republic** were tendered in support thereof.

8. It was submitted further that the appellant defence was not considered and or given the necessary weight and that in sentencing the same the court went outside its mandate and against the intent of the legislature when it stated that the appellant was to serve an additional year above the one for default of payment of the fine.
9. The respondent filed submission in which it was stated that the PW1 the owner of the house testified that he had rented the house from which the appellant was arrested to his brother and that the appellant moved in to live with his brother in C 14 until 2014 when the appellant moved into D19 and that he was alone in the house when he was arrested and recovery made, the inventory of which he signed.
10. On the chain of custody, it was submitted that the same was proved through the evidence of the prosecution witnesses and in particular PW8.

11. Upon coming on record for the appellant, his Advocates filed further submissions dated 25th April 2025 in which he stated that the ownership and control of the house was not sufficiently established and neither was the chain of custody

PROCEEDINGS

12. This being a first appeal, the court is under a duty to re-evaluate the evidence tendered before the trial court and to come to its own conclusion there on while giving allowance to the fact that unlike the trial court, it did not have the advantage of seeing and hearing witnesses. See ***Okeno versus Republic***

13. In this matter PW1 Justus Muriungi Kanak stated that the appellant brother entered into a lease agreement for v house no C14 a d was later joined by the appellant until 2014 when the appellant moved into D19 without signing a lease agreement .PW2 testified that he was a taxi driver who was hired by two men to take them to saika , while PW3 SGT James Tanki who was part of the police operation stated that he had not seen the appellant.PW4 David Mungai a taxi driver on 9th march 2019 carried three passenger one who had a green bag which was heavy which made him suspicious and that he did not know the appellant.

14. PW 5 Dennis Owino Onyango an Analyst with the Government Chemist produced the certificate of sampling in respect of the drugs that were recovered from the appellant and that the appellant refused to

sign the weighing certificate. The same had a weight of 3,700 grams with a total value of kshs 11,100,000.

15. PW7 Corp Derrick Kiprono was present at the scene of the recovery of the drugs from the appellant which were in a blue jerry can and that he took photographs thereof which he produced in court .PW 8 Inspector Aggrey Obiero stated that on the 28th March 2019, together with Corp. Mugambi they went to the house of the appellant at Kayole Estate after receiving information of alleged drug trafficking and carried a search thereat where they found a blue jerry can inside of which there was three packages of a substances suspected to be narcotic drug together with a weighing scale and the appellant passport issued by the Federal Republic of Nigeria .

16. It was further stated that Corp. Mugambi prepared the inventory which was signed by the appellant and witnessed by Corp Sitenei. It was their evidence that this recovery was recorded in the occurrence book and the search certificate and inventory thereof prepared and the inventory signed by the appellant. This evidence was corroborated by PW9 Corp. Mugambi.

17. PW10 PC Wakaba Mungai produced the CCTV footages.PW 11 Inspector Luke Kinoti stated that the substance which was recovered in the house of the appellant was weighed and found to be 3,700 grams and the preliminary test was positive for heroin , which he sent to the government chemist through a memo

dated 9th April 2019 for a comprehensive analysis and that the mobile phones that were recovered from the appellant were also forwarded to the cyber forensic unit and that one Okonkwo who was jailed in Tanzania sent the parcel to the appellant through Simba coach to be given to one Alfred Odhiambo who was the 4th accused at the trial who was to send it outside the country who was paid kshs 2000 by the appellant .

18. It was further stated that the 4th accused told them that the appellant gave him 25 kgs of the drug which drugs were taken by the 1st and 2nd accused and that upon the arrest the appellant told them that one Okonkwo who is jailed in Tanzania had sent him the consignment.

19. When put on his defence the appellant stated that he was in his house when a group of men came in and asked if he was Felix. They took his passport which was on the table and asked if they could search the house since they were police officers. They started hitting him, put him in a vehicle and took him to unknown place. He was later on taken to Pagani police station and the next day to DCI before being charged in court and that the jerry can which allegedly contained the drugs was never produced in court.

ANALYSIS AND DETERMINATION

20. From the submissions and the proceedings herein, the appeal herein is mainly founded on the fact as the law in respect thereof seems not to be disputed by the

appellant. The only issue therefore for determination is whether the prosecution proved the charge on count 5 in which the appellant was convicted noting that the same together with the other accused persons were acquitted of all other charges.

21. The appellant's main contention is that the ownership and control of the house wherein the suspected drugs were found was not established and further that the chain of custody thereof was not reliable so as to sustain a conviction. In convicting the appellant thereon, the trial court had this to say "accused was found in house D19.PW1 the landlord confirmed that accused was residing in that particular house. To me, identification by PW1 that the accused was residing in his rental apartment corroborates the testimony of PW8 and PW9 that he was found in that particular. The gap that arises on whose name appears on the sale(sic) agreement is well clarified by PW1. His explanation that the accused brother on Victor Oyiomo was the initial tenant and that he left accused in the apartment however that accused later changed houses within the same apartment is acceptable. More so when several of his personal documents and or items were also found in the same apartment .."

22. From the evidence on record, the appellant was arrested in the said apartment by PW9 Corp Mugambi in the company of PW8 Inspector Aggrey Obiero, PW7 Corp Derrick Kiprono and PW6 Chief Inspector Elizabeth

Lumumba who were acting on intelligence and that upon the search of the appellants house they found a jerrycan in which the drugs were found.

23. I therefore find no fault with the trial courts finding on facts that the house in which the drugs were found was under the control of the appellant as confirmed in his defence that there was a knock at his door and that the men who had come to the house identified themselves as police officers who searched his house. PW7 Corp. Kiprotich identified the said jerrycan in court and produced the photographs which he took at his residence.

24. There is also the circumstantial evidence on record of the intelligence report received and how the police tracked down the other accused persons which led them to the house of the appellant according to the evidence of PW 8 Inspector Obiero. PW11 Inspector Luke Kinoti corroborated this line of evidence and stated that acting on intelligence they raided the house of the appellant who informed them that the drugs had been sent to him from Tanzania through Alfric Odhiambo one of those who were acquitted and as confirmed through the CCTV footages. That the said drugs were destined for outside the country.

25. The trial court therefore rightly found and held that the appellant had actual possession or had knowledge of the existence of the narcotic drugs in the means of

conveyance and therefore his conviction was safe and free from error.

26. On the chain of custody, the evidence on record PW7 a scene of crime officer took photographs at the scene and captured the blue jerry can which contained the suspected drugs, PW8 confirmed that PW9 Corp Mugambi conducted a search in the appellants house and founds a jerry can in which the suspected drugs were recovered together with a weighing scale and the appellants passport issued by the federal republic of Nigeria among other personal effects and prepared an inventory thereof which was signed by the appellant and that the chain of custody of the exhibits shows how they were handled from receipt to custody without any break as corroborated by the evidence of PW9 who stated that the appellant declined to sign a Notice of Seizure .PW 11 confirmed that the substance was weighed and found to be 3,700 grams and that it tested positive for heroin and that the appellant was present when it was weighed .

27. I therefore find and hold that the chain of custody was not broken as alleged by the appellant and the conviction of the appellant was safe and free from error.

28. It follows that the appeal against conviction lacks merit and is therefore dismissed.

29. On sentence, the same remains the sole discretion of the trial court and will only be interfered with by the appellate court if the trial court acted in error. As

submitted by the respondent the appellant was sentenced to twelve years' imprisonment whereas the sentence provided for in addition to the fine is imprisonment for life. Whereas the sentence herein is illegal, since the appellant was not given notice of enhancement and further since there was no cross appeal on sentence, I will not interfere with the trial court exercise of discretion in favour of the appellant.

30. In the final analysis the appeal herein lacks merit both on conviction and sentence and is thereby dismissed and the judgement of the trial court both on conviction and sentence is affirmed. The appellant has right of appeal.

31. And it is ordered.

DATED SIGNED AND DELIVERED THIS 2nd DAY OF OCTOBER 2025

**J WAKIAGA
JUDGE**

In the presence of
C/A Irene

Ms. Kariuki for the prosecution

Mr. Mzari for the appellant