

**IN THE COURT OF  
APPEAL AT MOMBASA**

**(CORAM: MURGOR, TUIYOTT & NYAMWEYA, JJ.A.)**

**CRIMINAL APPEAL NO. E015 OF 2024**

**BETWEEN**

**ABDULMAJID MSALLAM TIMAMI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the judgment and sentence of the High Court of Kenya at Mombasa (**Kiarie Waweru Kiarie, J.**) delivered on 25<sup>th</sup> January 2024*

*in*

**H. Cr. A. No. 532 of 2019)**

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**JUDGMENT OF THE COURT**

- [1] The first appeal by **Abdulmajid Msallam Timami**, the appellant, against conviction and sentence for the offence of trafficking in narcotic drugs contrary to **section 4(a) of The Narcotics Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 (the Act)**, failed and he is before us on a second appeal.
- [2] In upholding the conviction by the trial Court, the High Court (**Kiarie Waweru Kiarie, J.**) believed the following evidence.
- [3] On instruction from their senior, **Corporal Philip Kazungu (PW1), PC Bernard Langat (PW5)** and **Corporal**

## **Solomon**

**Gachia (PW7)** proceeded to a Shell Petrol Station at Tononoka, where they waived down a motor vehicle, KCT 180M. In the car was the driver, the appellant. He was the only occupant. They moved the vehicle to CID headquarters, Mombasa, and searched it. Under the seat of the co-driver was a red carrier bag, which contained a substance which looked like *unga* (flour).

[4] The recovered substance was subjected to analysis by **Yanga Maingi Hamisi (PW3)**, who returned an opinion that it was 1,015.8 grams of diacetylmorphine, the scientific name of heroine. It is a substance known as a narcotic drug under the First Schedule of the Act.

[5] There was further evidence that the appellant owned the motor vehicle. **William Ooko Okoth**, an Operations Manager with Lota Automobiles limited, testified as **PW2**. He produced an agreement of sale by which his company had sold motor vehicle KCT 180M to the appellant.

[6] Aggrieved by the decision of the High Court, the appellant mounts this second appeal on the following grounds the learned Judge erred in law:

**(a) In finding that all the elements of possession of the drugs herein was proved exclusively to the appellant**

***and to the exclusion of any other person(s); while the evidence demonstrated otherwise.***

***(b) In finding that the defence tendered by the appellant was an afterthought despite the prosecution's statutory failure to avail rebuttal witness and evidence.***

***(c) In holding that the sentence was lawful and not excessive nor harsh; despite his clear failure to analyze whether discretion was properly and judicious.***

[7] At the plenary hearing of the appeal, the appellant was represented by learned counsel **Mr. Chacha Mwita**, while learned Assistant Director of Public Prosecutions, **Ms. Mutua**, appeared for the State.

[8] The appellant argued that his arrest on Friday, 22<sup>nd</sup> March, 2019, was based on shaky and doubtful intelligence, contending that the police claimed to be acting on intelligence about a motor vehicle, KCT 180M CVR Honda, which was allegedly trafficking narcotics. It was submitted that this was a red herring in the prosecution's narrative because the police could not have known about the motor vehicle without also knowing the driver or owner.

[9] The appellant asserted that the High Court judge erred in law by finding that all elements of drug possession were proved

exclusively against him. In this regard it was argued that the primary prosecution witnesses (PW1, PW5 & PW7) acted on intelligence concerning a motor vehicle that was not suspected, yet was confirmed to be trafficking drugs, which the appellant found illogical.

[10] The appellant further contended that the search of the motor vehicle at the CID regional offices, a deliberate choice by the arresting officers to avoid searching him at the point of arrest, was stage-managed in blatant violation of the rights of an arrested person as provided for under Article 49 of the Constitution.

[11] Regarding the charges, the appellant faced an offence of trafficking 1,015.8 grams of heroin with a market value of Kshs. 3,047,400. It was submitted that the particulars of the charge did not align with the evidence of the prosecution witnesses. Specifically, the charge stated the recovery was at Tononoka near a Shell Petrol station, but the evidence indicated the recovery occurred at the CID Regional Headquarters much later. This discrepancy, along with the charge mentioning he was trafficking with others not in court, was argued to be a fatal misnomer. Cited was the decision in

**Bakar vs. Republic (Criminal Appeal 39 of 2020)**  
**[2021]**

**KECA 129 (KLR).**

[12] It was pointed out that the intelligence leading to the arrest, accredited to Chief Inspector Mosobin Ngeiywa by the primary witnesses, was never substantiated as C.I. Ngeiywa was not called as a witness. This failure was deemed a fatal omission that left the prosecution's narrative in serious doubt, particularly as it would have clarified whether the source of the information was one Mr. Said Ahmed (**Ahmed**).

[13] The appellant's defence was that he had never trafficked drugs and that the events of 22<sup>nd</sup> March, 2019 were a set-up involving fabricated evidence to incriminate him. He claimed to have given a ride to the person who possessed the motor vehicle on 21<sup>st</sup> March, 2019, **Ahmed**, who was the right person to account for it. This defence, it was argued, was not an afterthought as concluded by the High Court, as a witness for the prosecution, PW1, even testified that he did not know who was driving the vehicle the day before. It was posited that the failure to dust the vehicle for fingerprints, particularly those of **Ahmed**, was

an act designed to compromise the crime scene.

[14] It was submitted that the appellant was taken to a hostile environment at the CID HQ where he was not informed of his rights under Article 49 of the Constitution, including the right to be informed of the reason for his arrest and the right to remain silent.

**[15]** Supposed conflicting evidence from prosecution witnesses was highlighted; PW5 claimed that the appellant denied knowledge of the search, while PW7 stated that he refused to sign the inventory, implying force or coercion was used to obtain his thumbprint. The appellant also contested the manner of the alleged recovery of the drugs, pointing to inconsistencies in witness testimonies about where the red carrier bag (PEXH 1) was found, with PW1 stating it was recovered from the co-driver's seat without specifying if it was noticed beforehand, whereas PW5 claimed to have first seen it protruding and attracting his attention. Furthermore, the appellant submitted that the photographic evidence from the crime scene manager (PW6) was unreliable and inadmissible under section 106B of the Evidence Act, as the source of the photographs was never explained and the compact disk they were transferred to remained unmarked. He cited Levi

**Simiyu Makali vs. Koyi John Waluke & 2 others**

**[2018] KEHC 8492 (KLR)** to support this point.

**[16]** It was argued that a crucial ingredient for the charge of trafficking by way of conveyance was not proved, as the prosecution failed to establish that the appellant was conveying narcotics from a specific point A to a point B, with both points remaining unknown. The appellant made reference to **Gabriel Ojiambo Nambesi vs. Republic** **[2007] KECA 499 (KLR)** and **Philip Nyakundi Kibagendi vs.**

**Republic** **[2022] KEHC 798 (KLR)** to assert that the particulars of the charge sheet must clearly specify the conduct of the accused. The possession of the drugs was also contested, as the appellant argued that the prosecution failed to demonstrate that he had knowledge and control over them, which is fundamental under section 4 of the Penal Code and section 2 of the Firearms Act. Numerous other conflicts in the evidence from the primary prosecution witnesses (PW1, PW5 & PW7) was alleged, including contradictions about who entered the vehicle upon arrest, who conducted the search, the colour of the tape used to wrap the drugs (yellow according to

PW1, brown according to PW5 and PW7), and

how the location of the appellant and the vehicle was known, suggesting that the evidence may have been planted.

**[17]** On whether the learned Judge erred in finding that the defence tendered by the appellant was an afterthought despite the prosecution's statutory failure to avail a rebuttal witness and evidence, the appellant argued that the defence tendered was formidable, citing cases like

**Juma Rashid**

**Mwawanga vs. Republic [2020] KEHC 937 (KLR), Josephat**

**Kisilu Mulinge vs. Republic [2014] KECA 259 (KLR)**  
and

**Abdi Osman Ahmed vs. Republic [2007] KEHC 1630**

**(KLR)** to support the argument that where there are several people involved in commission of a crime, it is impossible to apportion blame on an individual without availing special evidence and circumstances. The appellant also contended that the primary witnesses had failed to obtain a search warrant as required by section 57 of the National Police Service Act. In addition, section 60(1) of the National Police Service Act as read together with section 73(5) of the Narcotics Drugs & Psychotropic

Substances Control Act No. 4 of 1994, was also not complied with rendering the search inadmissible.

[18] Finally, the appellant challenged the sentence imposed as excessive and not properly applied, citing his status as a first-time offender and his current health condition; bedridden, hemiplegic, and dependent on support equipment. He relied on **Juma Rashid Mwawanga vs. Republic [2020] KEHC 937 (KLR)**, **Alex Njuguna Kimani vs. Republic [2016] KECA 397 (KLR)**, and **Mohamed Famau Bakari vs. Republic [2016] KECA 683 (KLR)**, to argue for a more lenient sentence under the circumstances. He contended that when considering a fine, the court ought to be guided by the valuation of the drugs in issue. He also added that he had served more than one (1) year and nine (9) months since his conviction and sentencing on the 5<sup>th</sup> January, 2023.

[19] In response to the appeal, the respondent submitted that the prosecution had successfully proved the guilt of the appellant beyond any reasonable doubt. It was argued that the appellant was found as the sole occupant inside the motor vehicle number KCT 180M CRV Honda, where the drugs were recovered. The respondent pointed to the testimony of the police witnesses who testified how the appellant was transporting the narcotics in his motor

vehicle and that the

drugs were found inside the vehicle, which was owned by him. It was further submitted that when questioned, the appellant had stated that the item in his car was 'unga' (flour). On the appellant's defence; it was argued that although the appellant claimed that the police officers had planted the drugs in his vehicle, he failed to cross-examine any of the prosecution witnesses on this specific claim during the trial. This allegation only emerged for the first time in the appellant's defence statement. The respondent contended that the prosecution had proved the element of conveyance as required for a trafficking charge, citing the case of

**Mohamed Famau Bakari vs. Republic [2016] KECA 683 (KLR)**, where conveyance is defined as the means of transport, which in this case was the motor vehicle the appellant was driving.

[20] Regarding the sentence, the respondent addressed the appellant's complaint that the sentence of 15 years' imprisonment and a fine of Kshs 9,142,200/= was harsh and excessive. The respondent asserted that sentencing is a matter that rests in the discretion of the trial court, and an appellate court should not be quick to interfere with it.

Citing

**Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR)** cited with approval in **Robert Mutungi Muumbi v Republic [2015] KECA 584 (KLR)**, it was submitted that interference is only warranted if the sentence is manifestly excessive, if the trial court overlooked a material factor, took into account wrong material, or acted on a wrong principle. The respondent argued that the penalty prescribed under Section 4(a) of the Act is not mandatory, and the trial court has discretion to impose an appropriate sentence up to the maximum provided. It was maintained that the trial magistrate had properly exercised this discretion by considering the plea in mitigation advanced by the appellant, including the fact that he was a first offender, his personal circumstances, and the contents of a pre-sentence report.

[21] The remit of this Court sitting as a second appellate court is limited to considering and determining matters of law only. See amongst others **Njoroge vs. Republic [1982] KECA 19 (KLR)**.

[22] We start by observing that the appellant made some arguments that went beyond the three grounds of appeal he took up in his Memorandum dated 11<sup>th</sup> June 2024, filed by

his advocates. We

shall not consider those arguments that traverse outside the appeal delineated in that memorandum.

[23] It is true, as contended by the appellant, that although the police officers stopped him at Tononoka near Shell Petrol Station, the search of the vehicle was conducted at the CID Regional Headquarters. PW5 explained that this was because they were sensitive to the privacy of the appellant, a plausible explanation. It seems to us, however, that the ideal place for conducting a search over a vehicle or vessel depends on the circumstances of each case. For example, it may be disruptive to traffic and extremely chaotic to search a motor vehicle which has been intercepted in the middle of traffic at Moi Avenue, Mombasa, during rush hour. What is critical is that, where the search is conducted in a place other than where the vehicle or other vessel was intercepted or impounded, there has been no tampering with the contents of the vehicle. Here, whilst the appellant now complains about the place of search, there was no evidence that the substance which turned out to be the illicit drug was planted in the vehicle between the time the vehicle was stopped by the police and the time it was searched.

Important, as well, is that the appellant acknowledged the presence of the suspect substance in his car by thumbing print the inventory, which recorded the items recovered after the search. Nothing can possibly turn on the argument that the search should have been conducted where the vehicle was intercepted.

[24] Regarding the possibility that the person culpable was **Ahmed**, it is evident that this matter featured for the first time when raised by the appellant at the defence hearing. No questions were put to the prosecution witnesses regarding the possible role of **Ahmed**. This late theory was never raised at the investigation stage, so that the investigators could test it. We have no difficulty endorsing the following holding by the High Court:-

***“Though he did not directly say that it must be Said Ahmed who placed the drugs in his vehicle and set him up for arrest, this was what he spoke in a veiled manner. This defence could have been available to him had he given this information to the police at the time of his arrest. The police would have investigated this claim, and if it were established to be accurate, then the right culprit would have been charged. On the other hand, if he volunteered this information and they failed to investigate, the court ought to have given the accused the benefit of the doubt.”***

[25] Because of this strong evidence, the various contradictory

evidence pointed out by the appellant like, who drove the vehicle

to the station, was not sufficiently material to weaken the prosecution's case.

[26] Regarding whether C.I. Ngeiywa should have been called to give the source of the information, this Court in Gitigi vs.

Republic

(Criminal Appeal 79 of 2019) [2025] KECA 1187 (KLR)

has said this about revealing the identity of informants;

***“The appellant also lamented that the informer was never called to testify....***

***....Section 132 of the Evidence Act provides that no public officer shall be compelled to disclose communications made by any person to him in the course of his duty, when he considers that the public interest would suffer by the disclosure. Under section 133 (1) of the same statute, no judge, magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence. The information acquired from the informant was glaringly that which was qualified under the above provisions.”***

[27] Similarly in Caroline Mumbi Ngondi & Another vs.

Republic [2019] KEHC 47 (KLR), this Court observed :-

***“In ground 3 the appellant has faulted the trial court for failing to summon the informer as a witness pursuant to the court's power to summon a witness on its own motion under section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The evidence of an informer is privileged in terms of section 132 of the Evidence Act (Cap 80) Laws of Kenya. Although section 132 only appears to cover public officers, in my view it covers members of the public to whom***

***disclosures of the commission of crimes has been made. This is universal rule, which may only be waived if the***

***disclosure is to assist the accused to establish his innocence. See Marks v. Beyfus (1820) 25 QBD***

***494. This is not the position in the instant appeal. Section 150 of the Criminal Procedure Code was not violated; since the informer's potential evidence was not required to establish the appellant's innocence. This ground lacks merit and is hereby dismissed."***

[28] This Court has reflected on the evidence tendered by the prosecution, the questions posed in cross-examination and the defence set up by the appellant, and concludes that the offence was proved beyond any reasonable doubt even without the evidence of the informant. The evidence established that at the time he was flagged down at Tononoka, the appellant was alone in the car he drove. In the car was a narcotic drug. He was unable to dissociate himself from the ownership or control of the drug. The investigation by the police did not absolve him from wrongdoing. This was definitely conveyance of the substance within the meaning of that word under section 2 of the Act, which is “ **conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel**”. In turn, the conveyance of the substance amounted to trafficking a narcotic drug. The evidence was iron-clad, and the outcome reached by the two courts below was inevitable.

[29] A challenge on sentence in a second appeal can only be about its legality. See section 361(1) of The Criminal Procedure Code and the decision of the Court in **Sichei vs. Republic (Criminal Appeal 8 of 2020) [2025] KECA 152 (KLR)**.

[30] We first consider the fine imposed. In sentences under section 4(a) of the Act, the value of the narcotics forms a basis for the fine to be imposed. Section 4(a) of the Act reads:

**“4. Penalty for trafficking in narcotic drugs, etc.**

**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.”**

[31] The value of the offending drugs was certified to be Kshs. 3,047,400 in a valuation prepared by **Philip Langat (PW4)**, a proper officer within the meaning of section 86 of the Act. There was no serious attempt to fault the valuation during cross- examination and the two courts below cannot be faulted for accepting it.

[32] The trial court chose to impose a sentence of 15 years' imprisonment instead of the maximum of imprisonment for life. In arriving at the sentence, the court stated:

***"I have considered the charges, mitigation and prosecution officers report."***

While the first appellate court and we may have been more lenient, the sentence of 15 years imprisonment against a possible life imprisonment cannot be said to be manifestly excessive or illegal, and we have no basis to interfere with it.

[33] Ultimately, this second appeal lacks merit, and we hereby dismiss it.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of December 2025.**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

**F. TUIYOTT**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a True copy of the  
original*

*Signed*  
**DEPUTY REGISTRAR**