



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION (APPEALS)

HIGH COURT CRIMINAL APPEAL NO. 231 OF 2023

ANNE ACHIENG ANYANGA.....

APPELLANT

-VS-

THE OFFICE OF DIRECTOR OF PUBLIC

PROSECUTION.....

.....RESPONDENT

(Being an Appeal against the Decisions (Both Conviction and Sentence) of Hon. M. Mutuku, Chief Magistrate,)

In Criminal Case Number 1317/16 (Republic v.2nd Accused Elizabeth Akinyi Mboga and 1st Accused Annie Achieng Anyanga) judgment on the 27th Day of February 2022 appeals against the whole of the said decision both conviction and sentence and pursuant to LEAVE TO APPEAL LEAVE TO APPEAL OUT OF TIME granted on the 20th July 2023 by Hon. Lady Justice KAVEDZA.R. High Court

JUDGMENT

PETITION OF APPEAL

1. The learned Trial Chief Magistrate erred in law and fact by convicting the Appellant on a charge which had not been proved beyond reasonable doubt as required by law.
2. The learned Trial Chief Magistrate erred in law and fact ignoring prosecution evidence which was in the Appellant's favor and materially contradicted the prosecution case.
3. The learned Trial Chief Magistrate erred in law and fact by finding the Appellant had a luggage tag labelled No.41 without any evidence of such recovery upon search thereby convicting the Appellant on findings not supported by evidence.
4. The learned Trial Chief Magistrate erred in fact and law by substituting "prove beyond reasonable doubt" (which is based on evidence) with "intelligence" which is not evidenced and ended up convicting the

Appellant on this amorphous evidence against trite law that a conviction can only be premised on "proof beyond ant reasonable doubt"

5. The learned Trial Chief Magistrate erred in law and fact by failing to consider that the luggage was marked as originating from Nairobi and destined for Mombasa thereby contradicting the assertion that it originated from Kampala and was destined for Nairobi which contradiction ought to have been resolved in favor of the Appellant.
6. The learned Trial Chief Magistrate erred in fact and law by relying on the evidence of a bus driver who was not driving the bus at the material time and distance and by failing to consider that the driver who had control of the bus at the material time and distance was not even disclosed.
7. The learned Trial Chief Magistrate erred in fact and law by admitting as a fact a lie that the Appellant carried her luggage from the bus in the face of clear evidence from the prosecution by the scenes of crime photographer No. 86634 P.C. Peterson Njue (PW3), that when the passengers were lined outside the bus all their luggage was in the luggage compartment and they photographed it and that it is

the police who removed the luggage including the questioned box and took it to the office which makes the conviction erroneous.

8. The learned Trial Chief Magistrate erred in fact and law by admitting and relying wholesomely on contradictory prosecution evidence without question and dismissing the Appellant's defense in one sentence without giving any reasons.
9. The learned Trial Chief Magistrate erred in fact and law by ignoring the fact that the prosecution case did not establish with clarity what the narcotic substance was (whether heroin, cocaine or Methamphetamine) that was allegedly being trafficked.
10. The learned Trial Chief Magistrate erred in fact and law by admitting and relying on evidence obtained in contravention of the law in violation of the Appellant's Constitutional right to a fair trial enshrined in Article 50(4) of the Constitution of Kenya 2010, namely that the search alleged to have been done on the Appellant and the luggage were against the law and illegal.
11. The learned Trial Chief Magistrate erred in fact and law by imposing a sentence that was manifestly excessive, inhuman and in fact unlawful ignoring the

provisions of the constitution of Kenya 2010 Article 50(2)(p) [Constitution] which entitles a first offender the least of sentences prescribed for an offence.

TRIAL COURT PROCEEDINGS

1. PW1 EVIDENCE ON 14/5/2019

PW1, Kiplimo Bore, stated that he was driver of Modern Coast Express for 12 years. He was plying Nairobi-Busia-Kampala-Kigali-Rwanda. On 18/8/2016, he drove motor vehicle Registration Modern 5 Uganda registration No, he left Uganda at 9 pm. At Kisumu he handed over the motor vehicle to a driver Mr. Augustine. They stopped at Nakuru for breakfast. They proceeded with the journey. At Naivasha, they were stopped by Police Officers, 2 men in plain clothes told them to drive the motor vehicle to the police station. They drove to Naivasha Police station. While at the station, all the passengers were ordered to take possession of their luggage. One of the passengers a lady was taken over by police officer as suspect to the office. Augustine and him were called in. They showed us the lady who had been arrested and they were informed that she was trafficking drugs.

He was shown different plastic brushes which contained the drugs. He was shown different brushes - plastic handle and cloth brush pink and purple in color. They were in brown box (carton) marked **MFI-1** The box was in a black polythene bag marked **MFI-2** 53 cloth/brushes marked **MFI-3**

The officer opened the box of the brush and he saw brown substance concealed in the hollow part of the brush.

(Witness demonstrates) he then recorded his statement with the police. He had his driving permit in court. He also had badge No. 5318/29 marked **MFI-4** in the name of Kiplimo Bore.

He had a chart showing motor vehicle bookings to any particular day. He had a chart for 18/8/16. On this day the bus was fully booked from Kigali-Bus. Travel Bus Chart marked - **MFI-5** Attached to the chart is a manifest showing the bounded clearance. He had the manifest for 18/8/16 marked **MFI-6** It was stamped at Busia Uganda and Busia Kenya.

The passenger Anne Achieng sat on seat No. 41. He also had a bus ticket issued on 18/8/16 from Kampala to Nairobi. He had a tag 1 showing the seat

number and name- **MFI-7** He recorded his statement. Accused 1 was known to him (identified).

2. CROSS EXAMINED BY MR. WANYANGA FOR ACCUSED 1

In cross-examination PW1 stated that when he got to Naivasha the following day. He was the driver, not the conductor. He did not concern himself with passenger's luggage and that tickets are issued in their offices and the tag was also issued at the booking office. He was not the one who issued the tag. All the luggage must be tagged. All travelers are issued with travel tickets. He was not present when the luggage was tagged.

The motor vehicle was full. According to the chart No. 12 was the co-driver's seat. The bus has 2 drivers. He did not know who was seated on to seat No. 44. According to the chart, the bus was fully booked. Passenger No. 44 boarded the bus at Kisumu. He saw the luggage at the police station having been removed from the bus. The drivers were all called to the office.

3. CROSS-EXAMINATION BY MR. OUNDU FOR 2ND ACCD

PW1 stated that he saw the bus at the police station office. He did not see the luggage bag removed from the bus referred to the rag in court does not bear the names and does not disclose the destination.

It only showed the seat No. He presented to court a computer-generated document.

4. PW2: ADULT SWORN STATE IN ENGLISH

No. 63487 Sgt Joseph Kipruto of DCI Headquarters, currently attached to Safaricom, previously ANU till April 2018,

He stated that on 19/8/2016, he got information that there was a person who was bringing in drugs from Kampala to Nairobi. I and PC Odhiambo left Nairobi early morning and drove to Naivasha. The information was that the suspect was using PSV Modern Coast Bus Registration Modern 5; a customized Uganda number plate. They got to Naivasha at 9.30 am, they sought assistance of Traffic officer. The bus arrived shortly before 11 am. The motor vehicle was stopped by police officers. They were directed by the officers to the police station. On arrival, they asked all the passengers to alight and collect their luggage, and also present ID documents. As they alighted, they went through the

documents. They already had the name of the suspect. Her name was Anne Achieng Anyanga. He waited for her to pick her luggage. She picked a carton wrapped in black polythene bag.

They escorted the suspect to the DCI office Naivasha a few metres from where the motor vehicle was parked. He informed her that her luggage would be searched as the lady officer did a body search.

The box carton contained several cloth brushes (**MFI- 3**). They inspected each and every piece of the brushes; a substance was concealed in the hollow space on the handle. The handle had a cork. There were 53 brushes marked **D1-D53**. Out of the **53, 52** had brownish substance suspected to be narcotic drugs.

(Exhibit polythene bag - sealed torn open in court).
Witness demonstrates how the substance were concealed in the brush handles. Pellet like substance marked **D1-D52- MFI 9**. They arrested the suspect and interviewed her. She said she had been sent by another lady. P.C.Odhiambo prepared an Inventory as is D/D. He signed the inventory, PC Njue and the suspect. Inventory marked **MFI-10**

The passport was recovered from Accused 1 - A2333622. Anyanga Anne Achieng-marked as **MFI- 11**. She also had a bus ticket from Modern Coast (**MFI 7**). The carton had a tag, it had no name but labelled seat No. 41 (**MFI 8**). They also were with Scenes of Crime officer. They photographed the motor vehicle. They took 135 photographs marked as **MFI -135**.

He issued Notice of Seizure to the Bus addressed to Managing Director - (M.C) registration Modern 5 marked as **MFI-13 (a)**.

He also seized the carton and brushes and issued the Notice to Anne A. Anyanga marked as **MFI-13 (b)**.

The Investigating officer confirmed with the investigations, I later learnt that the substance was analyzed and found to be Heroine. He got this from the Investigating Officer. Our preliminary test at the seizure, the substances had reached to show for that they were narcotics.

Mr Wanyanga for 1st Accused person applied to be supplied with 135 photographs to study and prepare for the Defense & Mr

Oundu supported [colleague's application] The Trial Court stood down the witness.

5. PW3 ADULT SWORN STATES IN ENGLISH

No. 86634 P.C. Peterson Njue, crime scene investigation officer. G/N 217/1/1/2013. He stated that on 19/8/2016, he was requested by one P.C Mugambi of ANU, DCI Headquarters to document a motor vehicle that they had intercepted along Nairobi Naivasha Highway at Total Petrol Station Junction.

He found the motor vehicle parked at Naivasha Police Station Yard. They said that motor vehicle was carrying suspected drug dealers. MODERN 5 - belonging to Modern Coast was the registration number. Their left side 2nd compartment, there was a luggage. They opened the compartment. They were made luggage. One had a tag. Modern Coast travel customer NRB-MSA No. 41. The luggage was inside a black polythene paper which was removed and taken into the office so that it would be opened. Inside the polythene bag was a box with brooms, made of plastic handles and cotton. They were of pink and purple in color.

One pink broom handle was opened on either side, it was stuffed with powder in between the handle. They were wrapped (powder) using clear paper.

They also requested to do a preliminary test. One was heroin, cocaine and the 3rd one was methamine. Then he took photographs of the 3 reagents and also

chemicals, the 3 reagents after the testing. He also took photographs of the items in bus without passengers. In total he took 36 photographs **MFI-14**. He prepared a report in respect of the photographs, which were processed at DCI Headquarters. He also prepared and signed a certificate- **MFI-15**. Photographs **14 i-xxiv & Certificate 15**.

6. CROSS EXAMINED BY MR. WANYANGA FOR ACCUSED 1

PW3 stated that at the time of investigation, he was based at Naivasha crime scene. He found the bus parked at Naivasha police station. All passengers were outside the bus.

Their luggage was still in the compartments. He found the luggage inside the bus compartment. He supervised the processing at DCI Headquarters. There is a photographic department at DCI Headquarters. He produced a work ticket where they produced the photographs for processing. His camera had an SD card. He had not produced the SD card. It was described in the certificate. He stated that the certificate could be produced if required, he could produce it before court. The photographs were transferred from his SD to CD for processing.

7. CROSS EXAMINED BY OUNDU FOR ACCUSED 2

PW3 stated that he arrived at the police station during the day. He could not recall the exact time. He found the luggage in the compartment. He did not see the police make enquiries.

8. RE-EXAMINATION BY PROS

The Investigating Officer told him that they had forwarded about the luggage. The photography was not stage managed.

9. PW4: ADULT SWORN STATE IN ENGLISH

No. 235249 CI Lilian Saka at DCI Headquarters as Crime Scene Investigator. She stated that on 26/8/2016 at about 1230 hours, while at DCI Headquarter, she was called to attend to a scene where suspected narcotic drugs had been found and taken to Government Chemist for analysis. Upon request by Investigating Officer, she took a total of 138 photographs. She was doing the weighing, sampling and analysis process. The photographs showed the exhibit brooms and samples collected marked **D1 - D52** and each marked exhibit was weighed. She took exhibit of **D1-D52** being weighed and also being sampled. The photographs were altered. This took place at the Government Chemist.

The photographs were before court. They were 138 in number, **MFI-16** as a bundle. She prepared a **Certificate -MFI -17. MFI-16 & MFI -17** now produced as **Exh 16 & 17**

10. CROSS-EXAMINATION BY MR. OUNDU FOR ACCUSED 2

PW4 stated PC George Odhiambo, asked her to take photographs. His name appeared on her report. She found the substance at Government Chemist. The Investigating Officer and the suspect were present. The substance was in the possession of the Investigating Officer.

She signed documents for analysis. She could not recall the number of the documents signed. The suspect was also present. The Investigating officer showed her the suspect. She did not photograph the suspects. She was not told to take photographs of suspects.

11. CROSS EXAMINED BY MR. WANYANGA FOR ACCUSED 1

PW 4 in cross-examination by Mr. Wanyanga stated that the brushes were marked **D1-D53**. She took photographs of the brooms with the top part removed. Referred to photograph marked 21, there

was a powdery substance from the top part of the broom. The substance was inside a polythene paper inside the broom. She was the one who opened the tops of the brooms. The polythene was inside the brooms. The 1st Photograph showed the exhibits in a box which was not sealed.

12. PW 2 SGT KIPRUTO JOSEPH- RECALLED FOR CROSS EXAMINATION- SWORN STATED CROSS EXAMINATION BY MR WANYANGA FOR 1ST ACCUSED

He stated that he did not participate in taking photographs by Scenes of Crime. They had intelligence in regard to the identity of 1st Accused. The source of Intelligence could not be disclosed to Court. He did not spot test in the presence of the Accused1.PC Odhiambo did the test in my presence. The test was done by trained Anti-narcotic Officer. He was also a trained ANU Officer.

Mr Odhiambo did the testing. Presumptive test would guide them whether the substance was a narcotic. He conducted the arrest and recovery. Photographs were taken by Officers from Naivasha.

13. CROSS EXAMINATION BY MR OUNDU FOR 2ND ACCUSED;

He did not arrest 2nd Accused. She was not on the bus. The presumptive test was not documented. He recorded it in his statement.

14. RE-EXAMINATION BY PROSECUTION

He recorded in his Statement that a presumptive test was conducted. At Pg 3 Paragraph it is indicated that he conducted a presumptive test and it was heroine.

15. PW 5: ADULT SWORN STATE IN ENGLISH/KISWAHILI

Denis Owino Onyango, working as Analyst at Government Chemist in Nairobi. He holds BSc from JKUAT in Chemistry and Bio Chemistry. He is a Gazetted Officer No. 6934 d/d 12/7/2007.

He had documents which he was relying on; certificate of weighing, certificate of sampling, police exhibit memo Form and report of Government analyst, together with samples of what were suspected drugs.

The weighing of brown powdery substance which was suspected to contain narcotic drugs was done by a weighing officer George Odhiambo, a police officer from the DCI. The total weight of the substance was 854.3 grams and he participated as a witness.

Others present were the accused persons namely Anne Achieng and Elizabeth Akinyi Mboga. Also present was Cpl Kenneth Kemeli, PC Muguna, Lilian Saka from crime scene support services.

The sampling was done on 22/8/2016 at Government Chemist at 1500 hours. From the total weight, he took a sample which culminated in preparation of certificate of sampling which reads in part; "52 brush handle D1-D52 containing brownish powdery substance was done by me and the total weight samples taken was 54.3 grams".

Witnesses present were the 2 accused, Cpl Kemeli, PC Kirimi Muguna, George Odhiambo and Lilian Saka d/d 22/8/2016. Time 1540 hours.

On 22/8/2016, he received a phone exhibit memo form accompanying the exhibit which was stamped and signed and an entry was made, code given Q 71/16.

The request was that he ascertain the content purity of the substance and confirm if they were drugs in Psychotropic Control Act 1994.

He proceeded to examine the powdery substance using a machine called gas chromatograph- gas spectroscopy machine. The findings were that the substances were methamphetamine a Psychotropic substance which is

in Schedule 2 of the Act. He made a report ref Q 71/2016 which he signed on 24/10/2016 and sealed the same.

The sample were presented before court as police exhibit Memo dated 22/8/2016 - Ref Q 71/2016. He also had samples that he sampled. He prepared a report dated 24/8/2016 - **MFI 19** produced as **PEX 19**. He also prepared a certificate of weighing dated 22/8/2016 - **MFI 20** produced as **PEX 20**. Samples collection was marked as **MFI 21 - PEX 21**.

16. CROSS EXAMINED BY MR. WANYANGA FOR ACCUSED 1

PW5 Referred to certificate of weighing and stated that the brushes (brooms) were not sealed when they were brought to him. It was the Investigating Officer who availed/brought the 52 brushes to him.

He could not remember if the police indicated that they had conducted a spot test.

An accused/suspect can decline to sign a certificate of weighing. The investigating officer explained to accused that court witness in exercise of weighing and sampling they would be required to sign the invoice documents by virtue of having participated in

the weighing and sampling. This was done by George Odhiambo.

The accused were escorted by police officers to the Government Chemist. The police came with the exhibit memo form already prepared. He was required to tell/ascertain the content in each of the 52 brushes. He did prepare a report in respect of each brush where were the exhibit memo. He had 52 sachets/samples. In his report he indicated that all of them had the same substance.

17. CROSS EXAMINED BY MR. OUNDU FOR 2ND ACCUSED

PW5 stated that he prepared the certificate of sampling. It was in course of sampling; He identified the substance. He did inform them of their right to have a witness. He did not record this nor their response. The time was 1540 hours of sampling. He received the exhibit memo the same day. The time is not indicated. George Odhiambo brought the Memo. He was a witness to the sampling. The Exhibit Memo presented the samples.

18. PW6: ADULT SWORN -STATE IN ENGLISH

No. 231067 ASP George Mutiso. He is the County DCI Deputy Mahiga - Mombasa County. He stated

that on 26/10/2016, he was approached by the Investigating Officer to make a Valuation Certificate in respect of some drugs seized in Naivasha.

Being Gazetted No 12710 dated 3/10/2011, he requested the Investigating Officer to provide him with an Analyst Report and a Weighing Certificate as proof of weighing. The Investigating Officer provided the report dated 24/10/16 and the Weighing Certificate of the drugs (meth) and the total weight was 854.3 grams. He checked through their daily intelligence brief 1 gram of meth was going for 8,000/- thus 854.3 grams X 8,000 totaled to Kshs.6,834,400/=. He prepared a Certificate and signed on 6/10/2016.

Certificate of Valuation **MFI 22** produced as **PEX 22**.

19. CROSS EXAMINED BY MR. WANYANGA FOR ACCUSED 1

In cross-examination PW6 stated that he got the value from doing drugs intelligence brief. He did not alter the brief in his report.

20. CROSS EXAMINED BY MR. OUNDU FOR ACCUSED 2

PW6 stated that on 26/10/16, he prepared the report he was referred to do. The date was 25/8/2016. The value in the charge sheet was Kshs.2,562,900/=. The request was made to him on 26/10/2016. He did not know where the value of Kshs.2,562,900/= was brought. The charge sheet indicated Heroin. He was presented with the report from Government Chemist.

21. PW7: ADULT SWORN AND STATES IN ENGLISH

84167 Cpl. George Odhiambo. He was attached to ANU Headquarters. He performed investigation duties. He did recall on 19/8/2016, they received information about a suspect travelling from Uganda and suspected to be carrying narcotic drugs. Alongside Sgt. Joseph Kipruto, they proceeded to Naivasha in hand for the bus from Uganda to Nairobi. Upon arrival to Naivasha, they were assisted by their traffic colleagues. They flagged down a bus operated by Modern Coast Modern 5 and the driver was directed to proceed to Naivasha police station.

At Naivasha Police Station, they instructed all passengers to alight from the bus, with their luggage. They started conducting search on the passengers.

One passenger, a female Anne Achieng, picked her luggage. Upon search, 53 cloth's brushes were found to be the content of her luggage. Upon search a substance was found on the handles of the 52 brushes. The substance was suspected to contain drugs. He made an inventory of goods found on her.

- Her Passport No. A2333622
- Inter certificate of vaccination bearing her name.
- Modern Coast express ticket KAIU0213 bearing her name seat No. 41 -business class.
- Piece of paper writing 41 which corresponded with another piece of paper in Modern Coast tied against her luggage.

He learned from the driver and confirmed that the luggage had tag. The one she held was for purposes of collecting the luggage.

- Tarmid Coach bus ticket dated 10/8/2016 bearing the name Anne Nairobi to Malindi
- Tarmid Coach ticket - Anne Achieng dated 12/8/2016-Mombasa to Dar es Salaam.
- Bus ticket Majinja special dated 15/8/2016 bearing Anne's Achieng from Mbeya to Dar es Salaam.

Bus ticket dated 17/8/2016 bearing the name Anne Achieng Dar es Salaam to Kampala. This indicated travel to Nairobi - Mombasa - Tanzania then to Uganda before coming back to Kenya. They obtained a normal bus chart from Modern Coast. It indicated that accused was seated on seat No. 41. The bus manifest confirmed the same.

They proceeded to Nairobi and kept accused in custody. On 20/8/2016, their colleagues from Nyando DCIO Headquarters arrested another suspect in connection with the office. The suspect was Elizabeth Akinyi. The suspect was brought to Nairobi. An inventory was made Mobile phones and sim cards. They organized for the Government Analyst and photographs on 27/8/2016.

They took the two to Government Chemist Nairobi for purpose of weighing and sampling of the substances found on the handles of the cloth brushes. He conducted the weighing of 52 packages which had brownish powdery substance. The total weight was 834 grams. The same was sampled by Dennis Owino Onyango. Immediately he prepared a Weighing Certificate. The 1st and 2nd Accused persons appended their signatures. One officer also signed.

Mr. Owino, prepared a search certificate signed by Accused 1 and Accused 2, The Crime Scene personnel and himself. He prepared an exhibit memo and left the samples with Government Analyst for comprehensive analysis.

Later Sgt. Joseph Kipruto prepared a notice of seizure notifying the Accused 1 the notice of seizure. He prepared record of custody of seized substances. He served it upon both accused who acknowledged by signing.

He prepared notice of intention as stated the record evidence which he served upon Accused 1 and Accused 2 and they signed it and acknowledged. He had a report from Government Analyst. The substance was found to contain methamphetamine a psychotropic substance under the Act. He engaged Mr. George Mutiso for purpose of Valuation of the substance. The suspects were later arraigned before the court to answer to the charges.

- **Passport - MFI 23**
- **Certificate of Vaccination - MFI 24**
- **Ticket dated 18/8/2016 - MFI 7**
- **Other bus tickets MFI 25 (a) - (d)**

- **Luggage tag and.... tag - MFI 18**
- **Inventory - MFI 10**
- **Bus chart - MFI 5**
- **Bus manifest - MFI 6**
- **Inventory for Accused 2 - dated 20/8/2016 - MFI 26**
- **Certificate of weighing - MFI 27**
- **Exhibit memo - MFI 18**
- **Records of Gazette - MFI 28**
- **Notice of intention - MFI 29**
- **MFI 5, 6, 7, 8, 10, 18, 23, 24, 25 (a)- (d), 26, 27, 28 & 29 now produced as exhibits respectively. The cloth brooms 53 in numbers MFI 3, box MFI 1, black plastic polythene MFI 2 produced PEX 1, 2, 3 as marked.**

22. CROSS EXAMINED BY MR. WANYANGA FOR ACCUSED 1

PW7 stated that on 25/8/2016, the accused were charged. The preliminary test by Government Analyst indicated it was Heroine. The value was informed by the report by Mr. George Mutiso. The prices of methamphetamine and Heroine vary. Methamphetamine is much more expensive than Heroine.

They received information from their Intelligence sources. He took the witness statement of Accused 1 at the time of arrest. They also told the Accused 2 and the reason of her arrest on 19/8/2016. He could not recall the day of the week. The accused was arraigned on 22nd. They were granted 3 days to hold the accused.

Accused 1 personally received luggage.

23. CROSS EXAMINED BY MR. OUNDU FOR ACCUSED 2

PW7 referred to weighing machine, this was done at the Government Chemist. The weighing was done previously. The record of custody is not dated. (**PEX 28**)

He supplied **PEX 28** to defence i.e Accused 1 and Accused 2. He made the same date as the Weighing Certificate. Under the Act record of claim of custody was not provided and he did not arrest Accused 2. PC Muturi at Nyando DCI arrested Accused 2. He did not give evidence in this case. A search was done on 20/8/2016. In Nyando by PC Muiruri. He is a man. He did not testify. He was not present during the search. The inventory made reference to mobile phones and sim. What they had before court was a photocopy. I could not tell where the original was. A black Nokia

Mobile Phone, 2 mobile phones, 2 Airtel sim card. Nokia phone black in colour and sim card.

It was not indicated if the goods/phone were returned to Accused 2. The same had not been produced as exhibit. They were also not examined by Heroine experts. No drugs were concealed in them. They should have been returned to Accused 2. Accused 2 was not on the Modern Coast bus. The passenger manifest does not contain her name. The normal chart indicated the passenger on the seat. Accused 2's name was not on the chart.

24. RULING

The Trial Court upon close of Prosecution case delivered Ruling on 30/9/2021, where the 2nd Accused person was acquitted and the 1st Accused was placed on her Defense on a case to answer.

25. DEFENSE HEARING

DW1: ANNE ACHIENG ANYANGA 1ST ACCUSED PERSON

Adult Female Unsworn Statement States in Kiswahili

Achieng Anyanga. residing in Nairobi, Mathare North Area One. She is a business woman. She made clothes at Kariobangi North. She indicated that she understood

the charges before court. She stated that she was a business woman. She made ladies clothes. She also bought Kitenge clothes from Uganda, Tanzania or Zaire. She had travelled to Kampala Uganda to buy Kitenge materials.

When she completed her purchase, she went and looked for transport to Nairobi. She did go to Modern Coast Offices. She asked for a chance. She was told that one passenger had paid for a ticket and was late. They offered to sell the bus ticket to her.

They left Kampala for Nairobi. Around Naivasha, the motor vehicle was flagged down. They were led to Naivasha Traffic Base. They were all ordered to alight. She had 2 parcels kept to the carrier of the bus. She removed her two-hand luggage.

When she got out, as she was on the rear seat. They were all placed on a queue. She had 2 bags in her possession. A Police Officer came and said he had her luggage. He said he had removed 2 parcels from all the motor vehicle. She told him that she only had 2 hand luggage. She disowned the luggage. She was then arrested. She was later escorted to Muthaiga Police and later charged with the offence.

She indicated that she was going to deny the charges against her. She did not even understand the charges. She has never done business worth that amount of money. She had never done business worth the amounts of money. She pleaded to be acquitted of the charges.

26. JUDGMENT

The Trial Court delivered judgment and convicted the Accused person /Appellant Anne Achieng Anyanga of the charges and sentenced her to fine of Ksh & to serve life imprisonment.

SUBMISSIONS

27. APPELLANT'S SUBMISSIONS

ANALYSIS OF THE LAW.

Whether the prosecution proved possession of the alleged narcotic drug beyond reasonable doubt,

The burden of proving every element of the offence, including possession, rests entirely upon the prosecution and must be discharged beyond reasonable doubt. It is trite that where doubt exists as

to any ingredient of the offence, the benefit must go to the accused.

The offence for which the Appellant was convicted requires proof that she knowingly had actual or constructive possession and control of the narcotic substance. Possession is not established by mere proximity or association; there must be credible evidence demonstrating knowledge and control over the substance.

In the present case, the prosecution's case hinged on the allegation that the Appellant was found with two boxes tagged with seat number 41, and that narcotic drugs were discovered in one of those boxes. Crucially, the luggage tag did not bear the Appellant's name. It only bore a seat number. The Appellant testified that she had not originally been allocated seat number 41 but was given that seat after another passenger failed to show up. This fact was never controverted by the prosecution;

The reliance on a mere seat number, without any accompanying name, manifest, or bus record linking the Appellant to the luggage, was highly speculative and unsafe. A seat number only identifies a location within a vehicle, it cannot, without corroboration,

establish ownership or possession of baggage. No manifest was produced to show that the passenger occupying seat 41 was indeed the Appellant at the time the luggage was loaded or tagged.

Significantly, the prosecution failed to call any witness from the bus company who was responsible for tagging and handling luggage. These would have been the critical witnesses to confirm who checked in the luggage under seat number 41 and whether it was associated with the Appellant. The failure to call such witnesses created a fatal gap in the chain of proof.

Furthermore, the police officers who intercepted the bus admitted that they already had intelligence concerning the Appellant before the vehicle was stopped. They stated that they "already had her name" even though the luggage tag had no name. The prosecution never explained how they obtained that information or why the Appellant was singled out before any search had been conducted. This raises serious doubt as to whether the Appellant was targeted beforehand, and whether the alleged link between her and the luggage was manufactured after the fact.

The existence of prior intelligence, when coupled with the lack of direct evidence connecting the Appellant to

the luggage, raises a real possibility of mistaken identity or planting of evidence. The prosecution bore the duty to eliminate that possibility by producing clear, cogent, and independent proof of possession which it failed to do.

On the evidence before the trial court, several reasonable hypotheses consistent with innocence remained unexcluded:

- a. The boxes may have belonged to the original passenger of seat number 41, who did not board the bus;
- b.** The tagging system, administered by bus company staff, may have been mismatched or erroneous;
- c. The luggage may have been placed by a third party without the Appellant's knowledge;
- d. The police, acting on prior intelligence, may have simply associated the drugs with the Appellant without an evidential foundation;

It is a cardinal principle of criminal law that circumstantial evidence must be so strong as to exclude every other reasonable hypothesis except

guilt. In the present case, the circumstances relied on by the prosecution did not meet this standard;

28. **In Simon Fosii Ouma v Republic [2022] KEHC 1552 (KLR)**, the High Court quashed a conviction for trafficking in methamphetamine where the prosecution failed to call witnesses from the Post Office to identify who delivered the parcel. The Court held that failure to establish the identity of the person in possession or control of the parcel was fatal to the prosecution's case.

Firstly, the government chemist (PW5) who testified as the expert witness stated that he was a government analyst but failed to produce any documentary proof of his qualifications. He neither tendered his professional certificate, licence, nor any appointment letter to verify his position or expertise. It is trite law that an expert's evidence must be supported by proof of qualification before it can be relied upon by a court. The failure to produce any such evidence casts serious doubt on whether PW5 was competent to analyse the alleged substance and prepare the report relied upon by the trial court.

Secondly, there existed material contradictions and inconsistencies as to the nature and identity of the

alleged substance. The prosecution's own witnesses could not agree whether the substance in question was methamphetamine or heroin. PW2 testified that he was informed by the Investigating Officer that the substance was heroin, while PW5, the purported chemist, concluded that it was methamphetamine. These contradictions go to the very root of the charge, which is possession of a specific narcotic drug. The court cannot safely convict where there is doubt as to what substance was actually recovered.

Thirdly, the integrity of the testing and sampling process was gravely compromised. PW5 admitted that the alleged narcotic substance was found concealed in 52 brushes and that the total weight was 854 grams. However, he only sampled and tested 54.3 grams, leaving the rest untested. There is therefore no evidence to demonstrate that the entire 854 grams contained methamphetamine or any illegal substance. The Court is left to speculate on whether the untested portion was indeed narcotic. This omission is fatal because in offences of this nature, the weight and total value of the drug directly influence both the charge and the sentence.

The Appellant further submits that PW6, who purportedly valued the substance at Kshs. 8,000 per gram, did not produce any document or guideline showing how such value was arrived at. He offered no reference material, valuation chart, or market index to justify his computation. His evidence appeared to be based purely on assumption or guesswork. Such speculative evidence cannot form a safe basis for conviction or sentencing:

29. Whether the sentence of life imprisonment was lawful, justified and proportionate in the circumstances of the case;

The Appellant submits that the sentence of life imprisonment imposed by the trial court was manifestly excessive, unlawful, and wholly disproportionate to the circumstances of the case. The trial court misdirected itself in both law and fact by imposing the harshest possible penalty without a proper factual or legal foundation to support such a sentences.

Firstly, Section 3 of the Narcotic Drugs and Psychotropic Substances (Control) Act clearly distinguishes between two categories of offences:-

(a) Possession for personal consumption, which attracts a sentence of twenty years imprisonment. and

(b) Every other case, which may attract a fine of not less than Kshs.1,000,000/= or three times the market value of the drug, whichever is greater, or imprisonment for life, or both.

The life sentence is therefore not automatic. It is reserved for serious cases such as trafficking or large-scale commercial possession, where aggravating factors have been proved. In this case, the prosecution did not establish such aggravating circumstances. The mere possession of the alleged drug, even if proven, did not justify the extreme penalty of life imprisonment.

31. RESPONDENT'S WRITTEN SUBMISSIONS

A) Whether the substance recovered was a narcotic drug within the definition of the act Section 2 of the Narcotic Drugs and Psychotropic Substance Control Act (herein referred to as "The Act") defines a narcotic drug to be,

"....any substance specified in the First Schedule or anything that contains any substance specified in that Schedule."

PW5 who is an analyst at the Government Chemist produced a certificate of weighing, certificate of sampling and a government analyst report all to the effect that the substance recovered was methamphetamine a psychotropic substance as defined in the act.

PW5 was[said to be] unqualified, as a matter of fact, he did state his qualifications and gave his gazette number confirming he was licensed to practice as a government chemist. It is imperative to note that, his qualifications or competencies was never questioned during the trial. That in any case, **section 77(2) of the Evidence Act** provides that the court may presume reports given by government analyst were presented by persons with the requisite qualifications It states:

"The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."

B. Whether the substance was recovered from the appellant.

PW1 a driver with modern coast bus testified that on the material date they were stopped by police officers at Naivasha and the vehicle driven to Naivasha police station. He confirmed that the appellant sat at seat no. 41 and produced Exhibit 7 as the ticket in the name of the appellant and also Exhibit 8 a luggage tag which indicated seat no. 41. PW5 and PW6 did produce the weighing, sampling and valuation certificate which proved the drug in question was weighed as 854.3 grams with a market value of Kshs.6,834,400/= as stated in the charge sheet.

C. The mode in which the substance was being trafficked

Section 2 of the Act defines trafficking as:-

"the importation, exportation, manufacture, buying, sale, giving supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof."

32. In the case of **Gabriel Ojiambo Nambesi v Republic [2007] eKLR**, the Court of Appeal when addressing what constitutes the offence of trafficking in narcotic observed as follows:-

"It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking"

D. Legality of the sentence

It is crucial for the court to note that at the time of sentencing, which was 17th February 2022, **Section 4(a) of the Act** provided that:-

"Any person who traffics 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" (Emphasis ours).

ANALYSIS & DETERMINATION OF APPEAL

33. The Court considered the Petition of Appeal, Trial Court Record and the submissions filed by parties through respective Counsel and find that the main issue for determination is whether the prosecution established beyond reasonable doubt that the Appellant with others not before Court, she trafficked in psychotropic substance namely Methamphetamine 854.3 grams with market value of Ksh 6,834,400/- by conveying in motor vehicle with Ugandan customized Reg No MODERN 5 belonging to Modern Coast Bus Company in contravention of provisions of the Narcotic Drugs & Psychotropic Substances Control Act No 40 of 1994.
34. The other grounds of appeal are condensed mainly into following terms;

- a) What is the import/ effect and/or reliance of Intelligence - Informer's evidence in place of evidence to prove beyond reasonable doubt?
- b) Whether the Trial court ignored prosecution evidence that favored the Appellant; finding that the Appellant had luggage labelled No 41 without evidence of such recovery; failing to consider the luggage marked as originating from Nairobi destined for Mombasa and not Kampala to Nairobi; Relying on the evidence of the bus driver who was not driving the bus instead of the one who drove the bus; relying on evidence that each passenger had their luggage and the Appellant had the luggage yet PW3 took photographs of luggage in bus compartment.
- c) The Trial Court did not confirm from evidence whether the substance was heroine cocaine or Methamphetamine
- d) The Trial Court admitted and relied on evidence obtained contrary to **Article 50(4) CoK2010**
- e) The sentence manifestly, excessive inhuman and unlawful contrary to **Article 50 (2)(p) CoK2010.**

34. The duty of this Court on first appeal was elucidated in **Jonas Akuno O’kubasu v Republic [2000] eKLR** where the court stated that:

“It is correct that on first appeal the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering.....”

35. This Court being the 1st Appeal Court, its duty is as set out in the case of **Okeno vs. Republic [1972] EA 32** as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court

must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M.

Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..

BURDEN & STANDARD OF PROOF

36. In criminal case the burden of proof solely rests with the Prosecution. In **H.L(E)Woolmington vs. DPP [1935] A.C 462 pp. 481**, Viscount Sankey L.C held that:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was

committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter

what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

37. The standard of proof is proof beyond reasonable doubt. According to Lord Denning on what is proof beyond reasonable doubt in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** stated that:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

EVALUATION OF EVIDENCE ON RECORD

38. In evaluating the evidence on record afresh, I have re-evaluated the evidence before the Trial Court as follows;

PW1 on 18/8/2016 drove Modern 5 Uganda bus plying Nairobi-Busia-Kampala-Kigali-Rwanda from Kampala to Kisumu and he handed over the vehicle to one Augustine to drive. PW1 was still in the bus as they reached Naivasha when they were stopped by Police Officers and they were told to drive to Naivasha Police Station. All passengers were ordered to take their possession of their luggage. One of the passengers a lady was taken over by police officer as suspect to the office. Augustine and him were called in. They showed them the lady who had been arrested and they were informed that she was trafficking drugs.

40. PW1 was shown 53 plastic brushes which contained the

drugs and they were in a brown box which was in a black polythene bag. The officer opened the box of

the brush and he saw brown substance concealed in the hollow part of the brush. He identified the Accused and stated he knew her. He produced the Bus Passenger Manifest-**PEXH6** and Passenger Anne Achieng was on Seat No 41. The Bus Ticket **PEXH7** was also produced and showed on 18/8/2016 the Accused travelled from Kampala to Nairobi in the said Bus.

41. The evidence was direct evidence by an eye witness PW1 witness to the Accused person having boarded the bus he

drove from Kampala to Kisumu but Co driver drove until they were stopped by Police at Naivasha; PW1 witnessed the Accused person singled out and taken to Police office and PW1 and Co driver were called and witnessed brooms with brown substance from the Accused person's luggage. PW1 recognized the Accused person and confirmed she was in possession of 53 brooms and when opened contained brownish substance.

42. The Appellant took issue with the fact that driver of the said bus was not called to testify as a witness. PW1 confirmed he drove the bus Modern 5

Uganda from Kampala to Kisumu and Mr. Augustine took over driving the bus towards Nairobi. In cross examination PW1 stated that the bus had 2 drivers and seat No 12 was for Co -driver. The fact that Augustine was not called to testify is not fatal as PW1 was in the said bus and saw the Accused person/Appellant both in the bus and at the Naivasha Police Station.

Section 143 Evidence Act provides;

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

43. In **PON vs Republic [2019] eKLR CoA** stated partly thus;

Direct evidence would be that which links a person to crime; that which is based on an eye witness account, on personal knowledge or observation. The direct evidence sought....who saw how the deceased met her death.....

44. The evidence by PW1 was corroborated by PW2 on 19/8/2016, he got information that there was a person who was bringing in drugs from Kampala to Nairobi. PW2 and PC Odhiambo left Nairobi to Naivasha. The information was that the suspect was using PSV Modern Coast Bus Registration Modern 5; a customized Uganda number plate. They arrived at 9.30 am sought assistance from Traffic Officers. The bus arrived shortly before 11 am and was stopped by police officers. They were directed by the officers to the police station. On arrival, they asked all the passengers to alight and collect their luggage, and also present ID documents. As they alighted, they went through the documents. They already had the name of the suspect. Her name was Anne Achieng Anyanga. He waited for her to pick her luggage. She picked a carton wrapped in black polythene bag.
45. The box carton contained several cloth brushes (**MFI- 3**). They inspected each and every piece of the brushes; a substance was concealed in the hollow space on the handle. The handle had a cork. There were 53 brushes **D1-D53**. Out of the 53, 52 had brownish substance suspected to be narcotic drugs. (Exhibit polythene bag - sealed torn open in court).

Witness demonstrates how the substance were concealed in the brush handles. Pellet like substance marked **D1-D52- MFI 9**

46. P.C.Odhiambo prepared an Inventory . He signed the inventory, P.C. Njue and the suspect signed the Inventory marked **MFI-10** The passport was recovered from Accused 1 - A2333622. Anyanga Anne Achieng-marked as **MFI- 11**. She also had a bus ticket from Modern Coast (**MFI 7**). The carton had a tag, it had no name but labelled seat No. 41 (**MFI 8**). They also were with Scenes of Crime officer who photographed the motor vehicle. They took 135 photographs marked as **MFI -135**.He issued Notice of Seizure to the Bus addressed to Managing Director - (M.C) registration Modern 5 marked as **MFI-13 (a)**. He also seized the carton and brushes and issued the Notice to Anne A. Anyanga marked as **MFI-13 (b)**.
47. The evidence of PW1, PW2 & PW7 who also produced exhibits is tangible and cogent evidence that the Appellant was found in possession of narcotic substance later analyzed to be Methamphetamine.

INFORMER'S TIP OF INFORMATION

48. The Court of Appeal in **Joseph Otieno Juma v Republic [2011] eKLR** stated that:

“Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution’s other evidence served the purpose. However, we think that if the evidence of the informers is necessary to prove the guilt of the appellant it would have been necessary for them to have testified perhaps outside the glare of the public.”

49. The Court of Appeal cited with approval **Kigecha Njuga v Republic [1965] EA 773** where it was stated that:

“Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

50. The tip of information from the Informer was that there was a drug trafficker that led PW2 & PW7 to travel to Naivasha and through Traffic Police intercepted the Modern 5 bus and inspected passengers and luggage and found the 1st Accused with luggage that consisted of 53 brushes and 52 of them had brownish substance suspected to be a psychotropic drug; was sufficient evidence to offer the Officers a lead to detecting and proving crime. Therefore, the information facilitated investigations and it was not relied on its own but was used to confirm commission of an offence. Therefore, there was no need to disclose the Informer to testify as a witness. The tip of Information gave the Officers the lead and it is at Naivasha that they found Appellant with the narcotic substance.
51. PW3 Scene Visiting Officer found Modern 5 bus at the Naivasha Police Yard. On left side compartment was luggage; a black polythene paper which was removed and taken to the office and opened. Inside were brooms and when opened it was stuffed with powder and it had a tag **NRB-MSA No. 41** Preliminary tests were done and 1 was heroine; the

other cocaine and other Methamphetamine. He took photos.

52. The Appellant took issue with Trial Court finding that the Appellant had luggage labelled No 41 without evidence of such recovery; failing to consider the luggage marked as originating from Nairobi destined for Mombasa and not Kampala to Nairobi; relying on evidence that each passenger had their luggage and the Appellant had the luggage yet PW3 took photographs of luggage in bus compartment. The Appellant took the view that the evidence by PW3 was exculpatory and the inconsistency and contradiction ought to have been in her favor as there was no proof of her possession of the recovered luggage with brooms that contained prohibited drug Methamphetamine.
53. The facts on record confirm that PW2 arrived at Naivasha 9.30 am and engaged Traffic Officers who stopped the bus Modern 5 and it was driven to Naivasha Police Station. At the initial stage there were 2 drivers of the bus; PW2 and PC Odhiambo PW7 frisked the passengers who alighted with luggage and as the passengers were checked and they produced identification documents, the Accused

person/Appellant was singled out and led to the office where further investigations were conducted. The luggage was opened and brooms/brushes removed and inside a brownish substance was found.

54. On the other hand, PW3 Scene of Crime Officer found the bus parked at the Station's Yard; he did not refer to passengers or the Accused person but only the luggage in the compartment and the tag **NRB - MSA No 41**. That is what he photographed; the bus, the luggage. Going by the evidence on record, PW3 may have come to the scene earlier or later and was not there from the time bus arrived at the station and therefore he did not witness what transpired in the office, he went to the Yard where the bus was and took photographs.

55. In **MTG vs Republic Criminal Appeal E 067 of 2021 HCT Voi Mativo J (as he then was) referred to the case of Theophilus vs State {1996 } In WLR PT 423.139** which stated;

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a

trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.

56. With regard to the Tag on the luggage **NRB - MSA No 41**, PW7 who accompanied PW2 witnessed the bus being stopped driven to Naivasha Police Station, passengers alighted and each took their luggage. The 1st Accused picked her luggage that consisted of brushes and a narcotic substance was found in the 52 of 53 brushes.
57. PW7 prepared an Inventory of goods found on the Appellant, Secondly, PW7 produced exhibits in Court

that included the Appellant's Passport A2333622, Certificate of Vaccination, Modern Coast Express ticket KAIUO213 bearing her name seat 41 business class; a piece of paper writing 41 which corresponded with another paper in Modern Coast Bus tied against her luggage; Tarmid Coach Bus ticket D/D 10/8/2016 with name Anne Nairobi-Malindi; Tarmid Coach ticket- Anne Achieng D/D 12/8/2016 Mombasa - Dar es salaam and Bus ticket Majinja special D/D 15/8/2016 bearing Anne Achieng from Mbeya - Dar es Salaam.

58. Admittedly, the Appellant traversed Uganda, Tanzania and Zaire purchasing and selling 'vitenge' as stated in her defense. The tag on the luggage NRB- MSA 41 confirms to be her luggage as she was in Modern 5 bus on 18/8/2016 as per the Bus Manifest **PEXH 6** and bus ticket **PEXH 7** and luggage Tag **PEXH 18** she sat on seat 41. The bus plied Nairobi-Busia-Kampala-Kigali-Rwanda route.
59. PW7 corroborated evidence of PW1 & PW2 that the 1st Accused was in possession of substance prohibited under the Narcotic Drugs & Psychotropic Substances Control Act No 40 of 1994.

60. PW5 Government Analyst relied on documents; Certificate of Weighing; Certificate of Sampling, Police exhibit Memo form and he prepared Government Analyst Report. He received samples of brown powdery substance for analysis. He analyzed a sample of the substance and found it contained methamphetamine; a prohibited Psychotropic substance in the Act.
61. The elements of proving offence(s) relating to drugs consists of possession for purpose for drug offences defined in the case of **Hussein Salim vs Republic [1980] KLR** to mean not only legal title or that there is access to the complete exclusion of all other persons has to be shown. The possessor must have such access and physical control over the thing that he is in a position to deal with it as the owner could to the exclusion of all others. See also **Ahmed Mohamed Ali vs Republic MSA CACRA No 21 of 1998** on the same point establishing possession and/or use of drugs.
- 62. Gabriel Ojiambo Nambesi vs Republic [2007] eKLR**, the CoA set out what constitutes trafficking and onus on the Prosecution to prove particulars of

the charge; the conduct of the Accused person that constitutes trafficking.

63. The Court finds on the evidence on Trial Record, the 1st Accused was found in possession of brownish substance spread between spaces of 52 brushes that were in a brown carton and polythene bag. The luggage and contents were photographed by PW3, PW4 also took photographs of the luggage and contents before being taken to Government Chemist for analysis. PW5 confirmed upon examination the substance contained methamphetamine; one of the prohibited substances in the Schedule to the Act. The evidence of PW1, PW2 & PW7 established the Appellant was in possession of the narcotic substance.
64. The Appellant contended that **Article 50 (4) & 50 2 (p) of CoK 2010** were not complied with. **Article 50 (4) of CoK 2010** reads;

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

65. The Appellant was taken through the investigations as required by law and the Trial court record did not show any irregular or improper mode of investigations or any evidence illegally obtained. All requisite official documents, of notice, search, sampling weighing, analyzing the chemical substance, the analysis report and inventory among others, were all produced by PW2 PW5 & PW7.
66. The Appellant relied on the case of **Simon Fosii Ouma v Republic [2022] KEHC 1552 (KLR)**, the High Court quashed a conviction for trafficking in methamphetamine where the prosecution failed to call witnesses from the Post Office to identify who delivered the parcel. In the cited case, a parcel was sent through Postal Service EMS from one Akino Sandra to Sandra Tui in New Zealand; the postal weight against declared custom value did not tally raising suspicion more so as was stated to be a fabric only to find flour substance. The Appellant was traced through his phone number as registered owner of the number but knew of no parcel sent or any of the parties named. The Appellant was not identified as no witness was called to testify on signed the parcel at the Post Office, or found in

possession or delivery of the parcel with flour substance. Consequently, the Prosecution did not prove their case beyond reasonable doubt and the Appellant was acquitted.

67. In the instance case the circumstances are different. The Appellant's defense an unsworn statement was admission of being in the said bus travelling as she did across various countries, she stated she sold 'vitenges' and suggested the luggage with brushes and inside the brownish substance was planted on her or belonged to another passenger who may or may not have boarded the said bus as the ticket attached was marked 41 with no names and was from Nairobi-Mombasa not Kampala- Nairobi.
68. This Court finds from the Trial Court record PW2 & PW7 were from (ANU) Anti Narcotic Unit Nairobi; following tip of information of a person trafficking narcotic drug or psychotropic substance they left for Naivasha and requested Traffic Police Officers to flag down the Modern 5 Bus.
69. The bus was driven to Naivasha Police station and all passengers alighted with their luggage and presented identification documents to the Police. It is

at this point that Appellant was taken to office with Luggage and PW1 driver and Co driver were briefed on what happened. PW1 one of the drivers of the said bus testified, he saw Appellant with luggage, she was taken to the office and in his presence; her luggage was opened and there were brushes that contained a brownish substance later analyzed as Narcotic substance/ drug.

70. There is no evidence that any of the Police Officers from ANU, Naivasha Traffic & Police Officers from Naivasha worked together, that they met in advance and plotted to fix the Appellant; there is no evidence that any of the Officers knew the Appellant before this day, out of all passengers that alighted the bus, they picked on her and upon search found the brownish substance in spaces within the brushes.

71. I find no logical or reasonable ground that in the absence of any knowledge of Appellant before, any/some/all Police Officers conspired to frame the Appellant out of all

passengers in the bus and planted the said substance in her luggage. There is no evidence to suggest malice, bad faith, revenge or any other

illegal motivation or act to explain the Appellant's possession of the luggage except that it was her luggage with tag 41, her seat was 41 and bus Manifest confirmed the Appellant as one of the passengers on the said bus at the time it was stopped by Police Officers.

72. The Appellant's Defense did not cast doubt on the Prosecution case; while admitting she was in the said bus that was stopped, she denied committing the offence. I find from the totality of the evidence on record the Prosecution proved beyond reasonable doubt; not all possible doubt; the Appellant was in possession of the narcotic substance that was placed between brushes which were luggage from the Bus with a tag 41 and the Appellant sat on seat 41 as her name was in the Bus Manifest. She collected her luggage and inside the brushes had brownish substance which PW5 found to be methamphetamine. The unsworn Defense did not cast doubt on Prosecution case.

SENTENCE

73. The Appellant was sentenced to serve life imprisonment and to pay fine of Ksh. 20,503,200/- in addition to life imprisonment.

The Appellant submitted that the sentence meted out was/is manifestly excessive, inhuman and in fact unlawful ignoring the provisions of the Constitution of Kenya 2010 **Article 50(2)(p)** [Constitution] which entitles a first offender the least of sentences prescribed for an offence. The Appellant submitted that the Trial Court failed to distinguish simple possession and aggravated trafficking and did not consider Appellant's mitigation. Life imprisonment is not automatic, but reserved for large scale commercial possession and where aggravating factors have been proved.

74. The Respondent submitted that the Trial Court meted out the appropriate sentence as required by law.

Section 4(a) of the Act

At the time before amendment to the law read as follows;

(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"

75. Sentencing Policy Guidelines of 2016, provide for mitigating circumstances/factors; the Appellant was 1st offender; to lessen the term of custodial sentence but as at the time of sentencing 17/2/2022, **Section 4 of the Act** then as outlined above provided a mandatory sentence. The Trial Court could not vary the sentence.

The Appellant submitted that **Section 3 of Narcotic Drugs & Psycho tropic Substances (Control) Act** distinguishes the types of offences; possession for consumption which attracts 20 years imprisonment and every other case which may attract fine not less than Ksh 1,000,000/- or 3 times the market value of drugs whichever is greater, or imprisonment for life or both.

77. Article 50 (p) & (q) of COK 2010 provides as follows;

to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

78. As regards the sentence, this Court sought guidance from **Clause 1.2 of the Sentencing Guidelines (2023)** that lay out the principles underpinning the sentencing process as follows:

- i. **Proportionality:** The sentence meted out must be proportionate to the offending behavior;..... Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
- ii. **Equality/Uniformity/Parity/Consistency/Impartiality:** The same sentences should be imposed for same offences committed by offenders in similar circumstances.
- iii. **Accountability/Transparency:** The reasons behind the determination of sentence should be clearly set out and in accordance to the law and the sentencing principles laid out in these guidelines.
- iv. **Inclusiveness:** Both the offender and the victim should participate in and inform the sentencing process.

- v. **Totality of the Sentence:** The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behavior as a whole.
- vi. **Respect for Human Rights and Fundamental Freedoms:** The sentences imposed must promote and not undermine human rights and fundamental freedoms. Sentencing impacts on crime control and has a direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.
- vii. **Enhancing Compliance with Domestic Laws and Recognized International and Regional Standards on Sentencing: Article 2 (6) of the Constitution of Kenya,** should be applied. There are also international and regional standards and principles on sentencing that, even though not binding, provide important guidance on sentencing.

79. Thereafter, the law was amended and now reads as follows;

4. Penalty for trafficking in narcotic drugs, etc.

Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her 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—where the person is in possession of between 1–100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;***
- (b) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;***

80. Now at the time of hearing and determining the appeal, the law was amended to give optional sentences as opposed to mandatory sentence, whereas the Trial Court applied the law as was then, since it was amended, it is prudent in light of the Sentencing Guidelines to consider mitigating circumstances presented to the Trial court to apply the least severe of prescribed sentences.

81. Therefore, this Court now considers; mitigation as presented before Trial Court then she sought the courts leniency and mercy. The Appellant mitigated that she was/is a mother of children at the time of tender age had/has an ailing parent and was sole breadwinner. She sought non-custodial sentence promised not to have any running with the law. She could not afford to pay legal fees to former lawyer.

DISPOSITION

82. Taking the guidelines on sentencing 2023 and applying the law as is amended now; and since admittedly from the Trial Court record; the value of the psychotropic substance found in the 52 brooms was contested as Ksh 6,834,400/- and earlier on Kshs.2,562,900/=; and that the amount tested was minimal and not whole amount to determine the Narcotic substance; this Court will err on the side of caution and prescribe the sentence from a fine of Ksh 20,503,200/- and in addition to serve life imprisonment to now serve 30 years imprisonment.

69. In compliance with Section 333(2) CPC the period the

Appellant was in custody during trial before sentencing to be confirmed by Prisons Department and Trial Court Record and to be included in computation of sentence.

70. The appeal is dismissed on conviction, the conviction is upheld, the appeal partly succeeds on sentence of 30 years imprisonment.

**JUDGMENT READ SIGNED & DELIVERED IN OPEN
COURT CRIMINAL DIVISION HIGH COURT OF KENYA
AT NAIROBI ON 24/2/2026.**

**M.W. MUIGAI
JUDGE**