

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION
APPELLATE SECTION
CRIMINAL APPEAL NO'S E050 OF 2025 AND NO 171 OF
2025
JOYCE AKINYI OCHIENG APPELLANT
PAULIN KALALA MUSANKISAY
....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT
(Being an appeal from the original conviction and
sentence in criminal case no 121 of 2019 of the Chief
Magistrates Court at JKIA)

JUDGEMENT

INTRODUCTION

1. The appellants were charge with the offence of t trafficking in narcotic drugs contrary to section 4 (a) of the narcotic Drugs and Psychotropic substances (control) Act) Act the particulars of which were that on the 13th day of July 2019in a room at deep west resort with Nairobi jointly with others not before the court trafficked by storing a narcotic drug namely heroin to wit 1002 grams with a market value of Kshs 3,006,000 concealed in a clear polythene bag wrapped with cello tape under the shoe rack.
2. The 1st appellant together with another was charged in count 2 with the offence of trafficking , the particulars of which were that on the 13th day of July 2019 to together with another and others not before the court trafficked by storing a narcotic drug namely heroin to wit 880.86 with the market value of kshs 2,642,580/ concealed in the false side of the right bag in contravention of the Act .

3. In count 3 the 1st appellant was charged with the offence of possessing a false passport contrary to section 54(1) (c) as read with section 54(2) of the Kenan citizenship and Immigration Act the particulars of which were that on the 13th day of July 2019 in a room at Deep West forged a Democratic Republic of Congo passport no 0P0501179 under the names Mape Marline Kambura.
4. On count 4 she faced a charge of being in possession of a passport without reasonable explanation or authority contrary to section 54(1)(d) as read with section 54(2) of the Kenya Citizen and Immigrations Act the particulars of which were that on the 13th day of July 2019 in a room in deep west resort within Nairobi had in her possession passport no A2298844 in the name of Jackline Achieng Kwendo without satisfactory explanation .
5. They both together with others pleaded not guilty and were tried and convicted and sentenced accordingly.
6. Being aggrieved by the said conviction and sentences they each filed appeals at the High Court criminal registry at Kibera and raised the following grounds of appeal :

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- a) That the learned trial court erred in finding that the prosecution case was proved beyond reasonable doubt
- b) That the court erred in failing to order the arresting officer to appear in court to give evidence before it and produce the CCTV DVR machine that contained the recordings of the occurrence on the day of the arrest

including the planting of the drugs by the arresting officer thus weakening the prosecution case

- c) That the magistrate erred in law and fact by failing to appreciate that the prosecution did not establish that it was the appellant who stored the alleged drugs in the store room that was accessible to all the employees and therefore inconclusive evidence that the appellant had exclusive control of the room where the drugs were allegedly stored .
- d) The court erred in failing to order production of full exhibits that was relied upon and to take into account that the prosecution evidence was tainted with inconsistency and contradictions.
- e) The court erred in failing to appreciate the fact that the passport was found in a store room where lost and found items were commonly placed and the explanation required of the appellant was beyond the meaning of reasonable explanation .
- f) The court erred in finding that the appellant used her business as a front for trafficking narcotics and that the money used to set up the business was derived from trafficking without any supporting evidence.
- g) The court erred by considering the appellants involvement in similar previous cases in the absence of previous convictions
- h) The court erred by shifting the onus of proof to the appellant and by failing to consider the appellants witnesses and defence .

- i) The court erred in law and fact by misinterpreting the relationship between the appellant and other accused persons in other cases she cited in her sentence vis vis the charges
- j) The court erred by failing to consider the plea and mitigations by the appellant by meting a manifestly excessive sentence

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- 7. That the trial court erred in law and fact by finding that the key ingredients of the offence - namely trafficking and possession were established against the appellant
- 8. The trial; court erred by failing to find that procedural safeguards were not adhered to when the alleged narcotic substances were impounded thereby breaking the chain of custody and creating no linkage with the appellant
- 9. The burden of proof was not discharged in linking the appellant to the offence in question.
- 10. The appellants defence was not considered .

SUBMISSIONS

- 11. Directions where issued that the two appeals be heard separately together by way of written submission and that there be a consolidated judgement thereon.
- 12. On behalf of the first appellant (**JOYCE**) it was submitted that this was a novel case as the arresting officers were unknown as the prosecution case was that the initial arresting officers who put the appellant in the room where the drugs were found were from NIS who were not called to testify. It was submitted that Section 5

(3) of the National intelligence Services Act prohibits the officers from carrying out police functions and acts of violence against a person. In this case the evidence on record is that the appellants were detained for more than six hours which the 2nd appellant being grievously injured and the officers eventually destroying the CCTV DVR recording. It was therefore contended that this case was based on an illegality which cannot be cured .

13. It was contended that the CCTV surveillance of the hotel and the DVR recording of the same that would have shown who “stored” the alleged drugs and which constituted vital prosecution evidence and which would have rebutted the appellants defence that the said drugs were planted by the arresting officers from NIS as confirmed through the evidence of PW1 and PW2 and further would have dispelled the trial courts finding that that the Tanita Digital Scale was used to measure specific measure of heroin, were never produced .

14. It was further submitted that the trial court erred in introducing new evidence of Tanita digital scale as a tell-tale sign of drug trafficking in the judgement without the same being raised by the prosecution so as to give the appellant a chance to defend the same and that the trial courts finding on the use of the same was not based on the prosecution evidence and was highly prejudicial to the appellant.

15. It was submitted that the court failed to consider the appellant’s defence that the drugs were planted by the

unknown arresting officers and failed to consider the appellants' alibi defence of being in the room which she found was an admission that she was in control and had constructive possession thereof without explaining how thereby convicting the appellants purely because of her presence in the room where the drugs were allegedly found without evidence of trafficking.

16. It was submitted that the prosecution did not prove storing but the trial court relied on her knowledge to terminate the connections and dealings for the appellants and one Peres.

17. On the charge of possession of a passport without reasonable explanation, it was submitted that the prosecution never sought an explanation before placing the charge and that the appellant in her defence stated that the same were found in a room where authentication documents were kept which defence the court did not consider. It was submitted that the prosecution stated that all the accused persons were first offenders without any previous record, however the trial court in her sentence stated that the appellant was not a stranger to the corridors of justice and took judicial notice that she has had cases in the magistrates court the high court and the Court of Appeal while all the cases listed were not drug related charges thereby prejudicing the appellant.

18. There was a lingering doubt on the essential ingredients of the offence in that the officer who uncovered the drugs (PW2) conceded under cross

examination that he had no evidence connecting the appellant to the room where the drugs were allegedly found yet the particulars of the charge placed the two appellants together in the same room. PW4 further admitted that he had nothing connecting the appellants with the drugs while PW6 the Government Chemist did not link the two appellants to the weighing certificates. It was contended that the appellants were only convicted based on relationship between the appellants and not their conduct.

19. In support of the submissions reliance was placed on the cases of **Rurunyi & Another versus Uganda [1968] EA 123** to the effect that the court strayed into the arena of making case for the prosecution, **Odote Versus Republic [2023] KEHC 24882 (KLR)** to the effect that mere presence or association without a complete chain of events cannot led to a conviction and **Ahmed Salim & Another Versus Republic** to the effect that mere presence in the house where drugs are found is insufficient for a conviction especially where ownership or tenancy is not established. It was contended that failure to link the appellant with the possession of the drugs through positive conduct weakened the prosecution case.

20. It was submitted further that the recovery and handling of the evidence were marred by significant procedural irregularities that vitiated the conviction. It was submitted that the officers who searched the premises did not have search warrants in violation of

Article 31 of the Constitution and that National Intelligence Services (NIS) officers were the first to arrive at the scene but left before the Anti-Narcotic Unit arrived leading to a doubt as to their role thereby leading credence to the appellants' defence that the said drugs might have been planted, which defence was dismissed by the trial court, though it left a gap in the prosecution case the benefit of which should have been accorded to the appellants.

21. It was contended that critical exculpatory evidence including the CCTV footage and the shoe rack which was alleged to be the hiding place of the drugs were never produced in violation of the appellants rights to fair trial under Article 50(2) (j) of the Constitution, in support of which the case of **Erick Ndirangu Mwangi Versus Republic [2020] eKLR** where the court held that failure to produce available CCTV footage in a criminal case is a serious omission that benefits the defence as it deprives the court of objective evidence. It was contended further that failure to call the NIS officers who were the first to arrive at the scene should have been held against the prosecution and led to an inference that their evidence would have been adverse to the prosecution case was stated in **Bukenya & Another versus Uganda**.

22. It was submitted that the prosecution case was presumptuous and circumstantial and that the court relied on photos from a phone which merely showed images of the 1st and 2nd appellant without any direct evidence

connecting the same typo drug trafficking , thereby raising a doubt on the prosecution case.

23. It was submitted that the trial court dismissed the appellants defence as an afterthought without adequate consideration and that the trial courts characterization of the appellant as an archetype and quintessential drug lord was prejudicial and violated the presumption of innocence as stipulated in Article 50(2)(a) of the Constitution. On sentence it was contended that the same was manifestly harsh and excessive for a first offender .
24. Mr. Githinji by way of highlight that there was unlawful role of the NIS officers in the arrest of the appellants herein and that if the officers were genuine the recordings of the happenings should have been produced without being destroyed and that the same intelligence officers are the one who arrested the appellants but they did not testify.
25. Mr. Hamisi for the 2nd appellant by way of highlight stated that the 2nd appellant was arrested and beaten by those who claim to be NIS officers and that it was possible that they are the ones who planted the drugs in the room as there was no search warrants and that CCTV footages were not produced and his defence was dismissed by the trial court in a prejudicial manner.
26. On behalf of the respondent it was submitted that PW1 testified that they were called by officers from NIS to go to Deep west Resort at Langata and secure the scene for the officers from Anti Narcotic unit where they found

the appellants in one room and that PW2 later in conducted search in a room which the 1st appellant confessed was used was an office cum store where the drugs were recovered at the shoe rack and the appellants arrested and that the use of the said room by the 1st appellant was confirmed by DW3 thereby proving that the appellant stored the narcotic and was in actual possession of the office within the definition of trafficking as stated in the case of Gabriel Ojiambo Nambesi v Republic [2007] e KLR .

27. On the chain of custody, it was submitted that PW2 took over the scene from special service unit and carried out a search at the rooms they had secured and documented and accounted for all the recoveries which turned out to be heroine. It was submitted that on the charge of possession the three passports were found in the appellant office and that they were found to have been obtained fraudulently using fake voters' card .

28. On the appellants defence it was submitted that the court found that it did not displace the prosecution case. On the sentence it was submitted that the same was lenient as the appellant ought to have been sentenced to life imprisonment while on count 2 she was sentenced to two years within the range provided for in section 54 of the Act which provides for a term not exceeding five years .

29. Ms Kariuki for the prosecution conceded to the appeal by the second appellant on the ground that there was no evidence adduced by the prosecution to show that

he had control of the office and store or that he had taken the room or using the same and that the only evidence tendered against him were the photos of him and the 1st appellant which showed that they had a romantic relationship.

30. She stated that the issue of the CCTV being destroyed was not true as the 1st appellant stated that she had requested someone to repair the DVR machine while in her defence stated that the police had taken it and that she is the one who had requested the officers to go sit in her office which she had total control of.

PROCEEDINGS

31. This being a first appeal the court is under an obligation to re-evaluate the proceedings before the trial court to come to its own conclusion thereon while giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses .

32. It is important for the court to state that the appellants were charged together with one Peres Anyango Omondi alias Raha Eveline Kambere alias Millicent Okoth Omondi who as stated in the judgement of the lower court absconded court soon after they were placed on their defence and as stated by the court , the 2nd appellant being a foreigner spent the entire period of trial in custody and has been in custody since then despite the fact that the prosecution has at the trial herein conceded to his appeal.

33. PW1 PC Amos Meriech testified that on the night of 12th July 2019 they were told to proceed to deep west hotel and that acting on intelligence they identified three rooms belonging to the appellants and one to peris suspected of drug trafficking , which they were to secure without knowing what they were to secure and that they left the scene soon after the officers from anti-narcotic arrived .In cross examination he stated that the intelligence was from NIS who were leading the operation at the time and that he could not tell the room numbers that being his first time to visit the facility and that he only secured the room where Peris was and that he found her with two men whom he assumed were officers from NIS who had already arrested her. He stated that he did not know anything to do with the first appellant who was in the same room with the 2nd appellant.

34. PW4 Rodgers Kibet Samoei an officer from the special service unit corroborated PW1s evidence to the effect that they arrived at the scene to secure rooms as they await officers from the anti-drug unit who did not recover anything from the room he had secured and that after all the rooms had been searched , officers from the anti-narcotic unit recovered substance believed to be narcotic and arrested the appellants. In cross examination he stated that they were informed of the operation by their in charge and that the operation was an intelligence led one whose officers were already at the scene when they arrived .

35. PW2 PC Timothy Maiyo an officer from the Anti-narcotic unit was instructed to go to the scene where he met officers from the special crime prevention unit who took him to a room which acted as an office where he met some officers and the two appellants who were suspected to be dealing in drugs. He conducted a search and managed to recover a package under the shoe rack suspected to be a narcotic drug , he prepared an inventory thereof and a search certificate prepared by I P Kuke Kinoti and that on 16th July 2019, the weighing and sampling was done in the presence of the appellants who had already been arrested. He further testified that they recovered east African passport in the names of Ochieng Joyce Akinyi , Kenyan passport bearing the name Kwendo Jackline Glory Achieng and three Congolese passports bearing the name of Kambuba Marline Mape and a Tanita Digital weighing scale among others .

36. PW5 Sergeant Wycliff Otando was present when the weighing and sampling was being done at the Government Chemist in the presence of the appellants' and that of the recovered substances four packages belonged to Peris and this one package belonged to the appellants. PW6 Chief Inspector Elizabeth Lumumba was the weighing officer who prepared the certificates on the recovered substances and gave the market value thereof while PW7 Corporal Derrick Kiprono a scene of crime officer took photographs thereof .

37. PW8 Inspector Luke Kinoti was informed of the intended operation at the deep west hotel where in one room the 1st appellant introduced herself and the 2nd appellant, they then conducted a search and in the shoe rack at the entrance found a package wrapped in white cello tape and other items which he made an inventory thereof and issued a certificate of seizure before arresting the appellants. In cross examination he stated that he had been notified to be on stand by for the intended operation and that the officers from SSU offers them protection when they are conducting searches, he stated further that the appellants had not been arrested but detained when they got to the scene. It was his further evidence that intelligence had been gather for a long time and that is why they went straight to the specific rooms .

38. He further stated that most of the documents recovered from the room where in the name of the first appellant and that she was residing in the same room. He confirmed that when one books a room at an hotel, they identify themselves with either a passport or an identity card. He denied seeing officers from the NIS and that he did not know how and where the 2nd appellant was injured .

39. PW3 Denis Owino Onyango holder of a bachelor a gazetted officer produced weighing certificates which was not signed by the appellants and stated that he was requested to ascertain whether the seized substances

contained drugs , which he confirmed to be heroin with a purity of 20%.

40. PW9 Moses Lelapeer was requested for travel history for passport no A 1075109 in the name Millicent akoth Omondi and A2298844 and AK0379213 in the name of Glory Achieng Kwendo. He stated that AK0379213 did not have a name and no record in the system while NO 0388904 was in the name of Tabot Bisong . PW10 Elijah Mamee Migiro an immigration officer confirmed that all the passports were in the system save for two .
41. PW11 CPL Lilian Munyinyi received mobile phones for forensic examination and that the first one belonged to the first appellant, a Samsung whose content she generated including audio communication between her and various people and images thereon including several Mpesa transactions and air tickets to various places in favour of other people and electronic payment including to the second appellant.
42. PW12 SGT Joseph Wafula Wanjala was informed of the arrest of the appellants for trafficking drugs as a result of surveillance and intelligence led covert operation the investigation of which he later on took over, he wrote a letter to DRC Embassy to confirm the status of the passports , which conformed that the two passports were authentic but fraudulently obtained using fake voters' cards. The passport of the second appellant was confirmed to be authentic and that the land where the hotel was situated was on lease from Kenya School for the

Blind for a period of five years in favour of Newport Inn Ltd whose directors were the 1st appellant, Susan Akoth Achieng and Raphael Wamiale-Junz.

43. It was his evidence that from the phone extracts he was able to establish that the three accused persons operated as a syndicate and that the photo in the voters card which was used to secure the DRC passport in the name of Kambura Mape Marlin had the image of the 1st appellant and the second passport had the image of the 2nd accused in the name of Kambere Raha Evaline and that the numbers of the passports followed each other and that the 1st appellant called the 3rd accused Millicent from the audio recording from her phone and that they were arrested at the same place. There were several photos of the 1st and 2nd appellant, whose travel record confirms had entered Kenya through Busia.

44. In cross examination he confirmed that the scene offers accommodation services where people need to identify themselves and that the 1st appellant was unable to explain why he had someone's passport. It was his evidence that IP Kinoti was involved in the arrest of the appellants and that he did not investigate the officers from NIS on the source of the drugs and that he did not see any shoe in the room where the appellants were arrested and that they were in a relationship. They did not have any search warrants. He confirmed that he was not able to extract the CCTV footages and that the only link between the appellants were the extracts from the phone .

45. When put on their defences the first appellant stated that she was a business woman and the proprietor of deep West Resort. On the material day , she had an event at the hotel and at 8.00 pm the 2nd appellant came to see her and gave out his order for food which she went to give instruction on at the kitchen, she was called by an employee who told her that the 2nd appellant was being beaten and crying in pain, she went to the place and suggested that they proceed to the store cum office so that they could talk and it was opened for them by Juma . inside the room the people who did not identify themselves started beating them and disconnected the CCTV and DRV in the said room .
46. It was her evidence that the room was used by the staff to iron bedsheets and towels and was also used by the manager and supervisor as a bed room in addition to storing customer left luggage's and shisha boxes and pots.

DETERMINATION

47. From the proceedings herein, the 1st appellant owed deep west together with her then husband Tony Chinedu and of great impotence to this appeal is that the said hotel was demolished on 26th February 2022 during the pendency of this trial and that some of those who participated in its demolition were present during her arrest in July 2019 during which the 2nd appellant was assaulted by the arresting officers before she went to his

rescue and led the men to the office where the drugs were allegedly found.

48. That the appellant was a possibly a drug lord as pointed out by the trial court is a reality which the court can not hid its face from and that this might explain the mode of the arrest of the appellant which from the evidence on record was effect by the officers from NIS , which the appellant submitted might not have been true and that there was the possibility of the said officers planting the drugs in the appellants room so as to fix her.

49. However, in as much as the trial court went at length in analysis of the documents recovered from the appellants, the case as she rightly put it in the introduction was a simple case of trafficking in a specific quantity drugs to wit 1.002 grams with a market value of kshs 3,006,000 found at a room in deep west concealed under a shoe rack and whether the appellant had exclusive control of the said room. Therefore, the prosecution case as presented before the court was either to reinforce circumstantial evidence and or to influence the court against the appellant which at the end of the day it managed to do at the expense of proof of the charge levelled against the appellant.

50. The other charge as regards the 1st appellant was possession of a forged passport and being in possession of a passport without reasonable explanation or authority contrary to the provisions of section 54(1)(c) and (d) of the Kenyan citizen and Immigration Act.

51. On the charge of trafficking in narcotic drugs, the only evidence which remains unchallenged is the recovery of the drug in room 19 which was occupied by the 3rd accused person in her presence and whose room seem to had been under surveillances by the arresting officers and who from the evidence on record seems to had been the person of interest going by the evidence tendered but since the same was convicted in absentia without offering her defence ,will say no more save that as the two appellant were ready to prove their innocence, the same took flight in the course of the trial .
52. I have looked at how the two appellants were arrested , at the close of the prosecution case there remains doubt as to whether they were arrested by officers from NIS or from special unit? According to the evidence of PW1 Amos Mariech acting on intelligence, they identified two rooms one by the two appellants and one by Pares which he secured pending the arrival of officers from anti-narcotic unit and that the officers from the intelligence were already in the said rooms and that he only secured the room Pares was in. PW2 Timothy Maiyo stated that when he arrived at the scene , he was taken to a room which was acting as an office in which there were two officers and the two appellants and that he conducted a search thereat at recovered the subject drug under the shoe rack. It was his evidence that they the time he got there the appellants had been arrested .

53. PW4 Rodgers Kibet secured the room where the appellants were and nothing was recovered therefrom and that after all the rooms had been searched the officers from the anti-drug unit recovered substance believed to be narcotic. PW8 Inspector Luka Kinoti confirmed that they were shown a room where the appellants were and in the shoe rack they recovered the drug, Tanita digital scale and the passports and documents belonging to the appellants. It was his evidence that he did not know where the appellants were arrested from but found them detained in the room which the drug was found.

54. If the appellant had knowledge of the presence of the alleged drugs in the said office and or store, would she have led the officers thereto? In her defence the 1st appellant raised the possibility of the drugs being planted on her, I have noted the way she was arrested and the fact that the arresting officers acted on an allegation of information from the intelligence officers who were allegedly the first at the scene before they called officers from special service unit led by Amos Mariech who was to secure the room where Peres was found and where drugs were found against his evidence that he found the appellants already arrested in her account at the kitchen and that the second appellant was assaulted before being taken to the said room and her evidence that the said room was being used by many people at the

establishment, it follows that the appellants did not have exclusive control thereof.

55. The courts conclusion that constructive possession was proved by the prosecution was in error. The circumstantial evidence that titan weighing scale which was found therein was pointing to the appellants possession of the drugs was also in error the appellant having not been charged with trafficking .

56. There were further several procedural irregularities which were not explained by the prosecution and which raised a doubt in the prosecution case, the benefit of which should have been given to the appellants, these being , lack of search warrants contrary to the provision of Article 31 of the Constitution , searching the 1st appellant in the absence of a female police officer, the unexplained role of the alleged NIS officers and assaulting the 2nd appellant without any justification.

57. The appellants allegation that the drugs were planted as a result of business rivalry and or lover affairs gone south was not interrogated by the trial court .

58. In convicted the appellant the trial court relied on the fact that Tanita digital scale was found in the room and that the question was why have the digital scale? Which according to the court is not an item which usually found in an office or room unless it was to weigh out the specific amount of heroin in the shoe rack ? this to my mind was speculative on the part of the court as the charge which was before the court was not on weighing the drug but

possession of specific drugs allegedly found at the shoe rack.

59. Further the evidence on record is that the search in the appellants business premises was carried without a search warrant and that she was body searched by male officers in contravention of the forces standing order in violation of her constitutional right to dignity. It therefore follows that any evidence obtained from the said search was done in contravention of the express provisions of Article 50(4) of the constitution and should have been excluded as they rendered the trial unfair. If that evidence was excluded , then the prosecution case against the first appellant would have logically collapsed .

60. I therefore find and hold that the prosecution did not prove possession of the on the part of the appellants herein as the circumstantial evidence presented by the prosecution did not point exclusively to the appellants herein being in total and exclusive control of the room where the drugs were found noting that DW2 testified that he was the one who had the key of the room and that it is him who opened it to the officers and the appellants who were not found at the said room as at the time of arrest but were taken to the said room after being arrested at the instruction of the 1st appellant so as to avoid the scene created by the arrest of the 2nd appellant.

61. Having established that the 1st appellant was the putative owner of the club and evidence having been produced to the effect that the said room where the drugs

were allegedly found was used by the staff members at the club as confirmed by the defence evidence, the fact that the photograph of the arrest of the appellant in the said room should have been looked at against her evidence that she is the one who took the officers to that room.

62. The fact that there was communication between the appellants however only raised suspicion of their involvement in trafficking but did not point exclusively to the possession of the drugs herein as charged and suspicion however strong can never form a basis for conviction in a criminal trial. The court was influenced by the reputation of the appellant as a known drug dealer as supported by the travel details and the language of communication which the court must have taken judicial notice of but forgot that the charge before the court was in respect of a specific drug allegedly found at the shoe rack in one of the rooms at the hotel and therefore find and hold that the appellants conviction on this count of possession was not safe and free from error and is therefore quashed.

63. On the second count of possession of forged passport, the appellant did not offer an account on why she had in her possessions the said passports and further there was evidence tendered which was not challenged by the 1st appellant that whereas the photo on the said passports belong to her the names and details thereon belonged to someone else, these were special information in the knowledge of the appellant and it was incumbent

upon her to offer explanation on how she came to possession thereon which she failed to do as such her conviction on this count was safe and free from error the prosecution having proved all the elements thereof beyond reasonable doubt and therefore find no merit on this ground of appeal.

64. On the sentence having found that the prosecution did not prove the count on possession I hereby set aside the sentence herein. on the charge of possession of passport , the sentence mated by the court was lawful and will therefore not interfere with the same .

65. On the 2nd appellant, the prosecution rightly conceded to his appeal, the only evidence tendered against him was that he was found at deep west and that there was communication between him and the 1st appellant. He was not found in the room where the alleged drugs were found and nothing was found in his possession , as rightly submitted by the appellant mere presence or association cannot link the appellant to the recovered drug and even if there was as alleged by the prosecution, intelligence, the same remained rumours and hearsay and has been stated severally mere suspicion however strong cannot form the basis of a conviction in a criminal trial .

66. The fact that the 2nd appellant was assaulted at the time of his alleged arrest further rendered his trial nullity and invalid as the prosecution failed to call as witnesses the arresting officers who would have placed him together with the 1st appellant at the point of arrest and or the

recovery of the alleged drugs as the issue which was before the court was not his travel records but possession of specific drugs allegedly recovered at the first appellants establishment.

67. It therefore follows that in the absence of evidence linking the 2nd appellant to the drugs herein his conviction was not safe and is therefore set aside. Having set aside the conviction , the sentence herein cannot stand and is quashed.

68. The appeal against the 2nd appellant is hereby allowed both on conviction and sentence which I hereby set aside and quash. The second appellant shall be set free forthwith unless otherwise lawfully held .

69. Before penning off I must point out that there remained strong suspicion of the 1st appellants involvement in the trafficking of drug as demonstrated by the evidence tendered in court which might have influenced the trial court, but those circumstantial evidence however strong did not prove the specific charge which was before the court and therein lies the fault of the court, the basis of which these two appeals are allowed.

DATED SIGNED AND DELIVERED THIS 30th DAY OF APRIL 2026

**J WAKIAGA
JUDGE**

In the presence of: -

Court assistant - Gitonga

Counsel for the state -

MAKADARA CRIMINAL APPEAL NOS E050 OF 2025 AND E171 OF 2025 JUDGMENT ORIGINAL