



REPUBLIC OF KENYA



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**Farah v Republic (Criminal Appeal E039 of 2023)
[2025] KECA 255 (KLR) (21 February 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E039 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

ZINAB ABDI FARAH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Mombasa
(A. Ong'injo, J.) dated 25th July 2023 in Criminal Appeal No. E065 of 2022)*

JUDGMENT

1. Zainab Abdi Farah (the appellant), was arraigned and charged before the Chief Magistrate's Court at Shanzu with two counts of the offence of trafficking in narcotic drugs contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* (the Act).
2. The particulars of count I were that, on 22nd August 2019 at Solian area, Kisauni sub-county, Mombasa County, jointly with others not before court, the appellant trafficked in narcotic drugs, namely Cocaine, to wit, 303.3 grams with a market value of Kshs. 1,213,200 by storing, in contravention of the Act.
3. The particulars of Count II were that, on 22nd day of August 2019 at Solian area, Kisauni sub-county within Mombasa County, jointly with others not before court, the appellant trafficked in narcotic drugs, namely Heroin, to wit 76.7 grams with a market value of Kshs. 230,100, by storing in contravention of the Act.
4. The appellant pleaded not guilty to both counts. After a full trial, the court (Hon. D. O. Odhiambo, SRM) found the appellant guilty of both counts. In count I, the appellant was sentenced to serve 25 years imprisonment and, in addition, pay a fine of Kshs. 3,636,600. In Count II, she was sentenced to serve 25 years imprisonment and, in addition, pay a fine of Kshs. 690,300. Both sentences were to run concurrently.



5. The background giving rise to the arrest of the appellant was from information received from an anonymous 'police informer' who tipped off other police officers about the appellant's engagement in selling cocaine and heroine (narcotics).
6. On 22nd March 2019 at around 7.00 p.m., PW1, SPT Paul Gathara in charge of transnational organized crime unit, received information that the appellant was dealing with narcotics in an estate known as Solian within Bamburi area of Mombasa County. Together with his colleagues, Sgt. Maingu, Cpl. Sheila and Sgt. Otando, from the Anti-Narcotics Unit at DCI Headquarters, they all proceeded to the appellant's house. While there, PW1 introduced himself and stated his purpose of the visit after which they embarked on a search of the appellant's house amidst her protest. PW1 together with the other police officers entered the house and found the appellant in the company of her daughter aged 17 years, a house help and a child who was around 2 years old.
7. While conducting the search, PW1 testified that they were able to recover Kshs. 75,000 in cash in the living room; some brownish powder wrapped in a clear paper bag under the appellant's bed in her bedroom; a red shopping bag, which had a digital weighing scale with a written label 'Tanita'; a black bag with whitish powder; and clear polyethene bags. After the recovery, under the instructions of PW1, Cpl Sheila prepared a search certificate which he, Cpl. Sheila and Sgt Otando signed. They also prepared an inventory of the suspected drugs that were recovered, dated 22nd August 2019 which was signed by himself (PW1), Cpl. Munyao and Cpl. Sheila. A second inventory was also prepared of other items other than the suspected narcotic drugs that were recovered, and it was also dated 22nd August 2019.
8. In cross examination, PW1 stated that they asked the appellant to sign the list of inventories, but that she declined; and that the appellant was the owner of the house from where the recoveries were made.
9. PW2, Yahya Hamisi Maingu, a Chemical Analyst from the Government Chemists, Mombasa, witnessed the weighing of the recovered powdery substances, which were suspected to be narcotics. He testified that he sampled some 2.0 grams from a creamish powdery substance weighing 76.7 grams marked as 'G'. He then analysed it, and the result was that the substance was cocaine. He again sampled some 3.1 grams from a brownish powdery substance weighing 303.3 grams marked Exhibit 'B', which he also analysed, and the result was that the substance was heroine. PW2 proceeded to prepare a report of his analysis dated 16th May 2019, a weighing certificate dated 28th August 2019 and a certificate of weighing dated 26th August 2019 which he produced as Exhibits 9b, 6A and 6 respectively. He also produced certificates of sampling for the cocaine and heroine as Exhibits 7A and 7B respectively. He further testified that the appellant was present as a witness during the whole process of weighing and sampling.
10. PW3, PC Patrick Mugambi attached to the Anti-Narcotics Unit - DCI Nairobi was present at the Government Chemist together with his colleagues, the government analyst and the appellant who was with her counsel, Mr. Magolo. He stated that the recovered substances were in two packages sealed in an exhibit bag. The first one weighed 303.3 grams while the second one weighed 76.7 grams. According to PW3, the substances turned out to be cocaine and heroine respectively. PW3 signed the weighing and sampling certificates.
11. PW4, CI Philip Langat attached to the DCI Headquarters, Anti-Narcotics Unit testified that he received the government chemist report dated 16th October 2019, which confirmed that the substances recovered were positively identified to be heroine and cocaine. He then prepared a valuation report in compliance with section 86 of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#). The



heroin weighing 76.7 grams was valued at Kshs. 230,100 while the cocaine weighing 303.3 grams was valued at Kshs. 1,215,200.

12. PW5, IP Ismael Oruko also of DCI Anti-Narcotics Unit, Nairobi Area, testified that on 26th August 2019 while on operation duties against drug trafficking within the Coast region, he was instructed by Dr. Hamisi Masa, Director Anti- Narcotics Unit, Kenya, to proceed to the Government Chemist, Mombasa. Upon arrival, he was handed an evidence bag which contained a red carrier bag that had a 'brownish substance'. He weighed the substance which he found to be 76.7gramms. He was also handed over another evidence bag which had a 'whitish substance.' He weighed the substance and found it to be 303.3 grams. He then prepared a notice of seizure dated 26th August 2019.
13. PW6, Sgt. Wycliffe Otondo of DCI Headquarters, Anti- Narcotics Unit, was one of the officers who accompanied PW1 to the appellant's home to conduct the operation sting to recover the alleged narcotics, which were in her possession. Notably, he stated that he recovered the appellant's Identity Card; a Naivas Supermarket card; a Driving Licence; ATM cards for several banks, namely Cooperative Bank, Gulf African Bank and Family Bank; a Telkom SIM card; Techno and Nokia mobile phones; and Kshs. 75,000 in cash in different denominations. He then prepared a search certificate which was signed by all the officers present except the appellant, who declined to do so.
14. PW7, Sgt. Joseph Munyao, attached to the DCI Mombasa, was the arresting officer and in charge of providing security on 22nd August 2019. He testified how he accompanied his colleagues to the appellant's home and what their search operations recovered. His evidence was that part of the items recovered were a 'cream powder' substance wrapped in a clear polythene, a weighing scale, and a 'whitish powder' substance inside a black silk bag; that they also recovered a motor vehicle registration number KCV 251Q Toyota Vitz, white in colour, and which was towed to the police station; that two inventories were prepared; and that he arrested the appellant and handed her over to the Anti-Narcotics Drugs Unit.
15. PW8, Cpl. Derrick Kiprono, was on the crime scene investigation duties at the Government Chemist in Mombasa on the material day. He took part in the documentation process of weighing and sampling of the suspected narcotics drugs. He then produced photographs which he took in evidence as Serial Numbers 1-18. He also prepared a certificate indicating that he is the one who took and processed the photographs.
16. While it is not clear from the testimony of PW8 which photographs among those serialised as No. 1-18 constituted the first or second set of the photographs, is it evident that the appellant's counsel objected to the production of the 2nd set of photographs. The objection was upheld, consequent to which only the first set of photographs constituting Exhibits 12 (a) – (xi) and a certificate of production dated 14th October 2019 as Exhibit 13 were produced.
17. PW9, Sgt. Sheila Kipsoi from the Anti-Narcotics Unit at DCI Headquarters was the investigating officer. She testified that, on 22nd August 2019, she was on operational duties in Mombasa; that they (with other police officers) received intelligence information that the appellant was dealing in narcotics; and that, in the company of other police officers of various ranks and duties, they proceeded to the appellant's home where they were able to recover some 'powdery substances' which were later established to be cocaine and heroin.
18. The other items recovered by Sgt. Sheila were the appellant's temporary permit in the name of Zainabu Abdi Farah dated 24th June 2019 which was to expire on 22nd June 2020; a passport; invoices from the Immigration Department dated 24th June 2019; the appellant's yellow fever certificate; a Kenyan Passport belonging to Omar Swaba Hemedi Mohammed; a copy of driving licence and identity card



for Fahim Essa Ahmed Bahaj; certificate of tracking for Motor Vehicle KCV 75IJ; receipt for Labster Autocare dated 24th July 2019 for motor vehicle KCV 251Q; a copy of Alcardia receipt No. 5974 for Motor Vehicle KCV 251Q Toyota Vitz dated 17th July 2019; a copy of a bill of lading dated 1st July 2019; an affidavit for ELC dated 17th June 2019; a C17 (sic) for Motor Vehicle dated 19th July 2019; bill (sic) for Motor Vehicle KAX 592R dated 19th July 2019; letters for (sic) Nyandete Advocates dated 4th April 2019; Certificate of Insurance for Motor Vehicle Registration Number KCV 251Q for 23rd July 2018; and witnesses statements recorded in a previous case by different police officers in a different case involving the appellant.

19. PW9 then prepared inventories of the items and the drugs recovered. She later wrote to the National Transport Safety Authority (NTSA) requesting for details of ownership of Motor Vehicle registration No. KCV 251Q, which was confirmed as belonging to one Thuraya Farida. PW9 produced in evidence all the items recovered as recorded in the search certificate dated 22nd August 2019 as Exhibits Nos. 1-19.
20. The appellant gave a sworn statement of defence. She testified as DW1 and called one witness in support of her defence, being DW2. She testified that on 22nd August 2019 at around 6.30 a.m., she heard a knock at the door of her house; that her husband was then at the mosque; that a group of people rushed into her house, being one woman and 15 men; that the group divided itself into various groups; that some people went upstairs while others remained downstairs; that she was taken to her bedroom upstairs where the female police officer removed something in a bag; and that, she was informed that she would be charged with it. She denied knowing what it was that was recovered.
21. The appellant stated that the police officers then proceeded to a house which they knew belonged to her father, but that they did not find anything suspicious; that she was then taken to the Government Chemist where she was told that she would be charged with being in possession of narcotic drugs; and that, there were many people who had been arrested. She denied ever being charged previously with a similar offence.
22. In cross examination, the appellant stated that she was not in any formal employment, but that she does business of selling clothes, shoes and bags which is her source of income. She stated that she declined to sign the search certificate since she did not know how to read. In regard to the money that was found in her house, she stated that it was proceeds from her business.
23. DW2, Markan Baharani, the appellant's daughter, testified that on the material day, they heard a knock at the door and when they opened, a group of 10 men walked inside the house. Half of them went upstairs while the rest remained downstairs. She stated that her mother was later taken upstairs. She wanted to follow her mother upstairs but was pushed back; and that, despite police searching their home, nothing untoward was recovered. In cross examination, she stated that one of the persons who entered their home was beating her; and that, she did not understand what they were doing.
24. After considering the entire evidence on record, the trial court concluded that the prosecution had proved its case beyond reasonable doubt. In so finding, the trial court examined the assertion by the appellant's counsel that the drugs may have been planted inside the appellant's home, but discounted that assertion on the basis that they were recovered in a black silver handbag and inside a small black bag; and that the drugs were sizeable enough, hence, it was not possible that they had been sneaked in and planted in the appellant's house.
25. The trial court further examined the appellant's assertion that she had never been arrested before in relation to a similar offence of trafficking in narcotics, and it held that, at the time of her arrest, police statements were recovered, which was an indication that she had been arrested before. The learned Magistrate further observed that the appellant's counsel, Mr. Magolo, argued that the appellant could



- not abscond bond since she had been granted bond in another matter. Therefore, it was true as asserted by the prosecution that the appellant was facing similar charges at Shanzu Law Courts in Criminal Case No. 682 of 2019 where she was charged with trafficking in narcotics worth KShs. 2,777,770.
26. The learned trial Magistrate examined the allegations put forth by the appellant that there was no 'search warrant' allowing the police to enter and search her house. In finding on this issue, the learned Magistrate referred to the cases of *Samara Engineering Limited & Others vs. Kenya Revenue Authority Nairobi* Petition No. 54 of 2011 and *Samson Mumo Mutinda vs. Inspector General National Police Service & 4 Others* (2014) eKLR on the application of the right to privacy when searches are being conducted. He held that Article 24 of *the Constitution* delimits such rights and, in this instance, it was in the best interest of security and justice that an arbitrary search be conducted.
 27. The learned Magistrate further placed reliance on the jurisprudence emanating from the South African Constitutional Court in the decision of *The Investigating Directorate: Serious Economic offences and Others vs. Hyundai Motor Distributors (Pty) Ltd and Others In Re: Hyundai Motors Distributors (Pty) Ltd and Others vs. Smit NO and Others (CCTI/00) (2000) ZACC 12* where it was held that, in matters where security is concerned, the limitation of the right to privacy is justifiable in certain circumstances; that the right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process; and that, in the instant case, the search conducted was above board as the police officers did introduce themselves and stated the purpose of their visit before embarking on their mission.
 28. On the alleged inconsistencies on the prosecution witnesses' evidence as to whether the appellant had previously been arrested and had an ongoing case, the learned Magistrate held that it was not within the knowledge of all of witnesses whether the appellant had been charged in another criminal case; and that the discrepancies and inconsistencies in the witnesses' statements did not necessarily cast doubt on the prosecution's case. In conclusion, the trial court found that the prosecution's case was proved beyond reasonable doubt, and the appellant was convicted and sentenced accordingly.
 29. Dissatisfied, the appellant appealed to the High Court where she raised 7 grounds of appeal. The appeal was canvassed by way of written submissions.
 30. The appeal was heard by the learned Judge (Ong'injo, J.). The learned Judge diligently and meticulously evaluated the prosecution and the defence evidence as adduced in the trial court whereupon she isolated three issues for determination.
 31. On whether the burden of proof was improperly shifted to the appellant and whether the prosecution proved its case beyond reasonable doubt, the learned Judge took note of the role played by each of the police officers who conducted the search at the appellant's house. She made reference to several provisions of the law, being Article 31 of *the Constitution* on the right to privacy; Article 50 (4) of *the Constitution* which provides for evidence obtained in a manner which violates any fundamental bill of rights; section 57 of the *National Police Service Act*, Cap 84 on the power of the police to enter premises and stop a vehicle without warrant; section 60 of the *National Police Service Act* on power to search without warrant in special circumstances; section 118 of the *Criminal Procedure Code* on the power to issue warrant; section 73 (5) of the *Narcotic Drugs and Psychotropic Substances Act*, Cap 245 on where any requirement to first obtain a warrant to enter and search would defeat the purpose of the search; and section 74 of the *Narcotic Drugs and Psychotropic Substances Act*, which provides that all items that are liable for forfeiture under the said provisions may be seized and detained by any police officer or any other person authorised in writing by the Commissioner of Police.
 32. The learned Judge held that the aforementioned provisions are not couched in mandatory terms that failure to obtain warrants is reason enough to find that the prosecution witnesses were possessed of



sinister motives. It was held that it was plausible that it is only the appellant who could have been charged with possession of the narcotic drugs since they were recovered in her bedroom under the bed and in her handbag; and that, she (the appellant) was the only adult in the house and, at the time of the search, she did not tell the police that the drugs belonged to her husband who, in any event, was not in the house at that time. The learned Judge upheld the finding of the trial court that the prosecution had proved its case beyond reasonable doubt.

33. In answer to the question as to whether the appellant's defence was considered, the learned Judge held that the prosecution's evidence was weighed thoroughly against the appellant's defence; and that the inconsistency in the prosecution evidence as to whether the appellant had been arrested and charged before was cured by the fact that not all witnesses were aware that the appellant had a similar case in another court.
34. In considering the appropriateness of the sentence meted out, the learned Judge held that the learned Magistrate had the discretion to impose a fine of up to Ksh. 50 million or three times the market value of the narcotic drugs, whichever is greater or, to imprisonment for a term of up to 50 years or, to both such fine and imprisonment.
35. The learned Judge held that the impact of drug abuse on the society, and particularly the youth and other persons, is a burden to the society. She noted that the sentence meted on the appellant was lenient but reasonable. She however substituted the custodial term for 15 years' imprisonment on each count to run concurrently from the date of conviction.
36. Further dissatisfied, the appellant has now approached this Court on a second appeal, challenging the decision of Ong'injo, J. on two grounds:
 - a) That the learned Judge erred in law in finding that all the elements of possession of the drugs was proved exclusively to the appellant and at the exclusion of any other person (s); while the evidence did demonstrate otherwise.
 - b) That the learned Judge erred in law, (sic) her failure to consider an alternative cash bail on the premise that the appellant was a first-time offender, and that she did not plead for extreme leniency owing for (sic) her advance age and being sickly."
37. At the plenary hearing of this appeal on 25th September 2024, learned counsel Mr. Chacha Mwita appeared for the appellant while learned Principal Prosecution Counsel Ms. Mwaura appeared for the respondent.
38. Highlighting his submissions dated 26th August 2024, learned counsel Mr. Chacha submitted that there were conflicting accounts as to who was present during the search for the drugs; and that, PW1 initially claimed that only the appellant's children were present, while other witnesses confirmed that a house help was also present, and that her husband had just left the house. This, according to counsel, was a material contradiction which undermined the reliability of the witnesses' testimony.
39. Counsel further contended that the scene of crime was compromised because officers entered the house and went into the bedroom way before the appellant, and that it was later that the drugs were "alleged to have been recovered"; and that, this certainly raised doubts as to whether the drugs were already in the room before the officers entered. Counsel also pointed out that the appellant protested when police officers entered the house.



40. Mr. Chacha further argued that there was no attempt to obtain fingerprints or DNA evidence so as to link the drugs exclusively to the appellant; that the lack of forensic evidence weakened the prosecution's case that the drugs belonged to the appellant; and that, the fact that the drugs were found in the appellant's home was not conclusive evidence that they belonged to her. In this regard, reference was made to the High Court cases of Juma Rashid Mwawanga vs. Republic (2020) eKLR, Abdi Osman Ahmed vs. Republic (2007) eKLR, this Court's decisions in Josephat Kisilu Mulinge vs. Republic (2014) and Bakar vs. Republic (Criminal Appeal No. 39 of 2020) (2021) KECA 129 (KLR) 5 November 2021).
41. It was also submitted that two inventories were written: the first titled "recoveries from the house," which did not mention any narcotic drugs; and the second titled "inventory of recoveries in the bedroom," which listed the narcotics; that the officer in charge of the operation could not explain why there were two inventories; and that, therefore, the discrepancy suggested that the narcotics were not found during the initial search of the entire house.
42. On the search certificate, it was submitted that it was prepared after the search had already taken place, meaning that the appellant was not aware of what the officers were looking for; and that, this was a violation of crucial procedure which ultimately rendered the search itself unlawful. To buttress the assertion that the process of recovery of the drugs was flawed and compromised, counsel referred to Articles 31, 49 and Article 50 (4) of *the Constitution*, sections 57 and 60 of the *National Police Service Act*, section 118 of the *Criminal Procedure Code*, and sections 73(5), and Section 74 of the Narcotics, Drugs and Psychotropic Substance Act in submitting that they were not complied with. To counsel, these provisions were intended to prevent mischief and ensure the integrity of the evidence collected during investigations but that, in the instant case, they were not complied with.
43. It was the appellant counsel's contention that the appellant had been arrested five months prior to the instant incident by the same police unit, but that nothing was recovered from her then, yet she was still charged with being in possession of drugs; that the preference for this case implies a possible bias and raises the possibility that the drugs were planted; that this was attested by the appellant's daughter (DW2), who testified that officers entered the bedroom before the appellant did; and that the prosecution did not refute the claim that the officers carried items into the bedroom, which should create further doubt on whether the drugs were indeed recovered from the appellant's possession.
44. As regards the sentence, it was submitted that the appellant was a first-time offender, of advanced age, sickly with a back problem and had already served 2 years in prison. On these grounds, and in urging us to interfere with the sentence, reference was made to the cases of Alex Njuguna Kimani vs. Republic Criminal Appeal No. 111 of 2014 (2016) eKLR and Mohamed Famau Bakari vs. Republic - Criminal Appeal No. 64 of 2015 (2016) eKLR where sentences were reduced on appeal.
45. On the whole, the appellant pleaded with this Court to allow the appeal by quashing the conviction and setting aside the sentence.
46. On her part, Ms. Mwaura relied on her written submissions dated 18th September 2024. It was submitted that the sole burden that the prosecution required to discharge was to prove that the appellant was indeed trafficking in narcotics as spelt out in section 4(a) of Narcotic Drugs and Psychotropic Substance (Control) Act. It was submitted that, in this case, the appellant trafficked the narcotic drugs by storing them in her house. Counsel referred to the decision of this Court in Gabriel Ojiambo Nambesi vs. Republic (2007) eKLR on what constitutes the offence of trafficking in narcotics. It was submitted that the 'brownish substance' and 'whitish powder' recovered from the appellant's house were confirmed by the government chemist to be cocaine and heroin respectively.



47. It was contended that the appellant did not dispute in her sworn testimony that the house from where the recovery was made belonged to her; and that, furthermore, it was not possible that the narcotics belonged to the appellant's children or house help since they were recovered from her bedroom, and she did not dispute that the room was her bedroom. To the respondent, the circumstantial evidence leading to the recovery of the drugs was beyond reproach. Reliance was placed on this Court's cases of *Ahamad Abolfathi Mohammed & Another vs. Republic* (2018) eKLR, *Abanga alia Onyango vs. Republic* Criminal Appeal No. 32 of 1990 (UR) and *Sawe vs Republic* (2003) KLR 364 where the threshold for application of circumstantial evidence was enunciated.
48. In conclusion, the respondent submitted that the prosecution's case was hinged on both direct and circumstantial evidence, and that no other conclusion can be drawn from the evidence on record apart from the fact that the appellant stored narcotic drugs in her house; that the case was proved beyond reasonable doubt; and that the conviction of the appellant was safe and sound.
49. On the sentence, it was submitted that, this being a second appeal, the question of the sentence imposed was a matter of fact and not law; and that, this Court cannot overturn the sentence unless it is unlawful. On failure to consider an alternative fine against the backdrop of the mitigating factors, it was submitted that both courts below were guided by the various laws and sentencing policies; that the two courts below considered the effect of drugs in the society, and that even then, the High Court reduced the custodial term to 15 years on each court, but maintained the fines imposed; and that the sentence meted was legal and lawful. We were urged to dismiss the appeal.
50. We have considered the record of appeal, the submissions made by both the appellant and the respondent and the law. By dint of section 362(1)(a) of the *Criminal Procedure Code*, this Court concerns itself only with matters of law, the issues of fact having been settled in the two courts below. The Court can only concern itself with matters of fact if the findings by the two courts below are based on no evidence, or are based on a misapprehension of evidence, or that the two courts below acted on wrong principles in arriving at their findings. The Court aptly explained its approach in a second appeal as follows in *David Njoroge Macharia vs. Republic* (2002) KEHC 469 (KLR) 7 November 2002:
- “That being so only matters of law fall for consideration – see section 361 of the *Criminal Procedure Code*. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611.”
51. The appellant is inviting us to quash her conviction on the grounds that the elements of possession of drugs was not proved exclusively to her, and to the exclusion of other persons. From the evidence adduced, two facts are undisputed; firstly, that the house in which the raid was conducted belonged to the appellant and, secondly, that there were three other persons in the house at the time, namely the appellant's daughter aged 17 years then, another child of 2 years and the house help.
52. The appellant refuted that the drugs recovered from her belonged to her. Through her counsel, she argued that they may as well as have been planted by the police officers who conducted the search in her house.
53. On the question of possession, the learned trial Magistrate analysed the evidence and concluded that:
- “I therefore find that the search conducted at the house of the accused leading to recovery of drugs was above board. She stated that it was her who opened the door and the people



she thought were thieves in...(sic). PW1 being the leader of the operation stated that they knocked on the door, the accused opened and they introduced themselves as police officers and explained the purpose of their visit.”

54. The High Court, acting within its mandate as the first appellate court and upon re-valuating the evidence, reached its own conclusion thus:

“All the prosecution witnesses said they did not plant drugs in the appellant’s bedroom and PW7, Sgt, Joseph Munyao, whose statement is alleged to have been recovered in the appellant’s house was not interrogated whether he was trying to fix the appellant whom he had previously arraigned in court with similar charges. PW9 said she did not know the appellant had no reason to fabricate the appellant.”

55. It was the learned Judge’s further finding that:

“The argument that the house was occupied by the appellant, her husband, two children and the house help and that she should not have been charged alone as she was not the only occupant of the house. When the police officers arrived at the appellant’s house, she was the only adult and the drugs were recovered in her bedroom under the bed and in handbags. In the absence of her husband, the only reasonable presumption was that she was the one who was in custody of the said narcotic drugs. She did not say that the drugs belonged to her husband and if he had been around, probably they could have been charged jointly.”

56. The concurrent findings of fact by the two courts is that the search conducted in the appellant’s home was above board, and that it yielded to the recovery of narcotic drugs. This was fortified by the evidence of PW1, PW6, PW7 and PW9 each of whom gave a concise account on the specific place where the drugs were recovered, namely the appellant’s bedroom and, in particular, in handbags, under the bed which the appellant did not deny belonged to her. In addition, the search and recoveries were done in her presence.

57. The appellant’s further argument in this appeal is that there were two different inventories which listed the items recovered at different places, thus casting doubt on whether the drugs were found during the initial search of the entire house. We have perused the record of appeal. ‘P. Exhibit 5’ is a record of inventory dated 22nd August 2019 prepared by Cpl. Sheila Kipsoi (PW9), which contained items Nos. 1-24 and were later produced in evidence. The other record of inventory list containing the items found is ‘P. Exhibit 14’, and it is dated 22nd August. It has a list of 13 items, but it excluded the narcotic drugs recovered from the appellant’s home. It was prepared by Cpl Wycliffe Otado (PW6).

58. We do not read any mischief in the preparation of two separate inventories of the items recovered. The separate lists of the inventories were prepared by two different police officers who were simply reporting on what each recovered as they were conducting their respective searches. It may as well be that, if 5 different police officers recovered different items, then they would be under an obligation to record an account of what each of them recovered. This only goes to prove that the exercise conducted was in good faith and without malice on the part of the police officers.

59. The presence of the two lists of inventories did not oust the fact that narcotic drugs were recovered from the appellant’s house. Furthermore, the appellant does not seem to deny that any of the items listed in the two inventories did not belong to her. The minor discrepancies and/or infractions alluded to by the appellant did not affect the overwhelming evidence presented by the prosecution. Neither can they be said to have discredited the process of the search and recovery of the narcotic drugs.



60. From our analysis, we are satisfied that the concurrent findings of fact by the two courts below were based on ample and credible evidence. The allegations that the drugs may have been planted on the appellant were not proved in evidence, neither did the issue come up at the trial. There was sufficient evidence to sustain the charge that the appellant was found in possession of the narcotics. We find no reason to interfere with the findings of the two courts below on this score. To our mind, the conviction was sound and well rooted in the law.
61. Turning to the sentence, section 361(1)(a) of the *Criminal Procedure Code* militates against our hearing a second appeal on sentence, as to severity of sentence meted out as it is a matter of fact. It states:
- A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the high Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section: -
- a. On a matter of fact, and severity of sentence is a matter of fact.
62. Emphasising the application of the afore-cited section 361(1) (a), this Court in *MGK vs. Republic* [2020] eKLR stated that:
- “As regards the sentence, under section 361(1) of the *Criminal Procedure Code* severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal.”
63. Section 4(a) (i) of the Narcotics Drugs and Psychotropic Substances Act, Cap 245 provides that:
- Any person who traffics 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-
- i. 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;
- ii. 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;”
64. The trial court sentenced the appellant to 25 years imprisonment on both counts, which sentences were to run concurrently, and further imposed different fines on each count premised on the different weights of the drugs. On first appeal, the learned Judge sustained the fines imposed, but reduced the sentences to 15 years respectively.
65. As already stated, our mandate as regards sentence is confined to a matter of law, and we can only interfere with the sentence imposed if the same is unlawful. Having regard to what section 4(a) (i) of the Narcotics Drugs and Psychotropic Substances Act provides, it follows that the sentence imposed was lawful. We find no basis on which we can interfere therewith. Consequently, we find that this appeal has no merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.



A.K MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

