



**Mohamed v Republic (Criminal Appeal E009 of 2023)
[2024] KECA 1194 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1194 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E009 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
SEPTEMBER 20, 2024**

BETWEEN

FATUMA SICOBO MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Dr. Githiru Freda Mugambi, J.) delivered on 17th March 2023 in HCCRA No. E104 of 2021)

JUDGMENT

1. This is a second appeal arising from the judgment of the Senior Principal Magistrate's Court at Shanzu (Hon. David Odhiambo, RM) delivered on 15th December 2021 in Criminal Case No. 615 of 2019 in which the appellant, who had been charged with another, was convicted and sentenced to imprisonment for life and fined Kshs. 22,197,650 for the offence of trafficking in narcotics by storing contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act*, 1994 (the Act).
2. The appellant's conviction and sentence prompted her 1st appeal to the High Court of Kenya at Mombasa in Criminal Appeal No. E104 of 2021 in which F. Mugambi, J. delivered the impugned judgment on 17th March 2023 upholding the appellant's conviction, but substituting the life sentence meted by the trial court for a term of fifteen (15) years, and an additional one (1) year in default of the fine imposed by the trial court in the sum of KShs. 22,197,650.
3. The particulars of the charge were that, on 16th April 2016 in the Bakarani area of Kisauni Sub-County of Mombasa County, the appellant jointly with others not before the court trafficked by storing a narcotic drug, namely 2466.4 grams of heroin with a market value of Kshs. 7,399,200 in contravention of section 4(a) of the Act.



4. On its part, the prosecution called 11 witnesses, including SP Paul Gathara (PW10), the officer In-charge of the Transnational Organised Crime Unit, Mombasa, who stated that, on 15th April 2019, he received information that the 2nd accused was supplying drugs to the appellant; that on 16th April 2019, he organised simultaneous raids at their residences; and that he (PW10) dispatched Sgt. Munyao (PW9), PC Emma (PW11), Cpl. Kiptes (PW7) and Cpl. Kokirol (PW3), who went to the appellant's house in the Bakarani area of Kisauni, Mombasa, to conduct a search therein.
5. PW9 testified that he was informed by PW10 that there was intelligence information about two persons residing in different areas of Mombasa; that, on 16th April 2019 at about 4:00 am, his team gathered at Nyali Police Station and proceeded to the appellant's residence at Kisauni; that, upon arrival, they knocked at the door, the appellant peeped through the window, but did not open the door; that he asked some of his officers to man the gate while he went to the rooftop after deploying PW7 at the door; that, while at the rooftop, he saw something being thrown out of the appellant's window to the rear of the house in a white-stripped shopping bag and a black shopping bag; that he went to the spot where the two bags had been thrown adjacent to the appellant's window and guarded the scene while awaiting return of the officers who had gone to search the appellant's house; that on recovering and conducting a search on the two bags, PW11 found a blue shopping bag, two red shopping bags, a small teaspoon and a sieve; that the red bags had white powder and brown powder substances; and that PW3 prepared an inventory and a search certificate in the presence of the appellant and her landlord, one Swaleh Mabruk (PW2).
6. PW11 went on to state that the appellant occupied the house on the 1st floor, whose window had a mosquito net with a hole; that the house below it had a window covered by an intact net; and that they arrested the appellant and took her to Nyali Police Station.
7. Confirming the incident, PW2, testified that he was called by the police at about 6.00 am and requested to ask the appellant to open the door to her house; that she opened the door at his request whereupon the police officers got in and conducted a search; that he accompanied the officers downstairs where he was shown some bags; that, when he looked up, he noticed that the appellant's window had a hole; and that she was arrested in his presence.
8. Cpl. Philip Kazungu (PW12) testified that he received the exhibits recovered from the appellant by the arresting officers; that he prepared an exhibit memo and weighing certificates, which the appellant signed; that he (PW12) forwarded the substances to Yahya Hamisi (PW4), a Government Chemist, for weighing and sampling.
9. In his testimony, PW4 stated that, on receiving the exhibits, he sampled them and prepared a sampling certificate; that the substances tested positive for heroine (diacetyl morphine), which is listed among the narcotic drugs set out in the 1st schedule to the Act. Cpl. Philip Langat (PW5) estimated the value of the drugs to be Kshs. 7,399,200 and prepared a certificate of valuation dated 1st October 2019.
10. The trial court having found that the prosecution had established a prima facie case against the appellant and her co-accused, it put the two on their defence. In her defence, the appellant denied the charge and gave a sworn testimony, but did not call any defence witness. It is noteworthy that she confirmed the testimonies of PW2, PW3, PW7, PW9, and PW11, but denied knowledge of anything to do with the bags containing the narcotic substances.
11. In his judgment dated 15th December 2021, Hon. David Odhiambo (RM) found that the State had proved its case beyond reasonable doubt, and that the appellant was guilty of the offence of trafficking in narcotics by storing contrary to section 4(a) of the Act. He sentenced her to life imprisonment and, in addition, fined her Kshs. 22,197,650.



12. Aggrieved by the trial court’s decision, the appellant appealed to the High Court of Kenya at Mombasa in HC Criminal Appeal No. E104 of 2021 in which F. Mugambi, J. dismissed the appeal, upheld the conviction, but substituted the life sentence for a term of 15 years. In addition, the learned Judge imposed an additional term of imprisonment for one (1) year in default of the fine imposed in the sum of Kshs. 22,197,650.
13. Dissatisfied by the learned Judge’s decision, the appellant moved to this Court on appeal on 3 grounds set out in her memorandum of appeal dated 22nd August 2023, namely that the learned Judge erred in law: in her interpretation and application of circumstantial evidence to uphold the appellant’s conviction; by relying on the uncorroborated evidence of PW9; and by “... shifting the burden of proof to the appellant by imposing a duty on her to prove that there was a hole in her house”.
14. Supporting her appeal, learned counsel for the appellant, M/s. Kirui Kamuibwa & Company, filed written submissions dated 28th December 2023 and a list of authorities dated 27th December 2023 citing the cases of *P (not bis real name) v. Republic* [2021] KECA 357 (KLR), highlighting the role of this Court on 2nd appeal; *Frederick Outa Otieno v. Jarred Okelo & Others* [2014] eKLR where the Supreme Court defined “matters of law”; *Chiragu & Another v. Republic* [2021] KECA 342 (KLR) where this Court set out the three- fold test to be satisfied before a trial court can convict on circumstantial evidence; and *JOO v. Republic* [2015] eKLR, submitting that the appellant’s appeal is only against her conviction; and that sentence is a discretion which the courts below exercised. According to learned counsel, “... there is no complete chain of events to pick out only the appellant and not someone else”. She prays that the appeal be allowed and that she be set at liberty.
15. Opposing the appeal, the learned Principal Prosecution Counsel, Ms. Wangari Mwaura, filed her written submissions and a list of authorities dated 16th December 2023 citing the cases of *Adan Muraguri Mung’ara v. Republic* [2010] eKLR where this Court set out the circumstances under which it would disturb the concurrent findings of fact by the trial court; *Abamad Abolfathi Mobammed & Another v. Republic* [2018] eKLR in which this Court defined what entails circumstantial evidence; *Sawe v. Republic* [2003] KLR 364; and *Abanga ALIAS Onyango v. Republic* Criminal Appeal No. 32 of 1990 (Unreported), highlighting the three-fold test to be satisfied in order to sustain a conviction on circumstantial evidence; and *Gabriel Ojiambo Lambesi v. Republic* [2007] eKLR where this Court explained what constitutes “trafficking in narcotics”.
16. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In *Karingo v. Republic* [1982] KLR 213, the Court stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.”
17. In *Adan Muraguri Mungara v. Republic* [2010] eKLR, this Court set out the only circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following terms:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.” [Emphasis added]



18. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on 2 main issues of law, namely: Whether the learned Judge properly interpreted and applied circumstantial evidence in upholding the appellant’s conviction; whether the trial court relied on the uncorroborated evidence of PW9; and whether the trial court shifted the burden of proof to the appellant by “... imposing a duty on her to prove that there was a hole in her house”.
19. Turning to the three issues, we hasten to point out right at the outset that they all relate to matters of fact, which cannot be re-opened for reconsideration on a 2nd appeal. We are, so to speak, under a duty to pay homage to the concurrent findings of fact made by the two courts below. We find nothing on the record as put to us to suggest that those findings are based on no evidence at all, or that the decision of the trial court and of the 1st appellate court were bad in law so as to call on us to interfere therewith.
20. It is also noteworthy that, save for denying knowledge of the origin of the drugs in issue, the appellant substantially confirmed the testimonies of the above-mentioned prosecution witnesses. To our mind, that explains the line of her submissions to the effect that:

“25. As we conclude, contrary to the Respondent’s submissions, the Appellant’s appeal is only on conviction since sentence is a discretion which the courts below exercised. We urge the Honourable Court to be guided by its decision in *Chiragu & Another v Republic* (*supra*) since, same as in Chiragu’s case, there is no complete chain of events to pick out only the Appellant and not someone else.”

21. From the foregoing submission, we understand the appellant to mean that her appeal is only on sentence on the ground that someone else might have been responsible for the drugs recovered from her premises. Whatever the case, the appeal before us is clearly anchored on matters of fact and “severity of sentence is a matter of fact) – see section 316(1) (a) of the CPC.
22. There being no point of law raised for our determination, we find no reason to interfere with the decision of the High Court (F. Mugambi, J.) on both conviction and sentence as reduced on 1st appeal. Consequently, the appeal fails and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

