



**Shebwana v Republic (Criminal Appeal 56 of 2021)
[2023] KECA 819 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 819 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 56 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 7, 2023**

BETWEEN

FARID JAMAL SHEBWANA APPELLANT

AND

REPUBLIC REPUBLIC

(An appeal from the Judgment of the High Court of Kenya at Garsen (R. Nyakundi J.) dated and delivered on 18th March 2021 in High Court Criminal Appeal No. 66 of 2018 arising from the original trial in Lamu PMC Criminal Case No. 339 of 2017)

JUDGMENT

1. The High Court of Kenya at Garsen (R. Nyakundi J.) delivered a judgment on March 18, 2021 in Garsen High Court Criminal Appeal No 66 of 2018, dismissing an appeal that had been lodged by Farid Jamal Shebwana, the Appellant herein, against his conviction for the offence of trafficking in narcotics drugs, and sentence of a fine of Kshs 1 million and in default 5 years imprisonment, and an additional imprisonment for 20 years for trafficking in narcotic drugs, which had been imposed by the Principal Magistrate Court at Lamu (hereinafter the trial Court). The particulars were that the Appellant, on November 26, 2017 at Mtangawanda Village, Pafe Location in Lamu East Sub County within Lamu County was found trafficking in narcotic drugs by way of selling fifteen (15) sachets of heroine with a street value of Kshs 3,000/- contrary to section 4 (a) of the [Narcotic Drugs and Psychotropic Substance \(Control\) Act](#), No 4 of 1994.
2. The evidence adduced in the trial Court was that on November 26, 2017 at 5:00 p.m., APC William Ombere a police officer based at Mtangawanda AP Post who testified as PW1, together with APC James Mitsanze were heading to Mtangawanda Village and upon arriving at Mtangawanda Jetty, they received information from the public that a group of people were undertaking a drug trade at bush that was on the way to the village. PW1 and his colleague proceeded to the scene and just before they arrived, the group saw them and scattered. However, that they were able to arrest the Appellant and



- after conducting a search, found a matchbox on him which contained 15 sachets of brown powder substance which he suspected to be heroine, a razor blade and Kshs. 6,525/-. The OCS at Kizingitini was informed and officers from Siyu came to escort the Appellant to Faza Police Post. PW1 conceded that he did not see the Appellant selling drugs but he drew that inference from the amount of money that was being held by the Appellant. APC James Mitsanze who testified as PW 2 collaborated this account of events.
3. The investigating officer was PC Benson Marwa who was based at Siyu Police Post under Kizingitini Police Station, and who testified as PW4. He stated that on November 26, 2017 at 5:00 p.m., he received a phone call from the OCS Kizingitini to accompany him to Mtangawanda Village to respond to intelligence that a male suspect had been found with narcotics. That on arrival they found the Appellant under arrest and he recorded the statements of PW1 and PW2 who were the arresting officers and that he recorded their statements. Further, that an inventory was prepared on November 26, 2017 and signed by the Appellant in his presence. The investigating officer testified that he prepared an Exhibit Memo Form on November 26, 2017 and forwarded 3 samples of the sachets found on the Appellant to the Government Analyst Mombasa, who confirmed that the substance was heroine. The Exhibit Memo was produced as Exhibit 8. Yahya Hamisi Maingu from the Government Chemist Mombasa, and who testified as PW3, received the exhibits which contained in a khaki envelope marked "A" with 15 sachets of heroin in a matchbox from one PC Khalif Mumo, and was required to ascertain if they were narcotic drugs. He established after conducting tests that the 15 sachets were heroine and he produced his report prepared on December 29, 2017. as Exhibit 1 during the trial.
 4. The Appellant was put on his defence and he stated that he is a fisherman and denied all the charges proffered against him. He stated that on the November 26, 2017, he had gone to the bush to answer a call of nature, which is when the police arrested him and found him with no drugs. He further informed the court that the police contradicted themselves as one told the court that they recovered the drugs from his belt, and the other said that the drugs were recovered from his leg. He denied having signed the inventory and that the thumbprint thereon did not belong to him.
 5. The trial Court found that it had been proved that drugs were recovered from the Appellant, and while citing the case of *Leonard Odhiambo & Another vs R* (2011) eKLR for the proposition that an irregularly prepared inventory did not override the physical exhibits recovered by the arresting officers proceeded to convict and sentence the Appellant as aforesated. In his appeal to the High Court, the Appellant alleged that his defence was wrongly disregarded; that the inventory presented was not prepared by the arresting officer at the scene; that the evidence of PW1 and PW2 was contradictory; that the court relied on the Government Analyst's Report without the prosecution calling PC Khalif Mumo who prepared the alleged Exhibit Memo Form and that the evidence on record did not support the charge of trafficking as defined in Section 2 of the *Narcotic Drugs and Psychotropic Substance (Control) Act* No 4 of 1994.
 6. Nyakundi J. in the judgement rendered on March 18, 2021, cited the cases of *Moses Banda Daniel vs Republic* (2016) eKLR, *Joshua Atula & Another vs Republic* (2016) eKLR and *Kabibi Kalume Katsui vs Republic* [2015] eKLR to find that the failure to adhere to the proviso of section 74A of the *Narcotics and Psychotropic Substances Control Act* did not vitiate the proceedings. It was also found that failure to produce a valuation certificate under section 86 of the Act was not fatal. On the issue of inconsistencies, it was found that the element of where the substance was found upon searching the Appellant was settled by the evidence of PW1 as corroborated by that of PW2 to the effect that the substance was found in the Appellant's inner trouser. The sentence was also found to be lawful.
 7. The Appellant being aggrieved by the dismissal of his appeal by the High Court proffered the instant appeal, and has raised three (3) grounds of appeal in his supplementary grounds of Appeal namely



- that the value of the subject drugs was not proven by a proper officer under Section 86(1) of the *Narcotics and Psychotropic Substances Control Act*; that the 1 million fine and default sentence of 5 years in addition to a 20 years jail term for trafficking 15 sachets of heroin with a street value of Kshs 3,000/- was against the provisions of Article 50(2)(p) and that Section 4(a) of the *Narcotics and Psychotropic Substances Control Act* is contrary to Article 2(1) and (4) of the *Constitution*.
8. We heard the appeal on this Court's virtual platform on February 15, 2023, and the Appellant was present appearing virtually from Kamiti Prison, while learned counsel Mr. Aboubakar Yusuf, appeared for the Appellant, and learned Principal Prosecution Counsel, Mr. Alex Gituma appeared for the Respondent. The two counsels relied on their written submissions dated July 22, 2022 and July 24, 2022 which they briefly highlighted on two issues, namely on the effect of non-compliance with section 74A and section 86 of the *Narcotic and Psychotropic Substance (Control) Act*, 1994, and whether there was a correct interpretation of the provisions of section 2 of the Act on the elements of the offence of trafficking of drugs.
 9. On the failure to comply with the provisions of section 86 (1) of the *Narcotic and Psychotropic Substance (Control) Act*, 1994, Mr. Aboubakar submitted that none of the arresting police officers weighed or valued the heroine and no certificate by a proper officer showing the market value of the drugs was produced in Court as evidence as required by section 86 (1) of the *Narcotics Drugs and Psychotropic Substance (Control) Act*. It was his case that in interpreting section 86, this Court was required to take note that the word used was 'shall' and hence it was mandatory for the prosecution to adhere to the letter of the said provision, and failure to comply with a mandatory provision of the law was fatal to the prosecution case. Therefore, that the High Court's interpretation of the decision in the case of *Antony Mbiti Kasyula v Republic* [2015] eKLR to find that the failure by the prosecution to produce a valuation certificate as per section 86 of the Act was not fatal was a narrow one and did not adequately explain section 86. Additionally, that these arguments were also true in respect of the interpretation of section 74A of the Act.
 10. Mr. Aboubakar further submitted that the High Court failed to properly interpret and apply provisions of section 2 of the Act, and that for there to be trafficking of drugs, there must be evidence of; importations, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution, and for the acts to be complete there was need of proof of a recipient which was not presented. The counsel therefore submitted that the conviction for trafficking drugs be set aside and be substituted with a conviction for possession and that the Appellant be sentenced to the period served in prison.
 11. Mr. Gituma on his part submitted that the learned High Court Judge reiterated the position in the case of *Kabibi Kalume Katsui vs Republic* [2015] eKLR where the Court of Appeal held that production of valuation certificate had been discussed and it was held that the value of drugs only arose during sentences when issuing a fine. Counsel also placed reliance on the case of *Antony Mbiti Kasyula vs Republic* [2015] eKLR that the failure by the Prosecution to produce a valuation certificate as per section 86 of the Act was not fatal to the prosecution case. On the proof of the offence of trafficking drugs, the counsel cited the Court of Appeal decision of *Kingsley Chukwu v Republic* [2010] eKLR that the law was categorical as to its phrasing and the life imprisonment sentence is to go in tandem with the fine imposed by the law, and urged us to find that the sentence meted was neither harsh nor excessive.
 12. The role of this Court as a second appellate Court was succinctly set out in *Karani v R* [2010] KLR 73 as follows:



‘By dint of the provision of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with decisions of superior Courts on facts unless it is demonstrated that the trial Court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omissions or commission would be treated as a matter of law’

13. It is necessary to point out at the outset that it is not in dispute that there was no compliance with section 74A and section 86 of the *Narcotic and Psychotropic Substance (Control) Act*. The material legal question which requires to be addressed is the legal effects of the non-compliance, and whether there was sufficient evidence adduced to sustain the conviction of trafficking and the sentence meted out to the Appellant. Section 74A of the Act provides for the procedure to be followed after seizure of narcotic drugs and paragraph (1) states as follows:-

“Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorised officers") shall, where practicable in the presence of —

- a. the person intended to be charged in relation to the drugs (in this section referred to as "the accused person);
- b. a designated analyst;
- c. the advocate (if any) representing the accused person; and
- d. the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"),

weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.”

14. It is notable that under the section 74A the material requirement is the weighing of the amount of narcotic drugs seized, and the requirement of the presence of the accused person or his or her advocate is not mandatory. The findings of the learned Judge of the High Court on the non-compliance with section 74A were as follows:

“In *Moses Banda Daniel v Republic* [2016] eKLR the Court of Appeal stated as follows:

“After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like “Where practicable” and “if any” convey the meaning that the procedure is not mandatory but directory and the use of the word “shall” must be so interpreted.

A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure.”

The Court of Appeal further looked at the purpose of section 74A of the Act as intended by the legislators and made a reference to the Hansard record of Parliament of December 6,



2000 where The Attorney-General, Amos Wako (as he then was) moved a motion for the amendment of the Act. The Court of Appeal went on to hold that:-

“Clearly the intention of Parliament was to ensure that the drugs or substance once recovered are not interfered with before the trial. That is why after ascertaining the nature and weight of the drug and obtaining the certificate of the analyst the rest of the drugs are to be destroyed immediately and only a sample and a certificate are presented as exhibits at the trial. The provision, in our view will be more relevant where a large haul of drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible.”

This position was further reiterated in *Joshua Atula & Another v Republic* [2016] eKLR where the Court of Appeal pronounced itself as thus....”

15. The learned Judge then proceeded to conclude as follows:

“Additionally, the failure to weigh drugs is not fatal as the as the weight of drugs is only considered in sentencing as was held by the Court of Appeal in *Kabibi Kalume Katsui v Republic* [2015] eKLR where it stated that:-

“The law is clear on the offence of trafficking, the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself.”

Guided and bound by the above precedents, is evident that the proviso of section 74A is not mandatory but only where it practical and further if failure to comply prejudices the accused. In the present case, there is no evidence that the failure to weigh the drugs prejudiced the Appellant as there were no complaints of tampering. Furthermore, the drugs recovered were not of such a large quantity to infer any tampering as the same was produced in court.”

16. Section 86 on the other hand provides for valuation of the drugs for purposes of determining the penalty as follows:

“Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.”

17. The learned Judge of the High Court found as follows on the non- compliance with the section:

“The question on the production of a valuation certificate has been aptly discussed in Kenyan courts where it has been held that the value of drugs only arises during sentencing when issuing a fine. See in *Kabibi Kalume Katsui v Republic* (*supra*).

In *Antony Mbithi Kasyula v Republic* [2015] eKLR the Court of Appeal held that:-

“Finally, the appellant took issue with the failure by the prosecution to prove the value of the cannabis sativa. Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under section 4(a) of the Act, the value of the drugs do not constitute the



ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs...”

I am guided by the above case law and find that the failure by the prosecution to produce a valuation certificate as per Section 86 was not fatal.

18. While we agree with the findings on the objectives of section 74 A and section 86, we are of the view that in determining the effect of non-compliance, it is also necessary to construe the said sections holistically and strictly in relation with the other provisions of the Act, particularly where the question of the quantity and value of the drugs which are seized is material. In particular, section 4(a) of the Act under which the Appellant was charged and convicted provides as follows:

“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;

19. To this extent, evidence of the quantity and value of the drugs seized is a relevant and necessary, even though it may not include ingredient of the offence, as it is a factor that will need to be proved so as to determine the appropriate sentence which will be meted out on the accused person under section 4(a) of the *Narcotic and Psychotropic Substance (Control) Act*. This aspect was noted by this Court (Makhandia, Ouko & M’Inoti JJ. A) in the case of *Mohamed Famau Bakari v Republic* [2016] eKLR as follows:

“This Court, in addition but in more recent decisions of *Carolynne Anna Majabu vs R* Cr Appeal No 65 of 2014, *Kabibi Kalume Katsui vs R*, Msa Cr App No 90 of 2014, and *Antony Mbithi Kasyula v R*, Criminal Appeal No 134 of 2012 has reiterated that the word “liable” in section 4(a) of the Act merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated. In Antony Mbithi (*supra*), after observing that the quantity of drugs with which the appellant was found was substantial, and that from that quantity it was apparent he was a serious drug dealer the court confirmed the life sentence in addition to Kshs.1 million imposed by the High Court. Therefore, depending on the quantity and value of the drugs, the past relevant record of the accused, the court retains its discretion to impose, as it did in the above case, the maximum sentence.

20. Put differently, since a Court will not be able to sentence an accused person under section 4(a) of the *Narcotic and Psychotropic Substance (Control) Act* without evidence of the weight and value of the seized narcotic drug or psychotropic substance, the requirements of section 4 would not have been proved



beyond reasonable doubt in the absence of such evidence. At the very least, the sentence imposed in the absence of such evidence will not be lawful.

21. On the second issue as to whether the ingredients of trafficking were proved, section 2 of the *Narcotic and Psychotropic Substance (Control) Act* defines trafficking as follows:

“trafficking” means 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, but does not include—

- a) the importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefor under this Act in accordance with the licence;
- b) the manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefor under this Act in accordance with the licence; or
- c) the selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by a medical practitioner or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or
- d) the selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist;”

22. In the case of *Gabriel Ojiambo Nambesi v Republic* [2007] eKLR, the Court of Appeal (Tunoi, O’Kubasu & Githinji JJ.A) stated that

“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.”

23. In the instant appeal, the particulars of the charge were that the Appellant was found “trafficking in narcotic drugs by way of selling fifteen (15) sachets of heroine with a street value of Kshs 3,000/=”. No evidence was adduced as to who, when or where the Appellant was selling the seized drugs to, and at what price, and on the contrary, PW1 admitted that they did not see the Appellant selling the drugs. The conviction for the offence of trafficking was therefore not safe. However, in light of the fact that there was evidence that the Appellant was found with heroin in his person, Mr. Aboubakar asked us substitute the offence with the minor offence of possession of narcotic drugs under section 3 of the which provides as follows.



1. “Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
 2. A person guilty of an offence under subsection (1) shall be liable—
 - a. in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a term of not more than five years or to a fine of not more than one hundred thousand shillings;
 - b. in respect of a narcotic drug or psychotropic substance, other than cannabis, where a person is in possession of less than one gram, to a fine of not less than five million shillings, or to imprisonment to a term of not less than five years, or to both such fine and imprisonment; and
 - c. To, in addition to the sentences in paragraph (a) and (b) respectively, committal to appropriate court appointed treatment programme or to voluntary submission to a rehabilitation programme for a period not less than six months, where the court deems fit.”

24. This Court (Tunoi, O’Kubasu & Githinji JJ.A) did hold in *Barasa and Another v Republic* [2011] 2 EA 56 that a person charged with trafficking can be convicted of the offense of possession which is minor and cognate to trafficking. In this regard, we do note that section 3 also requires the evidence of quantity of the drugs seized for the imposition of the appropriate sentence.

25. In conclusion, we find that this appeal partially merited. We accordingly set aside the conviction of the Appellant for the offence of trafficking in narcotics drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substance (Control) Act*, No 4 of 1994, and substitute it with a conviction for the offence of possession contrary to section 3 of the *Narcotic Drugs and Psychotropic Substance (Control) Act*, No 4 of 1994. We also set aside the sentence imposed on the Appellant of a fine of Kshs 1 million and in default 5 years imprisonment, and the additional imprisonment for 20 years for trafficking in narcotic drugs, and substitute therefor a sentence of time served for the conviction for possession of narcotic drugs. The Appellant shall therefore be set free forthwith unless otherwise lawfully held.

26. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

P. NYAMWEYA

JUDGE OF APPEAL

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J. LESIIT

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

