



REPUBLIC OF KENYA



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**Bakar v Republic (Criminal Appeal 39 of 2020)
[2021] KECA 129 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 129 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 39 OF 2020
W KARANJA, SG KAIRU & F SICHALE, JJA
NOVEMBER 5, 2021**

BETWEEN

AHMED SAID BAKAR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa
(Njoki Mwangi, J) dated 13th March 2020) IN HC. CRA NO. 120 of 2018.)*

JUDGMENT

- 1 Ahmed Said Bakar (the appellant herein), has preferred this second appeal against the judgment of Njoki Mwangi J dated 13th March 2020, in which he was charged at the Mombasa Chief Magistrates' Court alongside 4 other persons with the offence of trafficking in narcotic drugs contrary to Section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No. 4 of 1994.
- 2 The particulars of the offence were that on the 9th of April 2015, at Kilifi Boat Yard in Mnarani area within Kilifi County jointly with others not before court, trafficked by conveying a narcotic drug namely heroin weighing 2028 grams with a market value of Kshs 6,084,000/= (six million eighty-four thousand shillings) in motor vehicle registration number KCA 698H make Toyota Raum concealed in the false top and bottom of a black suitcase in contravention of the provisions of the said Act.
- 3 The appellant further faced a second count namely; trafficking in narcotic drugs contrary to Section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No. 4 of 1994.
- 4 The particulars of the second count were that on the 20th day of April 2015 at Kilindini Port within Mombasa County, jointly with others not before the court, trafficked by conveying a narcotic drug namely heroin weighing 7,600 grams with a market value of Kshs 22,800, 000/= (twenty-two million eight hundred thousand shillings) concealed under the water tank of "baby iris" yacht in contravention of the provisions of the said Act.



5 The appellant and his co-accused denied the charges after which a trial ensued. In a judgment delivered on 26th October 2018, Hon J.M Nang’ea the then Chief Magistrate Mombasa Law Courts, convicted the appellant on both counts and fined him Kshs 3,000,000.00 or 12 months’ imprisonment in respect of count I.

Additionally, the appellant was to serve 5 years’ imprisonment.

6 With respect to the 2nd count, the appellant was fined Kshs 5,000.00 or 12 months’ imprisonment. In addition, he was sentenced to serve 15 years’ imprisonment. The trial court directed the sentences to run consecutively.

7 Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 13th March 2020, Njoki Mwangi J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the convictions and affirmed the sentences.

8 Undeterred, the appellant has now filed this appeal and probably the last appeal vide a memorandum of appeal dated 15th September 2020 raising the following grounds of appeal which we reproduce verbatim:

“

1. THAT the Learned Trial Honourable Judge of the High Court erred in law in finding that the Learned Trial Magistrate still had jurisdiction even after recusing himself.
2. THAT the Learned Trial Honourable Judge of the High Court erred in law in finding that the Learned Chief Magistrate in charge had the jurisdiction and authority to set aside an order issued by a fellow Chief Magistrate.
3. THAT the Learned Trial Honourable Judge of the High Court erred in law in making a finding that a consent by the accused person could cure the illegality of the order of the Learned Chief Magistrate in charge.
4. THAT the Learned Trial Honourable Judge of the High Court erred in law in still making a finding of guilt after finding that the appellant’s driving licence was not found in the offending suitcase and neither was his passport found. These were the two documents said to have connected the appellant with the drugs found in the suitcase.
5. THAT the Learned Trial Honourable Judge of the High Court erred in law in coming to a finding that the appellant had knowledge of the suit cases content yet it was established that:
 - a. The captains personal belonging were in the suitcase,
 - b. The appellant had no passport and was not part of the team taking the voyage.
6. THAT the Learned Trial Honourable Judge of the High Court erred in law in finding that the charge in the 2nd count was not defective.
7. THAT the Learned Trial Honourable Judge of the High Court erred in law in failing to consider the possibility of interference with the yacht during the



many days it was left at the hands of unknown security officers while the appellant and others were in custody.

8. THAT the Learned Trial Honourable Judge of the High Court failed to consider the effect failure to call vital witnesses especially those said to have recovered the narcotic and drugs from the yacht known as baby iris.
9. THAT the Learned Trial Honourable Judge of the High Court erred in law in failing to consider and analyse the evidence adduced particularly by the appellant and thereby arriving at a finding not supported by evidence to the prejudice of the appellant.
10. THAT the Learned Trial Honourable Judge of the High Court erred in law in finding that the appellant was guilty by being a close friend and point man of one Bilal who owned the yacht, and who was not charged and who has never been found guilty of any offence.
11. THAT the Learned Trial Honourable Judge of the High Court erred in law in making a finding that the appellant was aware of the presence of narcotics in the yacht without any evidence to support that finding.
12. THAT the Learned Trial Honourable Judge of the High Court erred in law in confirming the sentence which was harsh and excessive.”

- 9 When the matter came up for plenary hearing on 6th May 2021, the parties highlighted their written submissions before us. Mr. Chacha Mwita and Mr. Magolo urged the appeal on behalf of the appellant whereas the State was represented by Mr. Jami.
- 10 In urging the appeal on behalf of the appellant, Mr. Chacha submitted that the trial magistrate had no jurisdiction to continue hearing the case having recused himself on 12th October 2016 on account of apparent interference by the executive; that the Chief magistrate lacked the powers (jurisdiction) to re-allocate the case to the same judicial officer whose judgment may have been influenced by the fear of the executive to the prejudice of the appellant and thus, a denial of fair trial under Article 50 of the Constitution. It was further submitted that the prosecution failed to prove that the appellant was in possession of the narcotics, bearing in mind that there were five occupants in the motor vehicle where the narcotics were allegedly recovered.
- 11 With regard to count 2, it was submitted that there was no evidence that the appellant had entered the yacht where the narcotics were allegedly recovered on 20th April, 2015; that the person who was in control of the yacht at the time of the arrest of the accused persons was the captain (the 2nd accused); that the keys to the yacht were never found on the body or person of the appellant and as a result of which, the arresting officers broke the lock to gain entry and further that the appellant was not amongst the crew who were to travel to Madagascar on board the said yacht.
- 12 On the alleged recovery of the drugs in the yacht, it was submitted that the same was extremely suspicious owing to the contradictions in evidence of the officers who were involved in the arrest and alleged recovery of the drugs, the subject of counts 1 and 2 and that the appellant and his co-accused persons did not witness the recovery as they only heard a European male shout *'bingo'*.
- 13 It was further submitted that the names of the 3 UK border police force officers who led the alleged recovery in the yacht remained unknown and neither were they called to testify and that failure to call these witnesses was fatal.



We were urged to allow the appeal.

- 14 Mr. Jami for the State while opposing the appeal submitted that there was no rule that barred the Chief Magistrate from re-allocating the matter to the same trial magistrate; that it was only proper that the trial magistrate hears the matter to its conclusion as he was the one who had seen the exhibit before it was destroyed; that further the appellant did not raise an objection during his trial and that any lapse thereof was curable under Section 382 of the Criminal Procedure Code. Counsel was emphatic that the issue of the destruction of the exhibit was addressed by the High Court, the reason for the destruction being that the police officers had attempted to steal the narcotics because of their high value.
- 15 With regard to the alleged failure to call key witnesses and police officers from the UK, it was submitted that the recovery of the drugs was in the presence of the appellant and that he suffered no prejudice.
- 16 We have anxiously considered the record, the rival oral and written submissions, the authorities cited and the law.
- 17 The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In *Kados, John vs. Republic Nyeri Cr. Appeal No. 149 of 2006* (Unreported) UR this Court rendered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In *David Njoroge Macharia vs. Republic [2011] eKLR* it was stated that under Section 361 of the Criminal Procedure Code:

Only matters of law fall for consideration and the court 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 also *Chemagong vs. Republic [1984] KLR 213*.)”

- 18 The High Court was faulted for, *inter alia*, finding that the learned trial magistrate still had jurisdiction to conduct the trial even after recusing himself. It is indeed not in dispute that on 26th October 2015, Hon J.M Nang’ea CM recused himself from hearing the matter after the vessel subject of this case namely; “*baby iris yacht*” was destroyed. He noted, *inter alia*, “*that the executive’s action strikes a huge blow against the rule of law*” and thus he felt no longer comfortable conducting the case whereupon he ordered that the file be placed before the Chief Magistrate’s court for re-allocation to another court of competent jurisdiction. It is also noteworthy that the learned magistrate observed that:

“**Court:**

The vessel subject of this case (Baby Iris Yacht”) was produced as an exhibit 1 (“exhibit 4”) and remained in the custody of the Kilindini Port Police awaiting further court orders. On 30th July, 2015, the prosecution counsel applied for its release to the police for eventually disposal in a manner the state deems expedient. The application was contested by the defence counsel. After hearing the rival arguments, the court reserved its ruling for delivery on 16th September, 2020 and I proceeded on my annual leave.



The court record was subsequently called for by the High Court in relation to an appeal made to it on bond of one of the accused herein. Before the court could deliver its ruling regarding the fate of the vessel, the Executive made a decision to dispose of it and did destroy it as confirmed by the prosecution. The Executive's action, needless to say, strikes a huge blow against the rule of law. On my part, I no longer feel comfortable to continue conducting the case. The accused persons do not seemingly feel sufficiently outraged by the states action as their advocates have not moved the court for appropriate proceedings that may include contempt proceedings.

For the reasons stated, I hereby recuse myself and order that this file be placed before court No. 1 of the Chief Magistrate's court, Mombasa on 27th October, 2016 for re-allocation to another court of competent jurisdiction and /or further appropriate directions."

- 19 Be that as it may, it is not in dispute that on 14th November 2016, Hon Matheka CM(as she then was), declined to re-allocate the matter to another court and directed that the same proceeds before Hon Nang'ea on the grounds, *inter alia*, that he was the only one who had seen the yacht prior to its destruction.
- 20 In the instant case Hon. Nang'ea CM having recused himself from hearing the matter on the grounds, *inter alia*, that the actions by the executive dealt a huge blow against the rule of law and having stated that he was no longer comfortable hearing the case, it is our considered opinion that it was improper for the Chief Magistrate to direct that the matter be heard by the same magistrate who had recused himself from hearing the case. The reason given by the State for the destruction of the vessel is even more confounding. We were told that "MV baby Iris" was destroyed as police officers were tempted to steal the narcotics therein because of their high value. Really! If persons who are entrusted to investigate crimes become the wrong doers, then who will save us? Be that as it may, we note that when the matter resumed for hearing before Hon Nang'ea on 24th November 2016, none of the parties objected to Hon. Nang'ea proceeding with hearing the case. To that extent, we are in agreement with Mr. Jami that the irregularity if any, is curable under Section 382 of the CPC.
- 21 As regards our mandate as a 2nd appellate Court and as to whether we can interfere with concurrent findings of fact by the two courts below, it becomes necessary to subject the entire evidence to an exhaustive review so as to arrive at the conclusion of whether or not, the findings of the two courts below are supported by the evidence tendered. We shall proceed to do so.
- 22 PW1 was Superintendent of police, Vincent Egesa, the O/C narcotics police unit Kilindini port, Mombasa. It was his evidence that on 20th April 2015, he together with 3 officers from the United Kingdom Border Police Force, the Area OCPD and the OCS carried out a search on the yacht that had been detained. The appellant together with other persons were in their custody having been arrested on suspicions of drug trafficking.
- 23 It was his further evidence that the UK officers had specialized equipment for searching the yacht and they discovered some wrapped materials under a water tank of the yacht, which were subsequently taken to the government analyst who found that the substances were narcotic drugs namely, heroin.
- 24 PW2, Peter James Bateman is a resident of Mnarani in Kilifi county and the owner of a boat yard in Kilifi. It was his evidence that it was within his knowledge that in July 2014, one Mike sold his boat "baby iris" to one Bilal who was with one Ahmed (the appellant herein); that further his company provided mooring services to "baby iris"; that the appellant was one of the members of the boat's crew and was a representative of Bilal when the boat left its anchorage for a destination he did not know; that he later learnt that the boat had sailed from Madagascar after its purchase but returned before



- reaching its destination due to bad weather; that it was packed in his yard after Bilal paid the requisite charges and that the appellant would sometimes make payments as a representative of Bilal and that the keys to the boats were kept by the crew and that they did not control the same.
- 25 PW3 was Peter Onyango a security officer with a boat yard owned by PW2. It was his evidence that on 8th April 2015, at about 11.45 PM a red motor vehicle registration number KCA 698H pulled up at the yard at high speed and rapidly made a U-turn whereupon 5 occupants alighted and informed him that they were suppliers of a vessel called "*baby iris*" taking food to their customers who were due to sail in the yacht. That, shortly thereafter, three other cars pulled up at the yard at high speed and the occupants alighted while introducing themselves as police officers. The police officers ordered everyone to lie down and inspected the red car and sought keys for "*baby iris yacht*". As the keys could not be found, the officers broke the vessel's padlock and a black suit case was removed from the boot of the vessel and upon opening, the police officers found what they suspected to be narcotic drugs whereupon he too was arrested, although later released.
- 26 On 8th April, 2015, P.W. 4, Samuel Kamiti, while acting on a tip off, laid an ambush on a motor vehicle registration number KCA 698H which he and others trailed up to the yard. On searching the motor vehicle, they found polythene bags from Naivas supermarket with assorted food stuffs and a black travelling bag at the bottom of which there was some brownish powder and 2 other black polythene bags which contained a whitish powder suspected to be narcotics. He prepared an inventory of the recoveries at the boat yard which was read out to the suspects who signed the said inventory. He and the others proceeded to check on the boat at the yard which they suspected would be used to traffic the suspected drugs and that since the keys to the vessel were unavailable, they broke the padlock to gain entry into the vessel. As there were many compartments in the ship, they decided to put it under 24-hour guard for a thorough search later.
- 27 PW5 was Chief Inspector George Mutiso then attached to the anti-narcotics unit headquarters in Nairobi. On 9th April 2015, he proceeded to Kilifi police station where they were shown a red saloon motor vehicle at the parking lot registration number KCA 698H and a medium sized black suit case which had brown powdery substances contained in 4 black polythene bags. 5 suspects had been arrested and were in custody. That he later obtained a crew manifest from the vessel in question which was christened "*baby iris*" which they found being guarded by 2 police officers and that since it was getting dark, they planned to search the vessel the following day.
- 28 PW6 was Lawrence Maina Thuku chief immigration officer at the Malindi border control. On 6th May 2016, the office of the DCIO Malindi asked him to confirm if the immigration stamps on the suspects' passports were genuine. It was his evidence that he confirmed that the exit stamps imprint on the passports were genuine and that they originated from their office.
- 29 PW7 was Captain Mubarak Munyatani Zaunga then based at the Kenya Ports Authority, testified that in April 2015, he was sent by his boss to inspect a vessel called "*baby iris*" at the G section at the Kilindini port and that upon inspection, he formed the opinion that the yacht was not sea worthy.
- 30 PW8 was Corporal Ngate Samuel. On 9th April 2015, he travelled to Kilifi and at the DCIO's office he weighed the drugs in the presence of the suspects and thereafter prepared a weighing certificate which he signed as well as the suspects. On 20th April 2015, he took the suspects to the boat for a further search and that on this day UK police officers assisted in the search whereupon 10 packages were removed from below the water tank. He later prepared a search certificate which the suspects refused to sign. That, on 21st April 2015, he took the recovered packages to the government chemist for weighing and sampling, which exercise was witnessed by himself and the suspects and that later on, the boat was removed from the sea into the mainland where it was destroyed together with the packages. The report



- of the analyst from the government chemist tested positive for heroin. He later handed over the exhibits to PW5 and corporal Kimenyi who were the investigating officers.
- 31 PW9 was Ruth Muinde , a valuer of narcotic drugs. It was her evidence that on 16th April 2015, the investigations officer herein asked her to value some drugs seized in Mombasa and that she was given the government analysis report and a weighing certificate in respect of the drugs which she valued at Kshs 6,084,000.00. On 22nd April 2015** she valued another 7,600g of heroin at Kshs 22,800,000.00.
- 32 PW 10 was Corporal Eric Mugendi from the CID scenes of crime section, Malindi. On 9th April 2015, he took photographs of a motor vehicle at a yard that was said to have been used to carry the narcotics.
- 33 PW11 was Sergeant Stephen Nyamai attached to the scenes of crime at DCI headquarters Mombasa. It was his evidence that on 24th April 2015, he proceeded to Marine police station Mombasa where he took photographs of a boat suspected to have been used to traffic drugs. He took several photos of the boat and processed them, and prepared a report and certificate.
- 34 PW12 was Yahya Hamisi Maingu a chemical analyst at the government chemist in Mombasa. He produced two reports on behalf of Mr. Njenga who had examined some exhibits to determine their chemical composition.
- 35 PW13 was Corporal Kenneth Kimeli . His evidence was substantially the same as that of PW5 George Mutiso.
- 36 PW 14 Sergeant James Ochola gave similar evidence to that of PW4.
- 37 The appellant in his defence gave a sworn statement of defence and elected not to call any witness. He denied being in possession of any narcotic drugs.
- 38 From the above evidence, it is not in dispute that the appellant was the driver of motor vehicle registration number KCA 698H where the black suit case that allegedly contained the narcotics were found. PW14 who was among the police officers who conducted a body search of the suspects testified that no recoveries were made on the body of the suspects. It was his further evidence that the 2nd accused person told them that the clothes in the suitcase were his and that he had borrowed the suitcase from the 1st accused (the appellant herein). It was his further evidence that the 2nd accused had told them that he was the captain of the boat called “*baby iris*” having been employed by its owner. The alleged boat owner was however not stated.
- 39 The High Court at paragraph 76 of the judgment stated, *inter alia*, as follows:
- “PW14 corroborated the evidence of PW4 on how they trailed and arrested the appellant and his co-accused persons. It was his evidence that the 2nd accused Clement Serge, the Captain of the MV Baby Iris informed them that the clothes in the suitcase were his and he had borrowed the suitcase from the appellant. The 2nd accused therefore exonerated himself from having knowledge of the drugs in the suitcase and thereby implicated the appellant with regard to the ownership of the heroin therein.”
- 40 The High Court however did not lay a basis as to why it believed the evidence of the 2nd accused as opposed to that of the appellant. The 2nd accused stated that he had borrowed the suit case from the appellant and his clothes were found in the suit case. Who had placed the drugs in the suit case? Was it the appellant (the owner of the suit case) or the 2nd accused who had his clothes therein? It is not in dispute that the appellant had been charged with 5 other persons in the lower court pursuant to which his 5 co accused persons were subsequently acquitted save for the 2nd accused who was also convicted in respect of count 2. It is also not in dispute and in accordance with the evidence of PW14 that the 2nd



accused person readily admitted that he was the captain of the boat where some of the narcotics were allegedly recovered from and he further did not disclose who the owner of the boat was but simply stated that he was an employee of the owner.

41 Given the above circumstances, it is our considered view that the High Court should have found that the 2nd accused, being the appellant's co –accused, was an accomplice and his evidence required corroboration.

42 The suit case belonged to the appellant. The clothes therein belonged to the 2nd accused. To whom did the narcotics belong? In the absence of proof of possession of the narcotics, it is our view that the conviction in count I was not safe.

43 With regard to grounds 6,8,9 and 12 of appeal, it was submitted, *inter alia*, by the appellant that the High Court erred in finding him guilty of count 2 since the appellant and his co accused persons were arrested on 9th April 2015 and that subsequently thereafter until 20th April 2015, the yacht was in the custody of police while the appellant and his co accused persons were in custody.

44 The particulars of count II were that on the 20th day of April 2015 at Kilindini port within Mombasa county, jointly with others not before the court trafficked by conveying a narcotic drug namely heroin. PW1 confirmed in cross examination that the suspects were arrested on 9th April 2015. PW3, and 4 also testified as much. PW 4 further testified that after the arrest, the vessel was placed under 24-hour guard for a thorough search to be conducted later. PW5 further confirmed that the vessel was under guard during the entire period it was under investigations. PW8 further testified that they had moved the vessel in which the suspects were to sail in from Kilifi boat yard to Kilindini port for further investigations. On 20th April 2015, he took the suspects again to the boat for a further search. How then could the suspects traffic in narcotics at Kilindini port on 20th April 2015, when they were in custody and more so when the said vessel was under 24-hour guard by police officers? How could the appellant be connected to the drugs when he was in custody and when the said yacht was under 24 hour police guard? Besides, the 3 officers from the UK who were said to have had specialized equipment to aid in the search that led to the alleged recovery of the drugs in "*baby iris*" were not called as witnesses. We are also at a loss as regards the extent we can place reliance on the evidence of the police officers who were allegedly present during the alleged recovery, given that these are the same officers who were thought to have wanted to steal the drugs thus, necessitating the destruction of the vessel.

45 From the circumstances of this case and in view of the above, it is clear to us that the Appellant was entitled to the benefit of doubt and the High Court erred in upholding the conviction and sentence against him. Accordingly, we allow the appeal herein, quash the convictions and set aside the sentences imposed against the appellant.

46 The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

