



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KARANJA, G.B.M. KARIUKI & MWILU, J.A)
CRIMINAL APPEAL NO. 66 OF 2013

BETWEEN

CHRISPINE KENT OTIENO..... APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi

(Achode, J.) dated 2nd May 2013)

in

H.C. CR. APPEAL NO.245 OF 2011)

JUDGMENT OF THE COURT

1. This is a second appeal by Chrispine Kent Otieno (the appellant) against the conviction and sentence by the High Court of Kenya as the 1st appellate court. The appellant was charged before the Chief Magistrates Court at Kibera on four counts. On the first count, he was charged jointly with Nassor Said Salim with the offence of trafficking in narcotics contrary to **section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. Nassor Said Salim however died in the course of the trial and the case against him abated leaving the appellant as the only accused person for the said offence.

2. The second count against the appellant was that of being in possession of narcotic drugs contrary to **section 3(1) and 2(b) (sic) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The appellant also faced a third count of having in possession paper intended to resemble bank note or currency note contrary to **section 367(a) of the Penal Code**. The appellant further faced a fourth count of being in possession of uncustomed goods contrary to **section 185(d)(iii) of the Customs and Excise Act Cap. 472B** of the Laws of Kenya. The accused pleaded not guilty to all the offences and the matter proceeded to full trial before the magistrate’s court at Kibera.

3. The appellant was acquitted of the offence he was charged with under count one and convicted on the other three counts. The appellant was sentenced to serve 20 years imprisonment, 4 years imprisonment and 2 years for the offences set out in counts II to IV respectively. The sentences were to run concurrently. Dissatisfied with the judgment, the appellant lodged an appeal before the High Court of Kenya at Nairobi and prosecuted the same before honourable Lady Justice Achode. In her judgment, the trial judge as a 1st appellate court re-evaluated and re-examined the evidence on record and made her own findings and drew her own conclusions. In the end, the trial judge upheld the conviction and sentence on counts II and III while dismissing the charge in count IV.

4. Aggrieved and dissatisfied with the conviction and sentence by the 1st appellate court, the appellant filed his appeal to this court, as a second appeal. The appellant filed the following five grounds of appeal:-

“(a) That the 1st appellate court judge erred in law by failing to find that the appellant’s constitutional rights under Article 50 of the Constitution were violated as read together with sections 213 and 310 of the Criminal Procedure Code

(b) That the 1st appellate court judge erred in law by failing to find that the appellant’s constitutional rights under Article 50 of the constitution were infringed when read together with sections 134 and 1347(a) of the Criminal Procedure Act

(c) That the 1st appellate court judge erred in law by failing to find that the prosecution’s case was not proved to the required standard of proof, being beyond reasonable doubt

(d) That the 1st appellate court judge erred in law by rejecting the appellants defence arbitrarily and summarily

(e) That the 1st appellate court judge failed to re-analyse and re-evaluate the evidence on record exhaustively.”

5. **Mr. Ngumbau Mutua**, the Advocate for the appellant argued all the 5 grounds of appeal. On the first two grounds relating to the violations of the accused’s rights under **article 50** of the Constitution, it was counsel’s submission that the appellant’s rights under **articles 50 (2)(f) and (g)** of the constitution were violated. Counsel argued that it was unclear whether any submissions were made at the close of the prosecution case and further that there was nothing to show whether written submissions were ever made. Counsel relied on the provisions of **section 213** of the **Criminal Procedure Code** to buttress this position. Counsel also submitted that there was no evidence that the appellant was asked whether he wanted to proceed by way of written submissions.

6. On the third and fifth grounds, counsel submitted that the burden of proof of beyond reasonable doubt was not met. He pointed out that the evidence of PW7 which corroborated that of PW5 to the effect that a white powdery substance was put in an inventory and yet the inventory exhibit does not contain any such white powdery substance. This meant therefore that no such white powdery substance was found on the appellant. In addition, it was counsel’s submission that the provisions of **section 74A** of the Narcotic Drugs and Psychotropic Substances Control Act were not complied with. The non compliance related to failure to weigh the substance, lack of weighing certificate tendered in evidence, no evidence of the weighing in the appellant’s presence or evidence that any weighing was done by an authorized officer gazetted for such purpose. The exhibit produced by the prosecution did not contain the gazette notice relating to the authority of the officer concerned to conduct a valuation.

7. Counsel referred us to this court’s decision in **Hamayun Khan v Republic [2002]eKLR** where the necessity for valuation of heroin upon which sentencing was made was considered necessary, and the absence of which invalidated the sentence imposed. The issue of valuation of drugs was also considered as was decided in **Priscilla Jemutai Kolongei v Republic [2005]eKLR** cited by the appellant’s advocates in their list of authorities.

8. Regarding the fourth ground of appeal, Mr. Ngumbau submitted that the appellant's defence had been rejected arbitrarily and summarily. The defence advanced by the appellant related to the alleged existence of a grudge between the appellant and one of the prosecution witnesses, one Inspector Kemboi. Counsel submitted that the appellant's statement made in his defence had not been contested. The appellant's argument also faulted the prosecution for not proving that the appellant knew that he was in possession of a fake US\$.20 bill to sustain the charge in count III.

9. The appeal was opposed. Mr. **O.J Omondi**, Senior Assistant Director of Public Prosecution appeared for the state. He submitted that a 2nd appeal should be strictly on points of law, concurrent findings of fact binding this court. To the prosecutor, one such concurrent finding is the possession of the narcotic substance by the appellant. Mr. Omondi submitted that there was proper re-assessment and re-evaluation of evidence by the High Court. Essentially, Inspector Kemboi was an authorized officer as per the gazette notice evidence produced and the evidence was never challenged on cross examination. The learned prosecutor further argued that weighing of the drugs was done and the suspect signed off which can only demonstrate that the suspect was present.

10. On the violation of **article 50** of the **constitution** and **section 213** of the **Criminal Procedure Code**, Mr. Omondi submitted that directions to file written submissions were given in the presence of all parties including the appellant and even so submissions are not mandatory as the appellant has an option to keep quiet. As for the defence of the existence of a long standing grudge, counsel stated that there was a finding of fact made by the two courts which heard the matter before us that that defence was an afterthought. The defence was never raised during cross examination. On count III, the charge relating to possession of fake currency, Mr. Omondi referred us to the provisions of **section 111** of the **Evidence Act** to the effect that the burden of proof lies with the appellant to discharge. He urged us to dismiss the appeal.

11. Mr. Ngumbau in reply submitted that the burden with respect to count III does not shift to the appellant with respect to proof of knowledge of fake note. Mr. Ngumbau referred us to the case of **Henry Odhiambo Otieno v Republic [2006] eKLR** where this court held that where written submissions are tendered without the accused's express consent, the proceedings of the court concerned are thereafter rendered null and void. The court's finding was in relation to its consideration of the provisions of **sections 213** and **310 of the Criminal Procedure Code** as read with **section 77(2)** of the **Constitution** now repealed.

12. Our duty as a second appellate court is to consider only issues of law and not to consider matters of fact which have been considered by the two courts below. This position on our limited jurisdiction as a second appellate court is spelt out in **Section 361 (1) (a) Criminal Procedure Code**. In **Daniel Kyalo Muema V Republic [2009] eKLR**, this court stated as follows:-

“Section 361 (1) of the Criminal Procedure Code, (Code) allows a second appeal to this Court on a matter of law. That section in addition specifically prohibits this Court from entertaining an appeal against a matter of fact which includes the severity of sentence.”

At the onset, we point out that sentencing and its severity is a matter of fact not to be considered within the realm of a second appeal as the one before us unless the sentence imposed was unlawful. We are guided by this Court's previous position in **David Munyao Mulela & another v Republic [2013] eKLR** where it was held:-

“The complaint on severity of sentence is misplaced. Firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact.”

13. The issues of law to be addressed relate to the application of several statutory provisions by the two courts that heard and determined the matter. As for count II, the particulars of the offence are that on the 15th day of March 2003 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, (the appellant) was found in possession of 1 gram of narcotic drug namely Diacetylmorphine commonly

known as heroin with a street value of Kshs.1,000/- in contravention of the said Act.

14. From the record, PW1, PC Mbithi arrested the appellant as an accomplice of the first accused, now deceased, based on what the witness termed as familiarity in the way the appellant and the deceased co-accused greeted each other and were proceeding to the car park. PW1 confirmed to not having searched the appellant nor seizing the 1 gram of heroin subject to count II. PW3 Acting I.P Koikai of CID corroborated the version of PW1 that the appellant was arrested at the parking lot talking to the deceased. According to this witness, the appellant was taken by I.P. Mwasi (PW7) and P.C. Onyango (PW5) who searched him. PW3 testified that he remembers seeing P.C. Onyango recover some brown substance from a wallet for which he prepared an exhibit memo and escorted them to the government analyst. He referred to the brown substance which was marked for identification as MFI 19. He also referred to the exhibit memo form and the report from the government analyst all of which were marked for identification.

15. PW5 testified that PW7 searched the appellant in his presence and from the appellant's pocket trousers removed a brown wallet. On a close look at the wallet several items were seen being currencies from different countries, pay slip in the appellant's name, Barclays Bank Card in the appellant's name and a powdery substance brown in colour. PW7 confirmed recovering a brown wallet from the appellant's trouser pocket following a body search. He corroborated the testimony of his other colleagues including PW5 on what was recovered in the wallet to include the brownish powder. He testified that the appellant was asked what it was and the appellant replied that it was herbal medicine but the government analyst later confirmed the substance as a drug. On cross examination, PW7 confirmed that he is not the one who weighed the drug but he thought it was weighed. PW9 who is a government analyst testified to having received and tested the brown powder forwarded to him by PW5 confirming it was heroin.

16. PW10, Act. Supt of Police Kemboi testified to having weighed the 95 pellets recovered from the deceased and the small paper weighing 1 gram. He testified that he is the one who valued the heroin at Shs.1,000/= and prepared a certificate of valuation. He further testified that he is the proper officer to give the valuation having been gazetted as such through Gazette Notice No.3669 dated 21/05/2001. On cross examination by the witness PW7 stood his ground that he had properly discharged his duty as a valuation officer.

17. Possession can be either actual or constructive under **section 4 (a)** of the **Penal Code**. Therein possession is defined as follows;

“be in possession’ or ‘ have in possession’ includes not only having one’s personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.”

From the evidence, it is not in doubt that the brown powdery substance which turned out to be a heroin was recovered from the accused's trouser pockets. This fact was corroborated by at least four witnesses all of whom testified and were cross examined by the appellant. The recovered substance was also availed in court as an exhibit and there was no allegation of it having been tampered with. It is in fact on record that when the appellant was asked what the substance was, he responded that it was herbal medicine.

18. On compliance with the provisions of **section 74A** of the Narcotic Drugs and Psychotropic Substances Control Act, the full objective, tenor and effect of the provision was recently discussed by this court in **Joshua Atula Atula & another v Republic [2016] eKLR** as follows:-

“the objective of this provision^{74A} was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances.”

This tallies absolutely with the case under consideration. As to whether the valuation was properly carried

out and PW7 was the authorized officer to carry out the valuation, **section 60 (f) of the Evidence Act** provides that the courts should take judicial notice of the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette. In the circumstances, once the valuer as a public officer is authorized under a gazette notice to undertake valuation of drugs and psychotropic substances as part of his functions, this fact need not be proved as the courts take judicial notice of the fact. The officer made reference to a very specific gazette notice number 3669 dated 21st May 2001 upon which he derived his functions and this fact was not disproved. In addition, **section 86(1)** of the Narcotic Drugs and Psychotropic Substances Control Act provides:-

“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.”

19. In **Joshua Atula Atula case** (supra), the court further held that though no proper valuation could have been carried out on the drugs, it was not fatal to the charge of trafficking. However, in the present case, a valuation was done and a certificate of valuation issued and adduced in evidence as exhibit 38. Applying the above decision to the present situation, it is evident that the two courts below were correct in holding that the accused had been found in possession of heroin contrary to the statute. It therefore is no surprise that the arguments such as those raised by the appellant along these lines did not bear fruit in **Priscilla Jemutai Kolongei case** (supra) cited by the appellant which appeal was itself dismissed.

20. Turning to count III, its particulars were that on the 15th day of March, 2003 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, (the appellant) without lawful authority or excuse knowingly had in his possession a paper s/no. AF 30178830F intended to resemble and pass as U.S. currency for United States dollars 20. There is no dispute that the said dollar was in possession of the accused and that the same was a fake currency. This is confirmed by the exhibit 39 which contains the search certificate done on the motor vehicle. The said exhibit contains an inventory of several items including a second wallet that contained the US\$.20 note.

21. The appellant contends that knowledge of the fact that the currency is fake is a material element of the offence under **section 367(a)** of the Penal Code. **Section 111 of the Evidence Act** which the state relied on in opposing the appellant’s argument provides:-

“111(1) when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be discharged if the court is satisfied that, the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

We agree with the learned counsel for the appellant that under **section 367(a)** of the Penal Code knowledge is an essential ingredient. Possession of a fake note *per se* is not an offence. One has to possess the same with the knowledge that it was fake. This is not a strict liability offence. It was therefore incumbent upon the prosecution to prove this essential element failure of which the offence cannot stand against the accused. The element of knowledge is not an exception as contemplated under **section 111** of the **Evidence Act** but knowledge of the presence of the fake money was an essential ingredient of possession.

22. This position has been adopted by the High Court in its decisions, such as in **Joseph Alumasa Oyasi**

V Republic[2012] eKLR by Njagi J as he then was, Benson Kiarie Ngugi V Republic [2007] eKLR by W. Karanja, J. (as she then was) and in Kossam Okiru V Republic[2012] eKLR by Said Chitembwe, J. which persuasive decisions we adopt. In the absence of the prosecution adducing evidence about the appellant's knowledge that the currency in his possession was fake, this count III must fail and we so find and hold.

23. Learned counsel also made submissions on the violation of the provisions of **sections 134 137, 213 and 310** of the **Criminal Procedure Code** and **Article 50** of the **Constitution**. The appellant's advocate did not however address us on the grounds of appeal relating to **sections 134** and **137** of the **Criminal Procedure Code**. The prosecution did not also address these provisions. These sections deal with charges and informations. There was neither an argument nor evidence by the appellant to suggest that the accused failed to understand the nature of the offence he was faced with as to be prejudiced during the trial. We are therefore unable to make any determination on the appellant's second ground of appeal. In any event, where discrepancies in the evidence do not affect an otherwise proved case against an accused, a court is entitled to ignore those discrepancies (see Njuki & 4 others versus Republic [2002] 1KLR 771) as guided by the provision of **section 382** of the Criminal Procedure Code.

24. On the issue of violations relating to written submissions and the provisions of **sections 213 and 310** of the **Criminal Procedure Code** as argued by the parties, we have thoroughly perused the record before us. **Section 213** of the **Criminal Procedure Code** provides for the order in which the parties shall address the court, while **section 310** of the **Criminal Procedure Code** gives the prosecution the right of reply should an accused person introduce new evidence during their defence. In the proceedings before the magistrate's court, the accused was arraigned before court, pleaded not guilty and the matter proceeded to trial. At no time did the prosecution witnesses testify in the appellant's absence and the appellant was afforded an opportunity to cross examine each of the witnesses. At the close of the prosecution case, the appellant was present when his then advocate on record Mr. Koyo applied for a date to make submissions. This however did not materialize as the accused absconded subsequent mentions and had to be traced through his surety.

25. When the appellant was finally traced and arraigned before court, his bond was cancelled and the appellant was directed to advise his advocate to file written submissions before the next mention date which did not happen. We take note of the following proceedings before the court when the matter eventually proceeded:-

“Court: the prosecution had closed their case. The counsel for accused was supposed to submit when the accused disappeared. I had heard the witnesses and I will rule on whether or not there is a case to answer on 9/2/2011. Accused remanded in custody. Mr. Kyalo for the accused comes in.

Mr. Kyalo: I understand prosecutor had closed the case, we can take a date for defence hearing.”

At no time did the appellant ever seek to address court save for the time he requested for treatment and a p3 form on account of having been assaulted by the police. The ruling was finally delivered, and the appellant was put on his defence.

16. At the close of the defence case, his then advocate on record Mr Ogude also made an application to prepare written submissions. We note that the accused was present on that day as he had testified together with his witness. The trial magistrate acceded to the request and ordered that written submissions be filed within two weeks and be forwarded to Bungoma Law Courts. There is no further evidence on record to establish whether the submissions were ever filed or made either by the prosecution or the defence as the judgment rendered by the magistrate did not make reference to any submissions.

27. Before the High Court, the appellant's then Advocate on record, Mr. Ademba informed the court that they had agreed to proceed by way of written submissions to which Miss Maina for the state confirmed as correct. The court agreed to the request and ordered the matter to be mentioned to confirm

compliance. The record confirms that both the prosecution and the defence filed and served submissions. The appellant once again was present and sought court intervention on his assault by the police and the court issued the necessary orders. Again, we did not come across the said written submissions as filed before the High Court and are thus unable to determine the line of argument pursued by the appellant therein.

28. What then is the effect of the above issues relating to submissions as they relate to the appeal? The appellant's case is that the resort to written submissions is fatal as held in **Henry Odhiambo Otieno case** (supra). However, we hold that the **Henry Odhiambo Otieno case (supra)** is distinguishable in the circumstances as the directions to file written submissions were made by the court on its own motion. In the present case, the option to file submissions was voluntary by the appellant through his advocates and in the appellant's presence. At no time did the appellant seek to address the court in opposition to filing written submissions as made. The appellant indeed sought court intervention on other issues such as assault by police and treatment. We reiterate this court's finding in **Francis Kahindi Mwaiha v Republic [2015] eKLR** where the learned judges stated as follows:-

“We have perused carefully the proceedings before the trial court and we are unable to appreciate the nature and basis of this complaint. The appellant was taken through every motion during the trial. . . The record does not show that the prosecution was allowed to address the court but the appellant was denied that right. Nor does the record show that the appellant requested to be allowed to address the court and he was denied the right. The address contemplated would ordinarily be submissions. If the prosecution and defence did not offer to submit, why should the trial court be assailed for their failure?”

In light of the above, the appellant's argument on the violation of the provisions of **sections 213 and 310** of the **Criminal Procedure Code** and **article 50** of the Constitution is hollow and must fail.

29. As for the defence adduced by the appellant at the trial court, we agree with the trial magistrate and the High Court on their findings. When the appellant had the opportunity to confront the witnesses by way of cross examination to pursue his line of argument he failed so to do. The appellant only raised the defence and made allegations against prosecution witnesses at the time when such witnesses were no longer available to respond. This state of affairs greatly weakens the credibility of such a defence.

30. In the end, we hold that the decision by the High Court was made on sound law and it stands, save for the conviction and sentence on count III, relating to possession of paper intended to resemble bank note or currency contrary to section 367(a) of the Penal Code, which conviction and sentence we set aside for having been made without supporting evidence hence erroneously.

Dated and delivered at Nairobi this 17th day of February, 2017.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR