Igwilo v Republic (Criminal Appeal E101 of 2021)
[2024] KEHC 1037 (KLR) (Crim) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 1037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E101 OF 2021

LN MUTENDE, J

JANUARY 25, 2024

BETWEEN

AUSTINE OBINWANNE IGWILO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No.193 of 2017 at the Chief Magistrate's Court JKIA by Hon. L. ONYINA – CM on 6th October, 2021)

JUDGMENT

1. Austine Obinwanne Igwilo, the Appellant, herein was charged with the offence of Trafficking in Narcotic drugs contrary Section 4(a) of the *Narcotics Drugs and Psychotropic substances (Control) Act* No. 4 of 1994. Particulars being that on the 2nd day of November, 2017 at Msafiri Court, in Donholm within Nairobi County, jointly with others not before court trafficked by storing in his house No. 211B, 22010.50 grams of Narcotic Drug namely Heroin concealed in a purple bag and Tuskys' polybag with a market value of Ksh. 66,031,620/- in contravention of the provisions of the said *Act*.

2. Having been taken through full trial, he was found guilty, convicted and sentenced to pay a fine of Kenya Shillings One Hundred and Eighty Million Shillings (Ksh. 180,000,000/-) and, in default to serve one (1) year imprisonment; and, further, in addition to serve life imprisonment.

3. Aggrieved, the appellant proffered an appeal against the conviction and sentence on the grounds that:

    a) The trial magistrate erred in law and fact by failing to find that the prosecution did not establish the ingredients forming the offence of trafficking in Narcotics Drugs and Phychotropic Substances provided in law.

b) The trial magistrate erred in law and fact by failing to find that the prosecution evidence was disclosed in piecemeals, therefore acting in breach of Articles 25(c) and 50 (2) (b) (c)) (k) of the Constitution.

c) The trial magistrate failed to resolve the alleged inconsistencies and contradictions on record in favour of the Appellant accused person which went to the root core of the changes he was facing.

d) The trial magistrate failed to note that an essential witness was not availed to testify and this left waging gaps and unexplained questions in the whole of the prosecution's case, doubts that should have been resolved in favour of the appellant.

e) The trial magistrate failed to note that factum probandum for the offence in question was not conclusively proved as per the dictates of the law.

f). That in light of jurisprudential change in sentencing the life sentence imposed on the appellant is both harsh oppressive and unfair.

4. Briefly facts of the case were that on 2nd November,2017, a team of officers from the Directorate of Criminal Investigations Unit, DCI Headquarters comprising of PW2 No. 76309 Corporal David Kipsoi; PW5 No. 90158 PC Roy Opiyo Odunga; PW6 No. 76104 PC Stanley Salim under the command PW 10 No. 23123 Chief Inspector Elizabeth Lumumba got intelligence about a Nigerian National staying at Donholm Savannah Estate Msafiri Court and acting on the information received proceeded to the residence of the suspect, Austin Obinwanne Igwillo. At a house No.211 B with a tinted door, they knocked and the occupant opened. Upon confirming his name they introduced themselves and sought permission to search the house. In the sitting room nothing was found, but, in the bedroom, they recovered a purple Kings collection carrier bag under the mattress on the bed. Upon unzipping the same, it contained some five (5) packages wrapped in pink and blue wrapping papers.

5. They moved to the Kitchen where they found a Tuskys carrier bag, which contained some seventeen packages. The substance in the packages was creamish in colour. Also recovered were documents including a passport No. A05XXXXXXX.

6. Investigations conducted at the premises revealed that when the appellant went in search of the rental house he was shown the same by PW1 Msafiri Mwinyi, a security personnel at the court who gave him the contact of the Landlord. Subsequently he occupied the house. PW3 Lawrence Kiprono Ngeno of Propensity Properties caused the appellant to fill the occupancy forms/ Tenancy Registration Form and he used to pay rent through Mpesa to the KCB Account held by the owner of the house.

7. The substance recovered was weighed and valued by PW4 Joshua Okallo who found it to be 22,040. 50 grams. The estimated value of each gram was Ksh. 3000/- hence the total value being Ksh. 66,031,620/- A certificate thereof was prepared.

8. PW7 No. 79063 Corporal Derrick Kiprono processed the CD received from C I Lumumba, prepared photographic prints and adduced them in evidence.

9. PW8 Dennis Owino Onyango, a Government Analyst sampled the twenty-two packages containing creamish granular substance and did a preliminary analysis of the same which was indicative of narcotic drugs in the presence of the police officers. Subsequently a comprehensive analysis was done where it was established that the substance was heroin with a purity of 35%.

10. Upon being placed on his defence the appellant stated that he visited his friend Job who lived at Plot 211 B Msafiri. While at the gate, officers from Anti- Narcotics Unit arrived called the security personnel

then also called him. Without asking him anything they embarked upon beating him seeking to know the whereabouts of Chadwick, a person he did not know. The officers asked Job where his house was and he showed them. They made them go to the house and he was made to sit down in the sitting-room on the floor. Another person was removed from the car and made to join them, making the number of suspects three. That drugs were removed from the car and placed on the floor. They counted and confirmed that they were twenty five packages. That Elizabeth (PW10) made him sign which he did. After a while they received a call and one of the officers said that they had arrested Chadwick. Subsequently a lady joined them. They opened the bag and removed three (3) packets and used his phone to photograph them a pregnant woman amongst them placed her hand on his face and he passed out. When he regained consciousness he saw PW10 with two (2) men who were walking around the house. That he was separated from the other two men and caused to take photos with the substance prior to being taken to the police station. He concluded his testimony by stating that he lived at Lilo Flats, House No. 19 Greenspan.

11. The appeal was canvassed through written submissions. It is contended by the appellant that the prosecution did not establish the act as defined in Section 2 of the *Narcotics Drugs and Psychotropic Substances Act* (Act) that there was no evidence that the drugs were recovered from the house of the appellant as ownership of the house was not proved. That the appellant was prejudiced due to the street value of the drugs as the market value of the drugs was in contention. That no evidential facts were tendered to prove possession of the drugs.

12. The appellant complains that evidence was not disclosed on time hence he could not sufficiently cross-examine witnesses on evidence not disclosed on time. He pointed out contradictions made as to where he lived.

13. Further, that it appears that some other witnesses available who were not called. That no evidence of CCTV was tendered to confirm whether drugs were recovered from the house. In this respect he relied on the case of Bukenya.

14. And that the trial court misconceived the provision of Section 4 (a) of the *Act* in Sentencing.

15. The State was granted the opportunity to file submissions but they failed to comply.

16. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of *Okeno v Republic* (1972) EA 32, it was held that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] EA 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *Shantilal M. Ruwala v. R* [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See *Peters v. Sunday Post* [1958] EA 424".

17. In the case of *Erick Onyango Ondeng' v. Republic* [2014] eKLR the court stated as follows with regard to the duty of a court when considering contradictory evidence:

> " The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, reevaluate and analyze the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. See *Okeno v Republic* (1972) EA 32."

18. It is contended that evidence obtained was illegal as the search conducted was without a warrant. Article 31 of the *Constitution* provides:

> Every person has the right to privacy, which includes the right not to have;-
>
> (a) Their person, home or property searched;
>
> (b) Their possessions seized;
>
> (c) Information relating to their family or private affairs unnecessarily required or revealed; or
>
> (d) The privacy of their communications infringed.

19. The right is not absolute as enunciated by Article 24((1) of the *Constitution* which enacts that the right to have a home or property searched may be limited by law. According to Statute a person's home or property can be searched for purposes of being investigated (See Section 47(3) of the *National Police Service Act* No. 11A of 2011).

20. In accord with evidence tendered the intelligence information was received at 6:00am and the officers having made notes at the ANU offices immediately proceeded to the residence of the suspect. It is discretionary for an officer to move to the scene if they reasonably believe a delay may be occasioned in obtaining the warrant of search. The officers having moved to the house upon reasonable grounds; they did identify themselves and on cross examination stated that they showed the appellant their certificate of employment prior to conducting the search. To this end failure to obtain a search warrant was not fatal to the prosecution's case.

21. The prosecution is faulted for failure to establish ingredients of the offence.

22. Section 4(a) of the *Narcotics Drugs & Psychotropic substances (Control) Act* provides that:

> Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be offence and liable
>
> (a) In respect of any narcotic drug or psychotropic Substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance whichever is greater and, in addition to imprisonment for life.

23. Section 2 of the *Act* defines trafficking to include storing. The particular act /conduct of trafficking in question. Evidence adduced was that the substance, some seventeen (17) packages were recovered from House No. 211B Msafiri Court, Donholm Savannah. A search Certificate, inventory and Seizure Notice were prepared and duly signed. The argument of the appellant was that the drugs were taken to the house whereafter he was made to sign the document. PW1 the caretaker/Security personnel was present but no such allegation was raised on cross-examination. The appellant admits having signed a search certificate, and, the inventory of items recovered. He did not claim to have been coerced to sign therefore the prosecution proved the case in that respect.

24. Ownership of the house in question is contested. PW1 proved the fact of the appellant having gone in search of the house and subsequently occupied it. PW3 a property agent who used to collect rent on behalf of the landlord confirmed occupancy of the premises by the appellant. The allegation that the house belonged to Job did not dislodge evidence adduced to prove that the appellant was the occupant of the house.

25. As to the question whether the document having been adduced in evidence suggesting that he owned another house at Lilo Flats, Greenspan Phase 8, one of the documents recovered at House No. 211B Donholm Savanna is a fact that could not bar him from occupying another house.

26. The market value of the drugs in issue is contended. Section 86(1) of the *Act* provides that:

> " Valuation of goods for penalty
>
> (1) 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."

27. Evidence to that effect was adduced by PW4 who was appointed as a proper officer under Section 86 of the *Act* pursuant to gazette Notice No. 12710. The valuation was done by a proper officer who signed the certificate and the court accepted it as correct evidence of the value given. This evidence was not prejudicial as alleged.

28. The appellant urges that evidence was disclosed in piecemeals contrary to Article 50(2) (b)(j)(k) of the *Constitution* that provide thus:

> (b) to be informed of the charge, with sufficient detail to answer it;
>
> (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
>
> (k) to adduce and challenge evidence;

29. The obligation to disclose all relevant material to be relied on in a case is a continuing duty and does not necessarily end a pre-trial stage. In the English case of *R v Ward* [1993] 2 ALL ER 557, cited by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v Republic*(2008) eKLR by the Court of Appeal held that:

> " The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them

to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.....

All that is required is that the prosecution should supply all evidence and material in advance to enable the accused prepare form his defence and cross examine witnesses."

30. In this case, proceedings show that the trial was adjourned several times when the prosecution sought to rely on documents that had not been served upon the appellant, and the prosecution were prevented from leading evidence on a set of photographs which had not been supplied to the defence. PW7 was stood down after the defence counsel had just been served with the cyber-crime report and the prosecution sought for an adjournment. The court declined to allow the Investigating Officer to produce the document which was not on the inventory of documents served, the court noted that production would be a violation Article 50 (2) (j) of the *Constitution*.

31. Although some documents were not supplied in advance and clearly the trial being characterized by unsystematic partial manner, the trial court ensured that the rights of the appellant under Article 50 (2) (j) were protected which enabled the appellant to cross examine and interrogate evidence introduced at later stages as required under Article 50 (2)(k) of the *Constitution*.

32. It is asserted by the appellant that it appeared that there were other witnesses available who were not called to testify. In particular that the CCTV individual did not testify to establish if indeed a search was conducted in the house in which drugs were allegedly recovered. The allegation having not been raised during trial, there is no suggestion if CCTV cameras had been mounted at the place, hence this court cannot interrogate the issue at this stage.

33. In the case of *Twehangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001 (2003) UGCA 6 it was stated that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

34. In the case of *Peter Ngure Mwangi v. Republic* (2014) eKLR, the Court of Appeal, while dealing with the question of alleged inconsistencies in evidence, opined that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. The Court stated as follows: -

> "We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case."

35. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

36. In the case of *Keter v. Republic* [2007] 1 EA 135 the court held inter alia:

> "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

37. PW12 stated that DHL could not accept drugs and thus the package was intercepted; therefore, failure to call the agent/ lady was not fatal to the prosecution's case.

38. In the case of *Julius Kalewa Mutunga v. Republic* [2007] eKLR, the Court of Appeal stated thus:-

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."

39. On sentencing, Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* provides for a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life. The word "liable" is used in the provision of the law which means there is a measure of discretion to the court in imposing a sentence with a maximum limit being indicated. (See *Caroline Anna Majabu v R* [2014] eKLR, *Kabibi Kalume Katsui v R* [2015] eKLR, and *Antony Mbithi Kasyula v R* [2015] eKLR) where the Court of Appeal noted that the sentence under Section 4 is not a mandatory sentence. The appellant was sentenced to a fine of Ksh 180 Million, and, in default to serve one (1) year imprisonment .This was based on the valuation of the drugs.

The appellant's contention is that the maximum sentence should not have been considered. Although the trial court did not give reasons for considering the maximum sentence, it noted the huge quantity and value of the narcotic drugs involved. The appellant having been a first offender, the court should have considered objectives of sentencing. There are various objectives of sentencing which are provided for in the *Judiciary Sentencing Guidelines* that include:

> Deterrence – Where the offender is punished for the crime so that the offender and public can appreciate the consequences of committing a crime;Incapacitation – Where the individual is taken away or removed from the society by being incarcerated so as to protect the society.

There is however a question of rehabilitation. A first offender should be granted the opportunity to be rehabilitated and return to the society as a law-abiding citizen. The trial court did not have this in mind. For that reason, the sentence was harsh and excessive. As a consequence, the appeal on the additional limb of the sentence is allowed by the life imprisonment being set aside. The same is substituted with twenty-one (21) years imprisonment, with effect from his date of arrest, 2nd November, 2017, and, upon service of the sentence he shall be repatriated to his country of origin.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 25TH DAY OF JANUARY, 2024.

L. N. MUTENDE

JUDGE

In the presence of:-

Court Assistant: Habiba

Appellant - present

Ms Ntabo for the Respondent