



REPUBLIC OF KENYA



KENYA LAW
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**Timami v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 634 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E002 OF 2023**

KW KIARIE, J

JANUARY 25, 2024

BETWEEN

ABDULMAJID MSALLAM TIMAMI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case number 532 of 2019 of the Chief Magistrate's Court at Mombasa by Hon. R. Orora—Senior Resident Magistrate)

JUDGMENT

1. Abdulmajid Msallam Timami, the appellant herein, was convicted of 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 are that on the 22nd day of March 2019, in the Tononoka area, Mvita sub-county within Mombasa County, in a motor vehicle registration number xxxx CRV Honda, jointly with others not before the court, trafficked by conveying heroin to wit 1015.8 grams with a market value of Kshs—3,047,400/= in contravention of the said Act.
3. The appellant was sentenced to fifteen years imprisonment- and a fine of Kshs.9,142,200/= or serve an additional year in prison. He was aggrieved and filed this appeal against both conviction and sentence. The firm of J.O. Magolo & Company Advocates represented the appellant. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact in proceeding with the trial and proceeded to place the appellant on her defence and to a conviction on a charge that was fatally defective.
 - b. That the learned trial magistrate erred in law and fact in finding the prosecution had proved its case, especially when the facts showed that:



- i. The officers had prior information about the appellant's motor vehicle and where it would be found, yet the source of information remained a mystery.
 - ii. The officers confirmed not to know who drove the motor vehicle the previous day.
 - iii. The search was only conducted at the Regional Headquarters several kilometers away from the point of arrest, and no attempt was made to search the motor vehicle at the point of arrest, thereby giving room for a possible planting.
 - iv. The search was conducted by several officers at the same time, again giving room for planting.
 - c. That the learned trial magistrate erred in law and fact in shifting the burden of proof on the appellant by requiring the appellant to call witnesses and blaming the appellant for not doing so.
 - d. That the learned trial magistrate erred in law and fact in finding that the appellant departed from his defence simply because the appellant had shown several loopholes about the search and also testified that his vehicle had been driven by someone else the previous day.
 - e. That the learned trial magistrate erred in law and fact in ignoring the inconsistencies and clear falsehoods which rendered the prosecution witnesses unreliable.
 - f. That the sentence was manifestly excessive considering the appellant's circumstances.
4. The state opposed the appeal through Ms Vallerie Ongeti, learned counsel who contended that the prosecution proved the case to the required standards. He argued that the sentence was proper.
 5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions while considering that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. For the prosecution to prove the offence of trafficking in narcotic drugs or psychotropic substances, the following ingredients must be established:
 - a. The act of knowingly possessing, manufacturing, selling, buying, transporting, or otherwise dealing with narcotic drugs or psychotropic substances.
 - b. The Act must prohibit the substance.
 - c. The quantity must be more than for one's consumption.
 - d. The prosecution must establish that the accused intended to engage in trafficking or dealing with narcotics, or an inference of such intention may be discerned from the circumstances.

These are the ingredients I will endeavour to find if they are proven.
 7. A senior Police officer received some information on the appellant. He, therefore, instructed his officer to intercept motor vehicle registration number xxxx.
 8. The evidence of Corporal Philip Kazungu (PW1) was that armed with the information, he proceeded to the Shell petrol station at Tononoka with other officers. The motor vehicle was being driven from Ronald Ngala Road toward Nyali. They stopped the motor vehicle, which had only one occupant: the driver. This was the appellant. They moved the vehicle to the CID headquarters, where it was searched.



9. Upon searching, he went on to say they recovered a red carrier bag under the co-driver's seat. When they enquired the contents from the appellant, he stated it was "unga".
10. PC Bernard Langat (PW5) and Corporal Solomon Gachia (PW7) testified to the same effect as PW1.
11. The appellant, in his defence, testified that on the 21st day of March 2019, his brother's friend, Said Ahmed, borrowed his motor vehicle registration number xxxx to take his father to the hospital. He gave him the vehicle. At about 9 a.m., he again called him the following day. He informed him that they were to meet at a petrol station along Ronald Ngala because his father was very sick. When he got there, he was arrested by police officers. At the police station, police officers gave him a red bag and said he was trafficking in narcotics.
12. Though he did not directly say that it must be Said Ahmed who placed the drugs in his vehicle and set him up for arrest, this was what he spoke in a veiled manner. This defence could have been available to him had he given this information to the police at the time of his arrest. The police would have investigated this claim, and if it were established to be accurate, then the right culprit would have been charged. On the other hand, if he volunteered this information and they failed to investigate, the court ought to have given the accused the benefit of the doubt.
13. In his defence, the appellant did not testify to have volunteered this vital information to the police. The arresting officers, i.e. PW1, PW5, and PW7, were not confronted with these crucial facts during cross-examination. The learned trial magistrate was justified in dismissing the evidence of recovery, for it was an afterthought.
14. The prosecution adduced evidence to prove that the motor vehicle registration number xxxx belonged to the appellant. This was through the evidence of William Ooko Okoth (PW2). He was an operations manager with Lota Automobiles Limited. He produced a sale agreement between the appellant and the company concerning the said motor vehicle.
15. Yanga Maingi Hamisi (PW3) analysed the contents of a package weighing 1,015.8 grams. His report indicates that the brown substance was found to be diacetylmorphine(heroin). This substance is on the list of narcotic drugs, the first schedule of the Act.
16. After analysing the evidence on record, I am satisfied that the prosecution established all the ingredients of the offence.
17. The appellant argued that the sentence was manifestly excessive, considering his circumstances. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nilsson v Republic* [1970] E.A. 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shersbewsity* (1912) C.CA 28 T.LR 364.



18. Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* provides:

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 guilty of an 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 the greater, and, in addition, to imprisonment for life;

19. CPL. Philip Lang'at (PW4) adduced evidence of valuation. He valued the heroin at Kshs. 3,047,400/=. His was not challenged.

20. The learned trial magistrate applied the sentence as prescribed by the Act. I have no reason to interfere with it. Doing so will be an illegality.

21. From the preceding analysis of the evidence on record, I find that the appeal lacks merit, and the same is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

