



**Ondeyo v Republic (Criminal Appeal 37 of 2023)
[2024] KEHC 4310 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 37 OF 2023
DR KAVEDZA, J
APRIL 30, 2024**

BETWEEN

KEVIN OWINO ONDEYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. L. O Onyino (CM) on 21st July 2022 at JKIA Chief Magistrate's
Court Criminal Case E029 of 2020 Republic vs Kevin Owino Odenyo)*

JUDGMENT

1. The appellant was charged and convicted for 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. He was sentenced to serve 20 years imprisonment. In addition, he was sentenced to pay a fine of Kshs. 20 million in default to serve one (1) year imprisonment. Being aggrieved, he filed the present appeal challenging his conviction and sentence.
2. In his petition of appeal dated 10th May 2023 and supplementary grounds of appeal dated 19th December 2023, the appellant raised a total of 20 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that key witnesses were not called to testify. He also argued that the sentence imposed was harsh and excessive. He urged the court to set quash his conviction and set aside the sentence.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno vs Republic* [1973] EA 32).



4. PW1 Chief Inspector Julius Ambuche, attached to the Transnational Organized Crime Unit at the Directorate of Criminal Investigations headquarters, recounted his involvement in a narcotic bust. It began with a call from his senior, Omar Bakari, instructing him to assemble a team and intercept a black Toyota Fielder suspected of transporting cannabis from Busia to Nairobi. PW1, accompanied by Officers Eliud Ngetich (PW2), and Abel Kiptes (PW3) set up an ambush near Salgaa. Spotting the vehicle, they trailed it to a petrol station where they confronted the driver and conducted a search, revealing sacks filled with green plant material, presumably cannabis.
5. The team arrested the suspect, the appellant herein, seized the vehicle, and handed the case over to the anti-narcotics unit. A thorough search witnessed by PW1 uncovered seven sacks of cannabis and 232 brooms inside the vehicle. PC Eliud Ngetich (PW2) prepared an inventory, signed by PW1 and the appellant, detailing the seized items. PW1 identified the vehicle and demonstrated how the contraband was packed. Photographs were taken at the scene, but no search certificate was prepared until later at the headquarters. PW1 drove the vehicle to the headquarters and notified the anti-narcotics unit upon discovery of the suspected narcotics.
6. PW2, Police Constable Eliud Ngetich, a member of the Transnational Organized Crime Unit based at DCI headquarters, recounted how he in the company of PW1, CI Omar Bakari, and PC Abel Kiptes (PW3) intercepted a vehicle suspected to be transporting narcotics. The vehicle was a Toyota Fielder registration number KBH 213M.
7. Once, the vehicle was intercepted, PW2, assisted by Kiptes, conducted a search, discovering sacks of green plant material suspected to be cannabis, along with the appellant's documents and belongings. He prepared inventories and, after completing the search, they proceeded to DCI headquarters with PW1 driving KBH 213M. At headquarters, they were joined by the anti-narcotics unit, led by Inspector Albashir Olow(PW8), who conducted a further search, confirming the presence of cannabis in the vehicle. PW2 identified KBH 213M and described the arrangement of the contraband found inside the vehicle, including seven sacks and 232 brooms, totalling 294 kgs.
8. Police Constable Abel Kiptes PW3, part of the Transnational Organized Crime Unit at DCI Headquarters, recounted his involvement in the operation. Along with PW2 and PW1, proceeded to Nakuru, reaching Salgaa along the Nakuru-Eldoret highway by around 10:30 am, waiting for the suspected vehicle. Around 11:00 am, they spotted the vehicle and trailed it to the Ngata area at Oilcom petrol station. They intercepted the vehicle before the driver could exit, conducting a quick search and discovering six full sacks and one half-full sack of suspected narcotics, along with numerous brooms.
9. The suspect, the appellant herein was arrested and escorted to DCI headquarters, with PW1 driving the vehicle containing the narcotics. At headquarters, they were joined by colleagues from the anti-narcotics unit and scene of crime personnel. A thorough search confirmed the presence of seven sacks and 252 brooms, weighing a total of 294 kgs. Kiptes witnessed the search and identified the inventory and weighing certificate during his testimony.
10. During cross-examination, PW3 clarified details about the search and inventory preparation, stating that no search certificate was prepared at the scene and that a deep search at headquarters revealed the accurate count of sacks.
11. PW4 Police Constable Paul Njage, a member of the anti-narcotics unit at DCI headquarters, testified about his involvement in the case. He received a call from Inspector Bashir regarding the arrest of a suspect by officers from the Transnational Organized Crime Unit for suspected drug trafficking. Njage proceeded to DCI headquarters, where he met Inspector Albashir, Chief Inspector Philip Langat, and



- Police Constable Stanley Kirui from the anti-narcotics unit, along with officers from the Crime Scene Investigation Unit.
12. Upon arrival, they were joined by officers from the Transnational Organized Crime Unit, led by PW1, and the suspect, Kevin Odenyo, along with the vehicle, registration number KBH 213M, a black Toyota Fielder. Inspector Bashir opened the vehicle, revealing sacks filled with dry greenish plant material and loose brooms. Crime scene officers documented the scene, while Inspector Bashir conducted a thorough search of the vehicle.
 13. PW4 detailed the items recovered during the search, including sacks and brooms, and identified the search certificate documenting the search. Inspector Bashir marked and weighed the exhibits, confirming a total weight of 294 kg. He also clarified during cross-examination that there were 262 brooms initially counted, but upon further tabulation, it was determined that there were 252 brooms, not contained in one package.
 14. PW5, Sergeant Hudson Henry Masake, a scenes of crime officer stationed at DCI headquarters, testified about his role in documenting the evidence related to the case. He was called upon by Inspector Albashir Olow to assist in documenting a Toyota Fielder with registration number KBH 213M, suspected of transporting narcotics. He photographed the vehicle, including the sacks and plant material inside, totaling 78 photographs. He also documented the process of weighing the substance.
 15. PW6, Denis Owino Onyango, an analyst with the government chemist, testified that he received 13 khaki envelopes containing samples of plant material allegedly obtained from sacks found in the vehicle. Under the escort of Inspector Albashir Olow, he analyzed the samples using the First Blue B Salt Test and Duequenous Levin Test methodologies. His findings confirmed the plant material to be cannabis, a narcotic drug. On 11/2/2021, he signed a report and affixed a government seal, identifying it as a prosecution exhibit.
 16. PW7, Chief Inspector Philip Langat, a member of the DCI headquarters anti-narcotics unit, supervised the documentation process, which included photographing the vehicle and its contents, specifically seven sacks and 252 brooms of suspected narcotics, along with a black polythene covering a spare tire and a vehicle spanner. The substance was found packed in the back seats and the boot, with brooms in the co-driver's seat. After off-loading the substance, it was weighed, totaling 294 kg. PW7 witnessed the preparation of the weighing certificate and signed it along with other officers present.
 17. Additionally, he prepared a valuation certificate, estimating the market value of the narcotics to be Ksh. 8,820,000 based on the value of Ksh. 30,000 per kilogram of cannabis. He also received a government chemist report confirming the substance to be cannabis.
 18. PW8, Inspector Alibashir Olow, an investigator with the anti-narcotics unit, testified about his involvement in the case. He assembled officers upon receiving information about the intercepted vehicle and supervised the search at DCI headquarters. During the search, he recovered sacks and brooms of suspected narcotics from various parts of the vehicle, totaling 232 brooms and seven sacks.
 19. Olow prepared a search certificate, seized the narcotics, and prepared notices of seizure. He also conducted a weighing of the seized substances, producing a certificate of 33ing. Despite a typographical error in the Record of Custody of Seized Substances, he ensured proper documentation and custody of the seized items.
 20. After the close of the prosecution's case, the appellant was found to have a case to answer. In his defence, he recounted being at home with his family when unidentified individuals barged in, conducted a search, and subsequently accused him of involvement in drug-related activities. Despite denying any knowledge or involvement, he alleged that he was physically assaulted before being taken to the DCI



- headquarters. There, he claimed to have been subjected to further mistreatment, including being made to lie down for an extended period and coerced into signing blank documents.
21. He recounted seeing a black motor vehicle for the first time at the headquarters, which he denied owning. The appellant maintained that the substance seized during the operation was weighed while he stood aside, unable to understand what was happening. He asserted that the officers who arrested him were not the same individuals who brought him to court. He also claimed to have been taken to a police station late at night and presented in court the following day, alleging severe mistreatment during the arrest. Throughout his testimony, he adamantly professed his innocence regarding any involvement in narcotics.
 22. This court has re-evaluated the evidence adduced before the trial court, the appellant's grounds of appeal, as well as the rival parties' submissions. Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* provides as follows:

“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;”
 23. The case against the appellant was that on 1st November 2020, police officers based on an intelligence operation, around the Ngata area in Nakuru County arrested the appellant. The appellant was apprehended while driving a motor vehicle registration number KBH 213M make Toyota Fielder Black in colour. After a search was conducted in the vehicle, they recovered six sacks containing plant substances suspected to be narcotic substances and numerous brooms.
 24. The appellant cooperated during the search and seizure. Officers escorted the appellant to DCI headquarters where an inventory of the recovered items was prepared. The suspects' packages were weighed at 294 kilograms, witnessed by the appellant, PW3, PW 4 and PW 7. In addition, PW7 also provided a valuation of Ksh. 8,820,000 based on the value of Ksh. 30,000 per kg of cannabis based on the charge sheet, weighing certificate, and government analyst's report.
 25. The chain of custody for the substances recovered in the case against the appellant is well documented through the testimonies of various witnesses. The investigating officer detailed the custody of seized substances through the inventory prepared and introduced the Notice of Intention to Tender Records in Evidence, along with several items recovered from the appellant as evidence. This sequence of testimonies establishes a clear and continuous chain of custody for the substances recovered from the appellant. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
 26. On whether the substance recovered was narcotic, the government analyst, PW 6 testified that he conducted a preliminary test of the substance recovered. The test confirmed that the substance was cannabis. The prosecution adduced evidence that established that the substance found in the appellant's possession was a narcotic substance within the meaning ascribed to the term by Section 2(1) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* and the 1st Schedule thereof.
 27. In his defence, the appellant alleged being assaulted during a home invasion, coerced into signing blank documents at the DCI headquarters, and denied ownership of the vehicle containing the seized narcotics. He maintained innocence, claiming mistreatment and lack of involvement in drug-related



activities. The court considered his defence and found it to be uncredible. Given the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind the appellant was arrested with narcotic substances namely cannabis which was recovered in the vehicle he was driving.

28. The appellant also contended that crucial prosecution witnesses were not called to testify. However, in his submissions, he failed to submit which specific witness was not called by the prosecution to testify. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).
29. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
30. On sentence, the appellant was sentenced to serve 20 years imprisonment. In addition, he was sentenced to pay a fine of Kshs. 20 million in default to serve one (1) year imprisonment. The appellant argued that the sentence was harsh and excessive.
31. From the record, the said narcotic drugs were duly weighed and found to be of the value of a substance (cannabis) weighing 294 kilograms grams with a market value of Ksh. 8,820,000. In sentencing, the trial court considered the market value before imposing the fine in addition to the prison sentence. The trial court also considered his mitigation and that he was a first offender. The sentence meted out was therefore within the law. However, the sentence of 20 years in my view was harsh and excessive.
32. Therefore, the appeal on sentence succeeds. The sentence of 20 years imprisonment is hereby substituted with a sentence of 10 years imprisonment. The additional sentence of payment of a fine of Ksh. 20 million in default to serve 12 months imprisonment is upheld. The sentences shall run concurrently from the date of conviction.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Hassan Nandwa for the Appellant

Mr. Mongare for the Respondent

Nelson Court Assistant

Kibera High Court Criminal Appeal No. 16 of 2023

