



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shifuma v Republic (Criminal Appeal 16 of 2023)  
[2024] KEHC 4143 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4143 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 16 OF 2023  
DR KAVEDZA, J  
APRIL 30, 2024**

**BETWEEN**

**PATRICK MUNYASA SHIFUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was charged with eleven (11) counts of offences. He was charged with one count of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994. Four counts of trafficking of psychotropic substances contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994. Three counts of being unlawfully in possession of Part I poisons contrary to section 26 (2) of the *Pharmacy and Poisons Act*. One count of carrying on the business of a pharmacist in unregistered premises contrary to section 23 (1) as read with section 26 (6) of the *Pharmacy and Poisons Act* and two counts of making a document without authority contrary to section 357(a) of the *Penal Code*.
2. The appellant was tried and found not guilty on counts IV, V, VIII, X, and XII and was acquitted accordingly. He was sentenced as follows on the remaining counts:
  - i. count I he was sentenced to serve 7 years imprisonment in addition to payment of a fine of Kshs. 2 million in default to serve 12 months imprisonment.
  - ii. count II, he was sentenced to serve 7 years imprisonment, in addition, to paying a fine of Kshs. 1 million in default to serve 12 months imprisonment.
  - iii. In count III, he was sentenced to serve 3 years imprisonment in addition to a fine of Kshs. 250,000 in default to serve 12 months imprisonment.



- iv. In counts VI and VII, he was sentenced to pay a fine of Kshs. 80,000 in default to serve 12 months imprisonment on each of the counts.
  - v. In count IX, he was sentenced to pay a fine of 200,000 in default to serve 12 months imprisonment.
3. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In his petition of appeal dated 20<sup>th</sup> July 2022, the appellant raised eight grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He also contended that the sentence imposed was harsh and excessive.
  4. In response, the appellant filed grounds of opposition dated 17<sup>th</sup> October 2022. The grounds raised are that the appeal lacks merit and is misconceived. The appellant has not demonstrated any special or unusual circumstances to warrant the appeal to be upheld. The prosecution discharged their burden of proof beyond reasonable doubt.
  5. The prosecution called eleven(11) witnesses in support of their case. PW3, Corporal Albashir Olow, stationed at the Directorate of Criminal Investigations, Anti-narcotics Unit, testified that on 3/11/2017, accompanied by Corporal Sitienei and Corporal Mjomba (PW6), they apprehended the appellant at a pharmacy near Yaya Centre. They informed him of the ongoing investigation, his rights, and the reasons for his arrest before escorting him to Muthaiga Police Station. During the arrest, they seized a small black Nokia phone from him, which they handed over to Inspector Oruko.
  6. PW4 Robert Gachohi Njoroge, a caretaker, testified that he was contacted by a police officer named Mjomba (PW6) to open the gate of a property belonging to his employer, Sara Njambi. Later, Mjomba (PW6) requested access to a specific house, claiming to have received drugs from there. Njoroge cooperated and was subsequently asked to open the main gate for further investigation. He later received a call from Officer Oruko to record a statement. Njoroge stated that the appellant, one of his tenants, lived in room 308 on the third floor, although he didn't personally oversee his moving in, so he lacked documentation confirming his tenancy. These events occurred on 4/11/2017.
  7. PW2, Joshua Plekwa, a Pharmaceutical Inspector with the Drug Crime Investigations Department of the Pharmacy and Poisons Board, testified that they received requests from the Directorate of Criminal Investigations regarding the registration status of Patrick Munyasa Shifuma with the Board and the registration status of Bulbul Medical Clinic and Pharmacy. They confirmed that Patrick Munyasa Shifuma was registered with the Board but that Bulbul Medical Clinic and Pharmacy was not.
  8. He received further requests regarding the classification and valuation of various drugs, including Ketamine, DF118, Dormicum, Xanax, Rivotril, and Ritalin. They provided detailed responses regarding the classification of these drugs as prescription-only medicines with potential for abuse and addiction. They also valued the quantities of these drugs provided, determining a total estimated value of Ksh. 4,235,346.
  9. PW1, Denis Owino Onyango, a designated analyst with the Government Chemist Department, Nairobi, testified that on 5/11/2017, at the anti-narcotics unit general office at the DCI headquarters, he sampled assorted packets containing tablets and liquid substances suspected to contain narcotic drugs and psychotropic substances. Patrick Shifuma, the appellant, declined to sign the certificate of sampling, but Inspector Abel Onyapidi and police officers Ishmael Oruko and Bernard Nyolei signed it. There were a total of twenty-six samples, and due to the nature of the substances, preliminary examination or analysis wasn't possible.



10. Later, on 9/11/2017, under the escort of PC Ishmael Oruko, he received the exhibits at the Government Chemist Department. After placing the exhibits in a CID evidence bag, he conducted an analysis of various liquids and tablets. He reported his findings for each sample, signing the report on 5/2/2018 and affixing a government seal. The exhibit memo accompanying the exhibits was marked as Q85/17 upon receipt. He identified the exhibit memo and produced the certificate of sampling and report of the government analyst as prosecution exhibits.
11. PW5, Joshua Okalo, based at the anti-narcotics unit, received an internal memo from PC Oruko on 20/2/2018 requesting him to prepare certificates of valuation as per Section 86 of the *Narcotic Drugs and Psychotropic Substances (Control) Act*. Attached to the memo were a report of valuation from the Pharmacy and Poisons Board dated 9/2/2018, a copy of the government analyst's report, and a copy of the charge sheet involving the appellant, Patrick Munyara Sifuna. Upon examining the substances listed in the valuation report, Joshua determined that the first three substances were not listed under any schedules of the Act, while the next five were under Schedules 1 and 2. Consequently, he prepared five certificates of valuation:
  - i. DF 118 (Dihydrocodeine), listed as a narcotic drug under Schedule 1, consists of 9,000 tablets valued at Ksh. 690,867.72.
  - ii. Ritalin (Methylphenidate), listed as a psychotropic substance under Schedule 2, comprises 6,240 tablets valued at Ksh. 384,800
  - iii. Dormicum, also a psychotropic substance under Schedule 2, totaling 960 tablets valued at Ksh. 84,000.
  - iv. Xanax (Alprazolam), listed as a psychotropic substance under Schedule 2, with 5,900 tablets valued at Ksh. 51,389.
  - v. Rivotril (Clonazepam), another psychotropic substance under Schedule 2, with 150 tablets valued at Ksh. 4,250.
12. These certificates corresponded to counts on the charge sheet, providing a valuation for the substances involved in the case.
13. PW6, Sergeant Francis Mjomba, attached to the Directorate of Criminal Investigations-anti-narcotics headquarters, testified about an operation on 3/11/2017 based on an intelligence report regarding a suspect allegedly involved in storing and distributing psychotropic substances. In the company of his colleagues, they went to the New Pharmacy at Yaya Centre and found the suspect in a chemist. They explained their presence, interrogated him, informed him of his rights, and then arrested him, taking him to Muthaiga Police Station. The next day, the suspect led them to his house in Umoja Innercore area, confirming his tenancy with the caretaker. Inside the one-room house, they found cartons of pharmaceutical drugs, loose pharmaceutical drugs, and other items.
14. During the search, conducted by police constable Oruko with assistance from PC Nyolei, scenes of crime personnel arrived early and documented the scene. A search certificate and inventory were prepared, listing recovered items including documents, cash totaling Ksh 138,500, USD 100, and Tanzanian Shillings, among other items. The inventory and search certificate were signed by the appellant, and officers present: Sergeant (PW6), PC Oruko, PC Nyolei, and PC George Odhiambo.
15. PW7, Police Constable Bernard Nyolei, based at the Directorate of Criminal Investigations (DCI) headquarters, testified that on 4/11/2017 around 8:30 am, he joined Inspector Oruko to interrogate the appellant arrested the previous day for suspicion of storing and distributing narcotic drugs and



psychotropic substances, held at Muthaiga police station. They requested him to lead them to his house in Umoja Innercore house number 304.

16. Inside, they found scattered cartons in the room, documented by the scene of crime personnel before commencing the search. They recovered assorted suspected psychotropic substances, documented them, and transported them to the DCI headquarters' armory for sampling and weighing. The appellant was the subject of this investigation. He detailed the contents of each package mentioned during his testimony.
17. Inspector Michael Njenga, appointed by the Director of Public Prosecutions, testified that Inspector Oruko of the anti-narcotics unit requested him to accompany him to a house in Umoja owned by Patrick Shifuna Munyasa, where suspected narcotic drugs had been recovered. In response, he took twenty-five photographs marked serially from No. 1 to No. 25, describing them in his testimony and presenting them as prosecution exhibits 20(1) to 20(25). He also prepared a report and certificate regarding the photographs, presented as prosecution exhibits.
18. Chief Inspector of Police Susan Wambugu, also referred to as PW8, testified as a qualified forensic documents examiner with eight years of experience at the DCI headquarters' forensic document examination section. She received exhibits accompanied by an exhibit memo from the anti-narcotics unit headquarters under the escort of Police Constable Ishmael Oruko. Exhibit A was a cash sale/invoice from Bulbul Medical Clinic and Pharmacy, dated 31/5/2016, containing questioned handwriting and stamp impressions. Specimen handwriting samples of Patrick Shifuna and specimen stamp impressions from Bulbul Medical Clinic were also provided.
19. Wambugu conducted a forensic analysis, comparing the questioned handwriting and stamp impressions with the specimens provided. She concluded that the questioned handwriting matched the specimen handwriting of Patrick Shifuna and that the stamp impressions were made by the same instrument as the known specimen. She utilized a video-specimen comparator USC 6000 and a superimposition procedure for her analysis. She prepared a report dated 01/12/2017, which she signed and presented as a prosecution exhibit.
20. PW9, Chief Inspector Abel Onyapidi, stationed at the Crime Scene Investigation office at DCI headquarters, documented exhibits suspected to be narcotics drugs impounded and escorted to DCI headquarters on 5/11/2017. He documented the cartons of various drugs, most of which were in injection form, in the presence of the government chemist and the appellant. After documentation, samples were taken by the government analyst for further testing and analysis at the government chemist laboratory. He captured the process with fifty-five photographs, which he presented as prosecution exhibits along with a certificate prepared in respect thereof.
21. PW10, Inspector Ishmael Oruko, from the Directorate of Criminal Investigations, anti-narcotics unit at DCI headquarters, received a call from the Director of anti-narcotics Mr. Hamisi Massa on 3/11/2017, informing him of a suspect arrested for trafficking in narcotic drugs at Muthaiga Police Station. On 4/11/2017, he, along with Corporal Mjomba (PW6) and Police Constable Benard Nyolei, took the suspect to DCI headquarters for interrogation. After interrogation, they proceeded to the suspect's house in Umoja, where they found assorted drugs. He identified and produced the recovered items, along with related documentation such as the inventory, search certificate, Notice of Seizure, Record of Custody of Seized Substances, and Notice of Intention to Tender Records in Evidence. He conducted investigations and subsequently preferred charges against the appellant
22. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he testified that he was, a licensed pharmaceutical technologist with extensive experience, and detailed his career trajectory. After training and obtaining



his license, he established multiple pharmacies over the years, including Desanied Pharmaceutical and Lumumba Pharmacy. Despite planning to launch Shuma Pharmacy, delays prompted him to work as a technical advisor at Neem Pharmacy. Eventually, he co-founded Kitengela Destiny Chemist. His pharmacies were registered to dispense both non-prescription and prescription-only medicines, including controlled substances. The accused highlighted his compliance with regulatory standards and his supervisory role in ensuring the legality of pharmaceutical operations. His testimony aimed to demonstrate his legitimate involvement in the pharmaceutical industry and adherence to regulatory guidelines.

23. 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.

### **Counts I, II, and III.**

24. 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;

25. The prosecution presented eleven witnesses who testified that the appellant was operating a pharmacy that sold narcotic and psychotropic substances. The appellant was arrested by PW3 and PW6 while at the business premises after investigations were conducted. PW3, After his arrest, the appellant took police officers to his premises in Umoja Innercore Estate. There, the caretaker, PW4 facilitated police access to the appellant's house. At the premises, more substances were recovered which were presumed to be narcotics. PW7, Police Constable Bernard Nyolei, described the house search and substance recovery. Inspector Michael Njenga testified on photographic evidence. Chief Inspector Abel Onyapidi documented impounded substances, and Inspector Ishmael Oruko oversaw the investigation and documented evidence.
26. 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.
27. On whether the substance recovered was narcotic, the government analyst, PW 1 testified that he conducted a preliminary test of the substance recovered from the appellant's premises. Preliminary analysis was impossible due to the nature of the substances. On 9/11/2017, he received the exhibits at the Government Chemist Department, conducted analysis on various liquids and tablets, and signed the report on 5/2/2018, affixing a government seal. The test confirmed that the substance contained narcotic and psychotropic substances 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.
28. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt that the prosecution proved beyond reasonable doubt the offence charged in counts I, II, and III.



## Counts VI, VII, and IX

29. In counts VI and VII, the appellant was charged with the offence of being unlawfully in possession of Part I poisons contrary to section 26 (2) of the *Pharmacy and Poisons Act*. With regards to count one, Section 26 of the *Pharmacy and Poisons Act* on the possession of part I poisons provides as follows:

“It shall be lawful for the following persons may be in possession of Part I poisons, but to the extent only and subject to the limitations prescribed by this subsection that is to say—

- i. a wholesale dealer licensed under section 27 of this *Act*, for the purposes of the licence and on the premises so licensed;
- ii. an authorized seller of poisons, on premises registered under section 23 of this *Act*;
- iii. a person licensed under section 28 of this *Act* to sell poisons for mining, agricultural or horticultural purposes, for the purposes of the licence and on premises so licensed;
- iv. any person, institution or department, to whom a Part I poison has been lawfully sold in accordance with section 29 of this *Act*, for the purpose for which such sale was made;
- v. any person for whom the poison has been lawfully supplied or dispensed by a duly qualified medical practitioner, dentist, or veterinary surgeon, or by a hospital, dispensary or similar institution under the provisions of section 31 of this *Act*;

subject to any conditions which may be prescribed, a representative of a person engaged in the business of selling and supplying pharmaceutical goods, for the purpose of giving free samples of such goods, in the course of such business, to persons who may lawfully be in possession of Part I poisons;

- vi. the personal representative of any deceased person, or the liquidator, receiver or other person appointed to deal with the property of a bankrupt or of a company which is being wound up compulsorily, or the manager of the estate of a person of unsound mind, in respect of poisons in the possession of the deceased person, bankrupt person, company or person of unsound mind at the time of the death or bankruptcy or the beginning of the winding up or the order appointing the manager, for the purpose of disposing of those poisons, with the written permission of the Board and in accordance with its directions, to a wholesale dealer in poisons licensed under this Act or to an authorized seller of poisons.

- (2) Any person who is in possession of a Part I poison otherwise than in accordance with the provisions of this section shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.”

30. The prosecution adduced evidence to the tune that the Appellant herein was found in the chemist by the pharmaceutical inspectors and the police officers and upon the request to produce the operating



license from the Pharmacy and Poisons Board the Appellant he was unable to produce the same. The part I poisons were also seized from both the business premises and his house. In these counts the Appellant was charged for being the owner of the business. The premises were not properly licenced by the Pharmacy and Poisons Board.

31. It is a fact that officers who arrested him were on a lawful course of inspecting outlets dispensing pharmaceutical drugs and that for such a business to operate as a Chemist in Kenya, crucial documents and/or licences must be obtained from the Pharmacy and Poisons Board. The Pharmaceutical Inspectors from the Board are charged with the duty of issuing licenses and had the requisite knowledge and experience to reasonably interrogate any such documents that were not presented to them in the case herein. The appellant was found inside the chemist selling and/or dispensing medicines which were confirmed to be narcotic and psychotropic substances. In addition, he was found in possession of Ketamine and Ketamax vals which are considered to be Part I Poisons.
32. In his defence, the appellant did not dispute that the premises were not registered. However, he maintained his innocence by trying to demonstrate his legitimate involvement in the pharmaceutical industry and adherence to regulatory guidelines.
33. Having considered the totality of the evidence presented before the trial court, I have applied the aforementioned reasoning and find that the Appellant was culpable for the offences charged in counts VI, VII, and IX. The conviction by the trial court was largely based on the understanding that the Appellant carried on the business of a pharmacy in premises not licenced for such a business. In addition, he was found in possession, of Part 1 Posions. The conviction is therefore affirmed.
34. On sentence, the appellant challenged the sentence imposed as being harsh and excessive. However, during the sentencing proceedings, the court considered the mitigation, the presentence report. the value of the narcotics and psychotropic substances recovered, the applicable law, and the time spent in remand custody. I find that the sentence imposed was not only proper but also legal.
35. In the upshot, the appeal is found to be lacking in merit and is hereby dismissed.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF APRIL 2024**

**D. KAVEDZA**

**JUDGE**

In the presence of

Appellant absent

Mr. Mong'are for the Respondent

Nelson Court Assistant.

