



REPUBLIC OF KENYA



**Opondo v Republic (Criminal Appeal 10 of 2023)
[2024] KEHC 3833 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 10 OF 2023
DR KAVEDZA, J
APRIL 23, 2024**

BETWEEN

HUMPHREY OMONDI OPONDO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. L.O Onyina (C.M) on 27th October 2021 at JKIA Chief Magistrate's
Court Criminal case no. 115 of 2018 Republic vs Humphrey Omondi Opondi)*

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 pay a fine of Kshs 15,000,000 in default to serve 1-year imprisonment. In addition, he was sentenced to serve twenty-two (22) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his appeal, the appellant raised 7 grounds which have been coalized as follows: The appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that crucial witnesses were never called to testify. He complained that the sentence imposed was illegal. He urged the court to allow his appeal.
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 v Republic* [1973] EA 32).
4. The prosecution called nine (9) witnesses in support of their case. Police Constable Isaac Muthama Munene,(PW3) stationed at Jomo Kenyatta International Airport, testified that he is the proprietor of



seven rental units in Embakasi, Mihango. He told the court that the appellant rented one of the units and paid a monthly rent of Ksh. 8,000 from January 2016. On 16th September 2018, he received a call informing him that police officers were at his premises and wanted to see the owner. Upon reaching the residence, he found the appellant in the company of police officers. He was informed that the appellant was suspected of drug trafficking.

5. On the afternoon of September 16, 2018, while on duty, officers from the Special Crime Prevention Unit in Nairobi, including Corporal Bethwel Langat (PW1) Inspector Peter Muthee (PW2), Corporal Sang, Corporal Ndonge, Police Constable Makeni, Police Constable Chebor, Police Constable Serem, and Police Constable Matunda, received a tip-off via phone from an informant. They arrived in Utawala where they found the appellant who was detained on suspicion of involvement in drug trafficking. A search was conducted by officers from the Anti-Narcotics Police Unit who arrived at the scene later on.
6. Corporal Geoffrey Kipkurui,(PW5) a police officer from the Anti Narcotics Police Unit told the court that on September 16, 2018, he received intel regarding a suspected drug trafficker sighted in Mihango, Embakasi, Nairobi County. Accompanied by Police Constable Benard Nyolei, they drove to the location. At the scene, they found officers namely; Inspector Peter Muthee (PW2) and Corporal Langat (PW1). The appellant was also present and he identified himself as a businessman.
7. PW5, along with Police Constable Benard Nyolei, searched while officers from the Special Crime Prevention Unit provided security. They began in the sitting room, where they found nothing, then moved to the kitchen with similar results. The appellant then directed them to his bedroom, where PW5 found a black traveling bag. Inside were two shopping bags, one brown and one reddish. Suspecting narcotic substances, they found packages inside the reddish bag and another bag within the brown one, containing similar packages. PC Nyolei photographed the evidence while PW5 labeled the bags with markings.
8. PW5 proceeded with the search and found identification documents in the wardrobe drawer, including a Kenyan passport, identification card, and international vaccination certificate, all belonging to the appellant. He called PW1 and PW2 into the bedroom to show them the recoveries before continuing the search. They concluded with a search of the washroom. He prepared an inventory and search certificate, signed by himself, Opondo, and Police Constable Benard Nyolei and Bethwel Langat(PW1), Upon piercing the packages, PW5 confirmed they contained creamish substances. He then prepared a Notice of Seizure, signed by himself and the appellant.
9. Sergeant Stephen Chesire (PW8), a police officer from the Directorate of Criminal Investigations, anti-narcotics unit, was tasked to take over investigations from Corporal Geoffrey Kipkurui regarding a drug trafficking case. Pw 5 and Police Constable Bernard Nyolei visited a scene and handed over recovered substances, items, documents, the Notice of Seizure, inventory, and search certificate. He visited the appellant whom he accompanied to the government chemist for weighing and sampling, along with Corporal Kipkurui(PW5). He also engaged Corporal Jenipher Sirwa (PW7) from Scene of Crime Support Services to document the proceedings at the government chemist premises.
10. Corporal Jenipher Chepkosgei Sirwa (PW7), a designated scene of crime officer based at Nairobi Area County headquarters, testified that on September 18, 2018, Sergeant Chesire from DCI headquarters asked her to accompany him to the government chemist to photograph exhibits related to a narcotics trafficking case. She complied and took numerous photographs, including those taken during weighing and sampling. These details were presented in her testimony, and the photographs were submitted as prosecution exhibits



11. Ms. Eunice Wamuyu Njogu (PW4), a government analyst at the government chemist headquarters in Nairobi, conducted sampling in the presence of the appellant and police officers Stephen Chesire, Jenipher Sirwa, and Geoffrey Kipkurui. She prepared a certificate of sampling, signed by herself and witnessed by the four individuals. Additionally, she signed a certificate of weighing, also witnessed by the same officers, dated September 18, 2018, for weighing conducted. The first package weighed 1.01481 Kgs, and the second package, weighed 1.00959 Kgs, totaling 2.0244 Kgs. After weighing, PW4 extracted samples from these packages, which she handed over to a police officer for presentation to the government chemist as exhibits.
12. On September 20, 2018, PW4, Eunice Wamuyu Njogu, received exhibits from the Anti-narcotics Unit at DCI headquarters, escorted by Sergeant Stephen Chesire. The exhibits, creamish powdery substances were analyzed on September 21, 2018, revealing diacetylmorphine, known as heroin, with 70% purity. PW4's report, prepared and signed on October 15, 2018, confirmed these findings and was presented as a prosecution exhibit
13. Inspector Philip Langat (PW6), stationed at Kasarani DCI anti-narcotics unit, received a call from Sergeant Stephen Chesire (PW8) on September 16, 2018, informing him of the arrest of the appellant with two suspected narcotic packages. He was later informed of the positive heroin analysis and the total weight of 2.0244 Kg. He calculated the value, Ksh. 6,073,200, aiding in drafting the charge sheet. He prepared a Certificate of Valuation, presented as a prosecution exhibit.
14. PW9, Corporal Derricks Kiprono, processed a sealed packet marked B, containing a photographic CD and exhibit memo referencing CR 121/313/2018, supposedly signed by PC Nyolei. The memo requested photographic prints processing from the scene. He produced sixteen photographs from the CD, presenting them along with the exhibit memo and a certificate as prosecution exhibits. During cross-examination, he clarified that he was not present during PC Nyolei's photography session and didn't know the camera used.
15. 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 gave unsworn evidence and did not call any witnesses. He testified that In his unsworn testimony, the accused stated that he resides in Mihango, Utawala, where he was on September 16, 2018. He recounted that around 2:00 pm, police officers arrived at his residence without explaining the reason, eventually requesting to search his house. Initially, six officers conducted the search, finding nothing but collecting his phones and laptop. Later, a larger group of about fifteen officers arrived, conducting another search. During this time, the accused was briefly taken outside to a Subaru car for about an hour before being brought back to the sitting room. Subsequently, another search commenced, lasting about five minutes, during which the officers claimed to find a bag in the bedroom. The accused questioned why it took so long to find the bag and why the media was called when they arrived late. He also attempted to call his landlord and the local chief to witness the search but was denied permission by the officers.
16. This court has re-evaluated the evidence adduced before the trial court, the Appellant's grounds of appeal as well as the rival parties' submission. Section 4(a) of the [Narcotic Drugs and Psychotropic Substances Control Act](#) provides as following;

“ 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;”
17. The case against the appellant was that on 16th September 2018, police responded to a narcotics tip-off at a residence in Mihango-Utawala Estate. The suspect was the appellant herein. He was found on the premises which he had rented from a PW1 tenant from January 2016. Subsequent searches in the premises revealed suspected narcotic substances in the bedroom where two brownish packages. The appellant did not dispute being a tenant on the premises. The Crime Scene Officer (PW7) documented the scene with photos, reports, and certificates.
 18. The suspected packages were weighed at the suspects' packages were weighed at 2.0244 Kgs, witnessed by the appellant, and the government analyst, PW4. PW6, provided a valuation of Ksh 6,073,200, for the 2.0244 Kgs of heroin on the suspected narcotic substances based on the charge sheet, weighing certificate, and government analyst's report.
 19. 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's premises. The chain of custody of the exhibits was clearly explained by the prosecution witnesses.
 20. On whether the substance recovered was narcotic, the government analyst PW4 testified that she conducted a preliminary test of the substance recovered from the appellant's premises. The test confirmed that the substance contained heroin. She conducted a sampling exercise and determined the purity of diacetylmorphine in the creamish substance. 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.
 21. In his defence, the appellant denied knowing the existence of the heroin in his premises. He argued that he was likely framed by the anti-narcotic unit. The court considered his defence and found it to be incredible. In view of 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.
 22. The appellant also complained that essential witnesses were not called to testify. In particular, he contended that PC Nyolei who was present during the recovery of the alleged narcotic substances was never called as a witness in contravention of section 150 of the [Criminal Procedure Code](#). He argued that the failure was fatal to the prosecution's case and as such, his conviction should not be sustained.
 23. Section 143 of the Evidence Act provides that in the absence of any requirement by the provision of law, 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).
 24. From the record, PC Nyolei was present during the search and seizure. However, other officers were also present namely PW1, PW2, and PW5. Their corroborated evidence was therefore sufficient to convict the appellant. From the totality of the prosecution's case, I hold the view that his evidence was



not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with the proviso to section 124 of the *Evidence Act*.

25. 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.
26. On the sentence, the appellant was sentenced to pay a fine of Kshs 15,000,000, in default to serve 1-year imprisonment. In addition, he was sentenced to twenty-two (22) years imprisonment. The appellant argued that the sentence was illegal, harsh, and excessive.
27. From the record, the said narcotic drugs were duly weighed and found to be the value of a substance (heroin) weighing 2024.4 grams with a market value of Ksh. 6,073,200. 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, that he was remorseful and the period spent in remand custody. The sentence meted out was therefore within the law.
28. That notwithstanding, sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, and was 32 years at the time the offence was committed, the appellant still has a full life ahead of him and needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.
29. For the above reasons, I hereby set aside the additional sentence of 22 years imposed and substitute it with a sentence of 12 years imprisonment. Consequently, the appellant is sentenced to pay a fine of Kshs 15,000,000 in default to serve one-year imprisonment. In addition, he is sentenced to serve 12 years imprisonment to be computed from the date of his conviction having considered the time spent in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Gladys for the Respondent

Appellant Absent

Nelson Court Assistant

