Otigbu v Republic (Criminal Appeal 200 of 2016)
[2022] KECA 1247 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1247 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 200 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

NOVEMBER 4, 2022

BETWEEN

EUGINE ODERA OTIGBU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Busia, (Korir, J.) dated 28th July, 2016 in HCCRA NO. 10 OF 2015)

JUDGMENT

1. Eugine Odera Otigbu (The appellant) is serving a sentence of 20 years' imprisonment having been convicted for the offence of trafficking in narcotic drugs contrary to section 4 (a) of the *Narcotics Drugs and Psychotropic Substances (Control) Act* No. 1 of 1994 (the Act). At trial, the prosecution's case was that on 6th April, 2014 at around 1830 hrs at Busia Township within Busia County, he was found trafficking in narcotic drugs namely 7kgs of heroin with a market value of Kshs. 7,000,000 in contravention of the provisions of the Act.

2. PC Daniel Busienei (PW1) was at the material time stationed at Busia Police Station. At about 6.00pm, while on the beat along Kenya- Busia border with his colleague P.C. Jackson Chemitei (PW2), they stopped a motor cycle carrying 2 pillion passengers. Upon inquiry they found one to be of Nigerian nationality and the other to be a Ugandan. The Nigerian had a passport but which was not duly stamped with a visa. PW1 also searched a manila bag he was carrying. Inside it were, among other things, clothes, human like sculptures and 2 black polythene bags with flour-like substances. PW1 arrested the Nigerian with the intention of charging him with being unlawfully present in Kenya. Eventually so charged, the Nigerian, who is the present appellant, pleaded guilty, was convicted and fined Kshs. 100,000 and in default to serve one year imprisonment.

3. PW2 gave similar evidence to that of PW1.The two officers returned to the police station at about 6.45pm and handed over the 2 polythene bags containing the flour like substances to Inspector Walter Ongaga (DW5). DW5 kept the exhibit in overnight safe custody. The following day he handed them over to Roseline Opondo (PW4). She is a police officer attached to the Anti-Narcotics Police Unit, Busia. She collected the 2 black paper bags with flour like substances, prepared an exhibit memo form and took the exhibits for analysis at the Government Chemist.

4. There, the flour-like substances were tested by Richard Kimutai Langat (PW3), a government analyst based at the Government Chemist, Kisumu. He came to the conclusion that the white and yellow flour like powders contained diacetylmorphine, the scientific name for heroin, a narcotic drug.

5. Upon the close of the prosecution's case, the appellant was put to his defence. However, on January 20, 2015, the appellant, through counsel, applied for the recall of PW3, an application opposed by the State. The trial court upheld the objection and rejected the application. Apparently upset with the rejection, the appellant chose not to give any evidence in defence.

6. It was on the basis of that evidence, which we have abridged, that the trial court convicted the appellant and imposed a rather curious sentence, a fine of Kshs. 20,000,000 and in default to serve 20 years' imprisonment. Curious because, even after observing that, "this is a serious offence for which the law provides a strict sentence" he imposed, not just an unlawful sentence, but one that was obviously much more lenient than that prescribed by statute. On the first appeal, the unlawful sentence was set aside by Korir J (as he then was) who, after affirming the conviction imposed a sentence of 20 years' imprisonment, and a fine of Kshs. 3,000,000 and in default to serve one year imprisonment to run upon completion of the 20 years' imprisonment. The sentence imposed by the High Court being in consonance with the penalty then provided in section 4 (a) of the Act: -

> 4. Penalty for trafficking in narcotic drugs,
>
> 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; or...

7. In this second appeal, the grievances before us are that the trial and first appellate court erred in law by failing to appreciate that the charge sheet was incurably defective; by failing to hold that the appellant's rights under articles 25 (c) and 50 (2) (b) and (j) of *the Constitution* were violated; by failing to appreciate that the exhibits were not properly quantified and valued; by failing to appreciate that the sentence imposed was against the weight of evidence adduced; by failing to appreciate that the evidence of recovery was not proved beyond reasonable doubt and by failing to appreciate that the sentence is unconstitutional due to its mandatory nature.

8. As we turn to consider and determine each ground of appeal, we are alive to our circumscribed mandate imposed by section 361 (1)(a) of the *Criminal Procedure Code* as a second appellate court. Of this mandate, this Court in *Njoroge vs Republic* [1982] KLR 388 stated: -

> " On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence."

9. The appellant urged us to find that the charge sheet was defective for failing to specify the alleged manner of trafficking. In this regard, the appellant cited the decision of this court in *Mohamed Famau Bakari v Republic* [2016] eKLR in which it held:

> " The main complaint in this appeal is that the charge as framed did not specify the manner in which the appellant was trafficking in drugs, since under section 2(1) of the Act, trafficking can entail the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution; and that the charge sheet ought to have identified one of the foregoing transactions that the appellant was allegedly engaged in at the time of his arrest. We agree that since trafficking under the law involves 12 distinct activities, the specific transaction or transactions a suspect is accused of must be specified in the charge. As part of fair trial the suspect must know the case against him."

10. In rebuttal, Ms Vitsengwa, learned prosecution counsel, submitted that both courts below were in agreement that the manner of trafficking was clear from the evidence that the appellant was transporting the narcotics and the kind of activity he was engaged in at the time of arrest was not in dispute, that is, he was travelling on a motorbike towards Uganda. Counsel submitted that although transportation is not part of the definition of trafficking under section 2(1) of the Act, the nature of the transaction the appellant was engaged in when he was arrested is found in the words 'illicit traffic' in section 2. That the appellant was not prejudiced by the charge as drawn since there was no dispute that he was travelling on a motorbike when he was arrested and found with the drugs. Counsel also added that the charge as framed contained sufficient particulars as to the nature of the offence.

11. At the first appeal, Korir, J (as he then was) answered the appellant's complaint on the charge sheet as follows:

> " 21. In the case before me in the manner in which the Appellant was trafficking in the narcotic drugs was not specified. However, no prejudice was suffered by the Appellant as the kind of activity he was engaged in at the time of his arrest was not in dispute. In the words of the Court of Appeal in the just cited case, "(t)he answer to the nature of the transaction the appellant was engaged in when he was arrested is to be found in the words "illicit traffic" in section 2." It cannot thus be said that failure by the prosecution to specify in the charge sheet the kind of trafficking the Appellant was engaged in occasioned him any injustice."

12. We echo the words of this Court in *Mohamed Famau Bakari* (supra) that as statute contemplates that there are 12 distinct ways in which trafficking can be carried out, it is of paramount importance that the exact manner of trafficking an accused person is alleged to have been involved in is specified in the charge sheet. A tenet of a fair criminal trial is that there must be clarity of the case an accused person is facing so that she/he can choose how to answer it and if the choice is to defend it, to be certain as to what is to be confronted.

13. The particulars of charge set out in the charge sheet were that "On the 6th day of April 2014 at around 1830hrs at Busia Town-Ship within Busia County, was found trafficking in Narcotic drugs namely Heroin to wit 7kgms with a market (value) of Kshs. 7,000,000/= in contravention of the provision of the said Act".

14. As observed by the first appeal court, the charge sheet was defective in not specifying the nature of trafficking that the appellant is alleged to have undertaken. On our part we hold that from the manner of questions the appellant asked in cross-examining the two police officers who found him with the substance that later turned out to be narcotic substance, there would be no doubt in the mind of the accused that he was charged with possessing the substance while on transit on a motorcycle to Kampala and Congo. This would be conveyance of the substance, one of the ways of trafficking contemplated in the Act. In section 2 of the Act, the word "conveyance" means a conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel. Clearly by use of the word "includes" the three means specified is not a closed list. We have no doubt in our minds that carriage of a drug on a motor cycle is a conveyance. We are unable to discern any prejudice the appellant suffered on account of the defect. Yet, in reaching this conclusion, we must not be understood to be trivializing the need for a charge sheet to be as specific as required by statute. We would have, without hesitation, found in favour of the appellant had the defect in the charge sheet compromised his right to a fair trial. It seems to us wholly unnecessary that the DPP should risk failing in his prosecutorial role simply because of inattention in framing a charge.

15. Just as he did before the first appeal court, the appellant complained that he was not supplied with witness statements to enable him adequately prepare his defence. Our attention is drawn to the proceedings of September 23, 2014 in support of the argument that the witness statements were never supplied to him.

16. The State retorts that nowhere in the record does it show that the appellant was not supplied with the witness statements and the only time that the appellant informed the trial court that he did not have copies of an exhibit was when the appellant told the trial court that he was ready to proceed only after supply of the analyst report which he was then duly furnished with. We note that he has not specified which documents were not supplied to him and even his advocate who came on record when one witness was remaining was able to proceed with the cross-examination of the witness.

17. We traced and perused the original court file as it became apparent to us that the typed proceedings were improperly paginated and may not have accurately represented the flow of proceedings. The proceedings of July 2, 2014 read;

> Prosecution: I am ready with 5 witnesses in court
>
> Accused: I shall proceed if I am given the analyst report
>
> Prosecution: We are supplying the same right now
>
> Accused: I shall proceed after perusing it
>
> Court: The report to be supplied to accused. Case to proceed at 11.00am
>
> 11.00am
>
> Court: Parties are present
>
> Accused: I have got the report. We may proceed.
>
> Court: Case to proceed.

18. It is clear from the proceedings of the day that the appellant was happy to proceed with the hearing once he was furnished with the government analyst report. There is no suggestion that witness statements of the four witnesses had not been furnished to him and the cross examination by the appellant of the witnesses was robust and gives no hint of inadequate preparation. It is on September 23, 2014 that counsel comes on record representing the appellant. Counsel Miano asked for witness statements and the trial court made an order that they be furnished to him. The matter is adjourned to October 13, 2014 but eventually proceeds on October 22, 2014 when the last witness testified. Counsel does not complain that the statements he had sought had not been furnished to him. The matter proceeded and counsel cross examined the witness. In the circumstances, we are not able to discern any violation of the appellant's constitutional right enshrined in articles 25 (c) and 50 (2) of *the Constitution*.

19. We turn to another aspect of the appeal. It is contended that the prosecution failed to prepare an exhibit on inventory to be counter-signed by the appellant and a third party or an independent witness as stipulated under section 19 of the *Police Act* Cap. 84 in support of the alleged evidence of search and recovery. Apart from the fact that the *Police Act* was repealed by the *National Police Service Act* on 30th August 2011 and was therefore inapplicable to this matter, this is not one of the issues raised in the first appeal and cannot be properly before us for determination. This court has on countless occasions pronounced itself on this position. See for example in *Alfayo Gombe Okello v Republic* [2010] eKLR where this court held:

> " Firstly, the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

20. We are satisfied that the evidence adduced proved that 2 black polythene bags with flour-like substances in them were recovered from the appellant by PW1 and PW2.The two police officers surrendered the 2 bags to PW5 who kept them in safe custody and on the next day handed them over to PW4 who in turn transported the 2 bags, still with the flour-like substances, to Kisumu and handed them over to PW3. PW3, a government analyst, tested the flour-like substances in the two polythene bags and found them to contain diacetylmorphine, the scientific name for heroin, a narcotic drug. There was cogent evidence of how the drug was recovered from the appellant and of how, in an unbroken chain, it was handled upto the time it was tested. The concurrent findings of the two courts below are in tandem with the evidence adduced and cannot be faulted.

21. Before the High Court, the appellant submitted that the prosecution failed to prove that the substance of 7kgs said to have been found on him was pure or crude heroin and to ascertain the ratio of the substance that was found to be heroin. He made those submissions to support his argument that the particulars of the charge were defective. Before us he makes arguments that while the charge sheet indicated the said drugs to be 7kgs, it was unclear as to who had quantified the drug and how it was valued. He further submits that no valuation certificate was tendered in court by a gazetted officer in support of the evidence. For this argument he relied on section 86 (1) (2) of the Act. The thrust of his grievance before us, different from his arguments before the High Court, is that there was improper valuation of the alleged drugs so as to deliberately mislead the trial court into imposing an incommensurate sentence.

22. We have read the submissions and grounds of appeal presented before the High Court. The argument regarding the quantification of the substance is made not to attack the sentence but to show a supposed defect in the charge sheet. Yet, if the charge sheet alleged a higher value than proved and the trial court imposed a sentence on the basis of the value in the charge sheet as opposed to what was proved as

trafficked, then the sentence imposed would be illegal. For clarity we reproduce section 4 (a) of the Act in which is the penal section for the offence:

> 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; or

23. Flowing from that provision, the value of the narcotic has a direct bearing on the fine to be imposed which if unpaid has an imprisonment implication. Hence the singular importance of the value. While the appellant may not have elegantly made his arguments regarding this aspect, we grant him some latitude and find that the issue was properly raised and in doing so we recognize that the appellant, a layman, was acting in person.

24. Section 86(2) of the Act reads:

86. Valuation of goods for penalty

(1) .....

(2) In this section "proper officer" means the officer authorized by the Minister by notification in the Gazette for the purposes of this section.

25. The only moment the value of the narcotic came up in hearing is when PC Roseline Opondo, the investigating officer, testified;

> " The substance were weighing 3kgs and 4kgs respectively a total of 7kgs estimated to cost 7 Million Shillings. This is because it was not possible to separate flour from the Narcotic drugs."

26. The person who valued the narcotic and how the valuation was undertaken is not disclosed. In addition, the certificate required by section 86 (1) of the Act was not produced. Put simply, there was no proper valuation of the narcotic and as a corollary, there was no basis upon which the trial court or the High Court could impose a fine. That aspect of the sentence is for setting aside.

27. On the imprisonment itself, the appellant argued that, on the strength of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic (number 1)* [2017] eKLR, the minimum sentence prescribed under section 4 (a) of the Act is unconstitutional. We have looked at the penal provision as it then read (reproduced elsewhere in this decision) and find that the penalty prescribed is a maximum as opposed to a minimum because of the use of the word "liable" in that provision. We have already held the fine imposed to be unlawful and is for setting aside. As to the imprisonment term of 20 years, we think it to be reasonably lenient taken against a possible imprisonment for life. Nothing has been placed before us that invokes further leniency.

28. Ultimately we reach the decision that the conviction is on firm ground and cannot be upset. On sentence, the fine of Ksh. 3,000,000 imposed by the High Court is set aside. For clarity the prison term of 20 years remains. Only to that very limited extent is the appeal successful.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR