Case Number:	Criminal Appeal 239 of 2019
Date Delivered:	31 Mar 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Cecilia Wathaiya Githua
Citation:	Eromaka Wisdom Ndudiri v Republic[2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL. NO. 239 OF 2019

EROMAKA WISDOM NDUDIRI .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, *Eromaka Wisdom Ndudiri,* was tried and convicted of the offence of trafficking in narcotic drugs contrary *to Section 4 (a)* of *the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.*

2. The particulars of the charge were that on 17th June 2018 at Jomo Kenyatta International Airport (JKIA), Terminal 1A, within Nairobi County, the appellant, jointly with others not before court, trafficked by conveying in a grey travelling bag, a narcotic drug namely heroin, to wit 3,975.56 grams, with a market value of KShs.11,926,680 concealed in the false sides of a grey bag in contravention of the aforesaid *Act*.

3. Upon conviction, the appellant was sentenced to pay a fine of KShs.30 million in default to serve 1 year imprisonment, and, in addition, to serve 20 years imprisonment.

4. Aggrieved by his conviction and sentence, the appellant filed the present appeal. In his amended grounds of appeal filed on 30th June 2021, he advanced a total of nine grounds of appeal.

In summary, the appellant averred that the learned trial magistrate erred in law and in fact: by failing to observe that the photographic evidence tendered by the prosecution contravened *part 3 (1)* of the *Narcotic Drugs and Psychotropic Substances (Control) Seizure, Analysis and Disposal) Regulations 2006;* relying on evidence regarding ownership of the bag which was inconclusive; failing to find that the trial contravened his constitutional right to a fair trial; convicting him on evidence which was contradictory and insufficient to sustain a conviction; and, in disregarding his defence.

5. At the hearing, both the appellant and the respondent chose to prosecute the appeal by way of written submissions which they duly filed. The appellant appeared in person while learned prosecuting counsel *Ms. Ndombi* represented the state.

6. In his written submissions, the appellant expounded on his grounds of appeal. He averred that the prosecution failed to adduce evidence to establish a connection between him and the grey bag and anything recovered from it. He denied that he was found in possession of the bag in which narcotic drugs were recovered. He further submitted that PW1's evidence in chief became null and void when the trial court ordered that hearing should start afresh and the learned trial magistrate thus erred by relying on that evidence since PW1 did not testify afresh as earlier ordered. He asserted that no reasons were advanced by the prosecution for failure to avail CCTV footage before court to prove that he was in actual possession of the bag.

7. In addition, the appellant complained that he was not afforded an opportunity to call a representative during his arrest and subsequent interrogation; that this contravened his right to a fair trial. He argued that the evidence adduced in support of the prosecution was contradictory and did not prove the charge preferred against him beyond reasonable doubt. He therefore urged the court to allow his appeal.

8. The appeal was contested by the state. Learned prosecuting counsel, *Ms. Ndombi* in her written submissions supported the appellant's conviction and sentence. She submitted that the appellant was properly convicted as evidence from the prosecution

witnesses established his guilt beyond any reasonable doubt. She averred that the appellant was accorded a fair trial as none of his rights to a fair trial were violated. She further asserted that the sentence imposed by the trial court was proper and commensurate with the offence for which the appellant was convicted. She invited me to dismiss the appeal in its entirety for lack of merit.

9. The appellant filed further submissions on 17th February 2022 in response to the respondent's submissions in which he highlighted what in his view were material contradictions in the prosecution case which entitled him to an acquittal.

10. A total of eight witnesses testified before the trial court in support of the prosecution case.

The brief facts of the prosecution case is that PW1, who worked as a screener at JKIA was on duty on 17th June 2016 at terminal 1A manning the x-ray monitor. At around 8pm, a passenger arrived and on screening his bag, he noticed something which was not clear. He then requested the owner of the bag to open it so that he could check contents of the bag physically. The passenger, who he identified as the appellant herein opened the bag and emptied his clothes. PW1 stated that even after removing its contents, the empty bag was still heavier than usual. He requested the appellant if he could re-screen the bag while empty and he accepted.

On rescreening the empty bag, the x-ray machine still showed images of something on the sides of the bag which were unclear.

11. PW1 then called his supervisor *Faith Musai* (PW3) who went and joined him. According to PW1, together with PW3, they tore the bag's side and found some white substance which had been concealed in between the sides of the bag. He had by then taken the passenger's Nigerian Passport No. A07437663 and boarding pass which he handed over to PW3.

12. PW1 recalled that the name appearing on the passport was *Eromaka Wilson Ndundiri*. The boarding pass showed that the passenger was travelling to Antananarivo. PW3 testified that upon joining PW1 at Terminal 1 A, she was shown an empty grey bag which on lifting felt heavy. There was a passenger standing besides the bag. On screening the bag, she noted organic substances which were not clear. She called the Airport Security services and was present when the passenger was arrested. She identified that passenger as the appellant herein.

13. PW4 *Chief Inspector Ndegwa* then attached to the Anti Narcotic Police Unit Offices at Jomo Kenyatta International Airport (JKIA) testified that on 17th June 2018 at 2130 hours, he received a telephone call from the Airport's security officers informing him that there was a passenger at terminal 1A with a bag containing suspicious substances. He called the officers on duty and instructed them to proceed to terminal 1 A where the suspect had been intercepted by Kenya Airport Authority (KAA) officers.

14. The officers on duty were PW2 and PW8. On arrival at the terminal, they found PW1 and other KAA officials and the appellant who had been set aside from other passengers. PW1 showed them a grey bag suspected to contain hidden substances on its sides. PW1 handed over to PW8 travel documents recovered from the appellant after which they took him plus the bag to the JKIA Anti Narcotic Unit Offices.

15. While at the office, PW2 and PW8 were joined by PW4. PW8 recalled having informed the appellant of his right to contact an advocate if he so wished before a thorough search on the bag was conducted.

According to PW2, PW4 and PW8, upon searching the bag, they found false compartments on each side concealing unidentified substances. PW8 also recovered from the bag a job identification card in the name of the appellant issued by *Buydudu Action Plan Agency*. He prepared an inventory of all documents and items recovered from the appellant including the bag and suspected narcotic substance. He recalled that PW2 and the appellant signed the inventory as witnesses.

16. On 19th June, 2018, PW4, the Government Analyst PW7 and PW8 convened at the Anti Narcotic offices for weighing and sampling of the unidentified suspected narcotic substance. This was done in the presence of the appellant and his representative *Mr. Collins Odoyo Osewe*.

17. According to PW4, he weighed the substance and its weight was 3,975.56 grams. He prepared a certificate of weighing *(pexhibit6*) which was signed by persons present including the appellant and his representative. PW7 took two samples from the recovered substance and upon performing a presumptive test, she concluded that the substance contained a narcotic drug. This test was later confirmed by a comprehensive laboratory testing done at the Government Chemist Laboratories which revealed that the

two samples contained diamorphine or heroin with a purity level of 54%. She compiled her report which she produced as *pexhibit18*. She also produced a sampling certificate as *pexhibit7*.

18. When placed on his defence, the appellant chose to give an unsworn statement and did not call any witness. In his statement, he admitted having been intercepted at Terminal 1A of JKIA on 17th June 2018 but denied having been found in possession of the grey bag *(pexhibit1)* from which substances confirmed to be narcotic drugs were recovered.

19. He claimed that PW4 and other police officers fabricated the charges against him after he refused to accede to their demands to give them a bribe in the sum of USD10,000.

He further denied having chosen *Collins Osewe* as his representative during the weighing and sampling exercise and that he signed the seizure notice, sampling and weighing certificates and the inventory prepared by PW8.

20. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully aware of my duty as a first appellate court which was aptly captured by the predecessor to our Court of Appeal in ***Okeno V Republic (1972) E.A. 32*** as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya V Republic, 1957 EA 1957 330). It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and draw its own conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial has had the advantage of hearing and seeing the witnesses."

21. After carefully considering the grounds of appeal, the evidence on record and the written submissions filed by the parties, I find that three main issues emerge for my determination, namely:

i. Whether the appellant's right to a fair trial was violated during the trial;

ii. Whether the evidence adduced by the prosecution was sufficient to prove the appellant's guilt as charged beyond any reasonable doubt;

iii. Whether the sentence imposed on the appellant was manifestly harsh and excessive in the circumstances of the case.

22. Before addressing the main issues isolated above, I wish to briefly deal with the appellant's complaint that the learned trial magistrate erred by relying on PW1's evidence in chief which was tendered before the court ordered that hearing would start afresh yet when PW1 was recalled, he did not testify afresh but was only cross examined.

23. According to the appellant, PW1's evidence in chief became null and void after the trial court ordered that hearing would start afresh and it was therefore erroneous for the trial court to rely on it in arriving at its decision to convict him.

24. Although it is true that PW1 had given his evidence in chief on 23rd August 2018 before the trial court ordered that the trial should start afresh and when he was recalled he was only cross examined, the leaned trial magistrate was perfectly in order to rely on his evidence in chief in his judgement since it still formed part of the court record. Although PW1 should have testified afresh in compliance with the court order, failure to do so did not affect the validity of his evidence in chief since the same had not been expunged from the record.

25. Even if the court were to accept the appellant's contention, it is noteworthy that the court's order was made after a minor amendment was made to the charge sheet to correct the appellant's first name and such a minor amendment would not have warranted the recalling of PW1 to testify afresh. Failure to comply with its own order to have PW1's evidence in chief taken afresh may have been an inadvertent error on the trial court's part which could not have caused the appellant any prejudice. Such an error was curable under Section 382 of the Criminal Procedure Code.

26. Turning to the second issue, the appellant complained that his right to a fair trial had been contravened during the trial. He

claimed that he was not given an opportunity to have his advocate present when the suspected drug was being weighed and sampled as required by *Section 74 A* of the *Narcotic Drugs and Psychotropic Substances Control Act* (hereinafter the *Act)*. He also claimed that his rights under *Article 50* of the *Constitution* were violated.

27. In his evidence, PW8 stated that while taking the appellant to the Anti Narcotic offices at JKIA, he had verbally informed him of his right to contact an advocate or a representative if he so wished.

The evidence on record confirms that the appellant and the person described as his representative *Mr. Alphonce Collins Odoyo* were present during the weighing and sampling processes and they both signed the relevant certificates as witnesses.

28. Though the appellant has denied knowledge of how *Mr. Collins Osewe* featured in the documents as his representative, the trial court's record confirms that the said *Mr. Osewe* appeared as counsel for him when he was arraigned in court for plea. The appellant's claim that he did not know *Mr. Osewe* and that he was not his representative during the weighing and sampling process must therefore be false.

29. Although it is desirable to accord suspects an opportunity to have their advocate present during the aforesaid processes, a reading of *Section 74 A* of the *Act* shows that the presence of counsel is optional and not mandatory. In any event, the processes contemplated by *Section 74 A* are pretrial procedures and failure to comply with anything required to be done under the said provision cannot affect the trial rights of an accused person but can only affect the admissibility or probative value of the resultant certificates.

30. I say so because the rights enshrined in *Article 50* of the *Constitution* are rights which are supposed to be exercised and enjoyed by an accused person during the trial. They are not available to suspects who are yet to be charged with a criminal offence. In this case, it is clear that the appellant fully participated in the trial and was represented throughout the trial by advocates of his choice. My reading of the trial court record does not show that any of the appellant's rights guaranteed under *Article 50* were violated during the trial. Nothing therefore turns on that ground of appeal.

31. Regarding the third issue, as stated earlier, the appellant was convicted of the offence of trafficking in narcotic drugs.

"Trafficking" is defined in *section 2* of the *Act* as:

"… the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof…"

32. The prosecution case is that the appellant was arrested at the JKIA terminal 1A after he was found in possession of substances concealed in false compartments of a grey bag which were later certified by PW7 *Ms Catherine Murambi,* a Government Analyst to be heroin; a drug classified as a narcotic drug in *Schedule 1* of the *Act*.

33. When convicting the appellant, the learned trial magistrate reproduced and weighed the evidence adduced in support of the prosecution case and the appellant's statement in defence. The trial court considered the appellant's defence but dismissed it as untrue and unworthy of belief. The claim that the learned trial magistrate did not consider his statement in defence is therefore unfounded

34. In his judgment, the learned magistrate stated as follows:

"The prosecution witnesses who testified about the bag in issue were cross-examined, and PW1 was clear in his testimony that it is the accused person who opened the bag, and is also the one who put back the clothes that had been removed from the bag so that the bag could be rescreened, and that it is the accused who opened the bag also. The evidence of the prosecution witness with regard to the bag is quite consistent, and what the accused stated in his testimony disputing the bag does not, in my finding, create any doubt on the prosecution's case. From the evidence on record, adduced by the prosecution witness, there is proof beyond reasonable doubt that the accused person is the one who had the bag, and the evidence on record is that it was from the same bag that the substance which was subsequently established to be heroin was found."

35. After my own independent appraisal of the evidence, I am unable to fault the learned trial magistrate's finding that the appellant was actually found in possession of the grey bag (exhibit 1) in which substances later found to be heroin weighing 3,975.56 grams were recovered. I did not find any material contradictions in the evidence of PW1, PW2, PW3 and PW8 who were involved in the interception and arrest of the appellant as well as recovery of the substance later confirmed to be heroin. The inventory prepared by PW8 shows that the appellant signed it as the owner of the items listed therein which included the grey bag.

36. Although the appellant denied having signed the documents produced as exhibits in this case, he did not cross examine PW8 or the authors of the other documents including certificates of weighing and sampling to challenge their claim that he actually signed the documents as a witness. He did not deny then that the signatures attributed to him in the said documents did not belong to him.

37. In my view, the evidence adduced by the prosecution witnesses against the appellant was consistent, credible and overwhelming. The appellant's claim that PW4 and his colleagues framed him with the offence after he allegedly refused to part with USD 6,000 cannot be true because if it was true, he would have put this claim to PW4, PW2 or PW8 during cross examination which he did not. In my view, the appellant's statement in defence was at best an afterthought crafted with the aim of exonerating himself from the offence.

38. For the foregoing reasons, it is my finding that the prosecution proved beyond any reasonable doubt that the appellant was found in possession of the grey bag in which 3,975.56 grams of heroin was discovered.

39. The next question which now falls for my determination is whether the applicant trafficked in the said drugs.

I have already reproduced in paragraph 30 the definition of trafficking within the meaning of *Section 2* of the *Act*.

40. In this case, the particulars of the charge allege that the appellant trafficked in heroin by conveying the drug in a grey travelling bag.

From the evidence on record, I find that the prosecution proved beyond doubt that the appellant was indeed trafficking in the aforesaid drug having conveyed it in the grey travelling bag from wherever he had come from to the airport. It is also important to note that he was intercepted and arrested as he was checking in to board a flight from Nairobi to Antananarivo.

41. The trial court's record further shows that the heroin trafficked by the appellant had a market value of KShs.3,000 per gram according to the undisputed evidence of PW6, an *Assistant Superintendent of Police Mr. George Mutiso* who was a gazetted proper officer appointed under *section 86 (1)* of the *Act*.

42. Given the foregoing, I have come to the same conclusion as the learned trial magistrate. I am satisfied that the appellant was properly convicted. His appeal against conviction therefore fails.

43. On the appeal against sentence, the appellant has complained that the sentence imposed on him was harsh and excessive in the circumstances of the case.

It must be remembered that sentencing is always at the discretion of the trial court. It is settled law that an appellate court should not interfere with the sentence passed by the trial court unless that sentence was illegal or the trial court failed to take into account relevant factors or took into account irrelevant ones. The court is also justified to interfere with a sentence if, in its view, it was harsh or manifestly excessive. See: ***Bernard Kimani Gacheru V Republic, [2000] eKLR.***

44. The penalty for the offence of trafficking in narcotic drugs is set out in *Section 4 (a)* of the *Act* as a fine of KShs.1,000,000 or three times the market value of the narcotic drug or psychotropic substance, whichever is greater and in addition, imprisonment for life.

45. The Court of Appeal in ***Mohamed Famau Bakari V Republic, [2016] eKLR*** and ***Caroline Auma Majabu V Republic, [2014] eKLR*** has held that the prescription of life imprisonment in *Section 4 (a)* of the *Act* is not mandatory and that trial court's retained

discretion to impose on a convict an appropriate sentence depending on the circumstances of the case.

46. The trial court's record shows that in sentencing the appellant, the court took into account his plea in mitigation; the period he had spent in custody during the trial; his demeanour; the nature of the charge and the applicable law; the presentence report and the value of the narcotic drug the appellant was found trafficking.

47. In this case, after considering the appellant's plea in mitigation and the applicable law, the learned trial magistrate in the exercise of his discretion sentenced the appellant to pay a fine of KShs.30,000,000 in default to serve 12 months imprisonment and in addition, to serve 20 years imprisonment.

48. After considering the appellant's plea in mitigation as made before the trial court and this court and the circumstances surrounding commission of the offence as well as the quantity of the drugs in question, I find that a sentence of 20 years imprisonment for a first offender was harsh and manifestly excessive in the circumstances of this case. I thus set aside the sentence of the trial court and substitute it with a sentence of 10 years imprisonment which shall take effect from the date of the appellant's arrest, namely 17th June 2018.

49. As the appellant is a Nigerian national, he shall be repatriated to his home country after completion of sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2022.

C. W. GITHUA

JUDGE

In The Presence of:

Appellant – Present virtually

Mr. Kiragu for the Respondent

Ms. Karwitha Court Assistant