REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 192 OF 2019

MARY MUKAMI MWANGI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence in JKIA Criminal Case No. 59 of 2016 dated 24th September 2018 (Hon. L. O. Onyina (SPM))

JUDGMENT

1. The appellant, *Mary Mukami Mwangi,* 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* of *1994* (the *Act).*

2. The particulars of the charge were that on 6th July 2016 at Jomo Kenyatta International Airport (JKIA) terminal 1A, in Nairobi County, jointly with others not before the court, the appellant unlawfully trafficked by conveying in her rectum a narcotic drug namely Methamphetamine to wit 929 grams, with a market value of KShs.7,432,000 in contravention of the provisions of the said *Act*.

3. Upon conviction, the appellant was sentenced to pay a fine of KShs.20 million in default to serve 12 months imprisonment and in addition to serve 20 years imprisonment.

4. She was aggrieved by her conviction and sentence hence this appeal. In her petition of appeal filed through her advocates, *Swaka Advocates*, the appellant advanced a total of nine grounds of appeal but when prosecuting the appeal through written submissions filed on 10th March 2021, learned counsel for the appellant *Mr. Swaka* narrowed them down to five grounds of appeal which I reproduce hereunder:

> ***i. The learned trial magistrate erred in fact and law by failing to find that there was no evidence to establish the ingredients of the charge.***
>
> ***ii. The learned trial magistrate erred in fact and law by failing to find that the trial offended and contravened the appellant's constitutional rights to a fair trial.***
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> ***iii. The learned trial magistrate erred in fact and law by failing to find that the exhibits tendered by the prosecution failed to be of any evidentiary value to the prosecution's case.***
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> ***iv. The learned trial magistrate erred in fact and law in convicting the appellant while the prosecution did not satisfy their burden of proving their case beyond reasonable doubt.***
>
> ***v. The learned trial magistrate erred in fact and law by imposing a harsh, excessive and untenable sentence upon the appellant.***

5. The appeal is contested by the respondent through written submissions filed on its behalf on 15th April 2021 by learned prosecuting counsel *Ms Ursulla Kimaru*.

6. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully conscious and guided by the principle regarding the duty of the first appellate court which is to revisit and exhaustively re-evaluate the evidence presented before the trial court to arrive at my own independent conclusions remembering that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. This was the holding in the celebrated case of ***Okeno V Republic, [1972] EA 32***, which has been adopted and followed by both the High Court and the Court of Appeal in numerous subsequent authorities.

7. The brief facts of the prosecution case presented to the trial court through a total of twelve witnesses is that on 6th July 2016 at around

1400 hours (2pm), PW3 *PC Fred Watikhe Makhoha* and PW4 *Cpl Justus Muinde* were on duty at Jomo Kenyatta International Airport profiling passengers at terminal 1B. In the course of their duties, they came across the appellant who was preparing to check in for Emirates Airline Flight Number EK 720. PW3 recalled that on checking her passport, he came across an Indonesian visa. Her ticket showed that she was travelling to Dubai enroute to Jakarta, Indonesia where she was supposed to stay for 4 days and on the fifth day travel back to JKIA through Dubai.

8. Upon interrogation regarding what she was going to do in Indonesia and how she had acquired the airline ticket, PW3 found the appellant's answers to be unsatisfactory and decided to keep her under surveillance. The two officers watched her as she walked to terminal 1D where she met two other ladies who included *Amina Gobe Kone* who was her co-accused before she jumped bail in the course of the trial.

9. According to PW3 and PW4, after parting company with the two ladies, the appellant walked back to terminal 1B, checked in and proceeded to the departure lounges where they intercepted her. She had two boarding passes, one from Nairobi to Dubai and the other from Dubai to Jakarta. PW3 and PW4 recalled that on further interrogation, she informed them that she had been sent by Amina and she had something in her stomach. They then took her to the Anti - Narcotics Unit offices for further investigations.

10. On arrival at the offices, PW9 searched the appellant but did not recover anything suspected to be a narcotic or psychotropic substance either from her person or hand luggage. She was thereafter put under observation.

11. According to the evidence of PW1, PW2, PW3, PW6, PW7, PW9 and PW10, for the period of 6 days that the appellant was held under observation at the anti narcotic offices, she emitted from her anal orifice a total of 83 pellets which were suspected to conceal narcotic drugs.

12. On 13th July 2016, PW7 *Inspector Jane Njagi* in the company of the appellant, the Government Chemist *Ms Esther Njogu,* who testified as PW8 and PW5 *PC Gaudencia Olweny* attached to the crime scene support services weighed the 83 pellets which weighed 929 grams. A weighing certificate to that effect was produced by PW7 as *Pexhibit 27*. PW5 took 12 photographs of the 83 pellets which she produced in evidence as *Pexhibit 22 (a)-(z)* and her report as *Pexhibit23*. PW7 recalled that PW8 did a spot test on the seized pellets and confirmed that they contained Methamphetamine.

13. On her part, PW8 recalled that on 13th July 2016, at the JKIA anti narcotic unit offices, she took samples from 83 pellets containing a whitish powdery substance in the presence of some police officers and the appellant. She analysed the same on the following day at the Government Chemist Laboratories. Her analysis revealed that each of the 83 pellets contained Methamphetamine which was a narcotic drug. She prepared her report which she signed on 1st August, 2016 *(Pexhibit33)*.

14. When put on her defence, the appellant elected to make an unsworn statement and did not call any witness.

In her defence, the appellant admitted having been intercepted by two police officers at JKIA on 6th July 2016 who questioned her about her intended visit to Indonesia. She denied having committed the offence as alleged and claimed that she first saw the 83 pellets on a table in a room in which she found Amina. In short, she claimed that the police officers at JKIA framed her with the offence for undisclosed reasons.

15. After considering the grounds of appeal, the evidence adduced before the trial court and the written submissions filed on behalf of the parties as well as the authorities cited, I find that three main issues emerge for my determination which are as follows:

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

ii. Whether the prosecution proved the charge of trafficking in narcotic drugs beyond any reasonable doubt.

iii. If the answer to issue no. ii is in the affirmative, whether the sentence meted out on the appellant was harsh and excessive in the circumstances of the case.

16. Starting with the first issue, *Mr. Swaka* submitted that the appellant's right to a fair trial was contravened when the police officers at the Anti- Narcotic offices at JKIA fed the appellant with food which may have been laced with some drug which upset her stomach and made her turn violent. Counsel also submitted that *Article 50 (2) (1)* of the *Constitution* which guarantees an accused person's right to refuse to give self incriminatory evidence was violated when the appellant was asked to sign the seizure notice to acknowledge recovery of eight pellets on 9th July 2016 which she allegedly emitted while on the airside and as she was being transported to the JKIA police station. These allegations were denied by the respondent in its submissions filed on 15th April 2021.

17. In my view, the claim that the appellant's rights to a fair trial during her pre - trial detention were infringed in the manner stated in her submissions are not borne out by the evidence on record. The claims were first made in her written submissions and they did not form part of her defence.

18. The evidence tendered by the prosecution which remained unchallenged reveals that the appellant voluntarily signed all the seizure notices after the alleged emission of the pellets except on 9th July 2016 when she refused to sign the seizure notice relating to the eight pellets aforesaid. The appellant has not claimed that she was forced to sign any of the seizure notices. PW2 and PW3 were very clear in their evidence that when the appellant refused to sign the seizure notice relating to the eight pellets, the matter ended there. I have perused the said seizure notice and it does not bear any signature attributed to the appellant.

19. In the circumstances, I do not find any merit in the appellant's claim that her rights to a fair trial including the right enshrined under *Article 50 (2) (i)* of the *Constitution* were violated either before or during the trial.

20. Regarding the second issue, the appellant submitted that the prosecution failed to adduce sufficient evidence to prove the ingredients of the offence of trafficking in narcotic drugs beyond reasonable doubt and that the evidence adduced proved mere possession of the suspected drugs; that there were inconsistencies in the evidence tendered by PW2, PW3, PW4, PW6, PW7 and PW8 regarding the questions put to the appellant when she was intercepted at the Airport; her behavior on 9th July 2016 when she became violent and ran to the Airport's airside and whether PW8's spot test on the 83 pellets revealed the particular psychotropic substance the pellets contained. The appellant also submitted that eight of the 83 pellets she allegedly emitted on 9th July 2016 were not properly accounted for.

21. As stated earlier, the appellant was convicted of the offence of trafficking in narcotic drugs. *Section 2* of the *Narcotic Drugs and Psychotropic Substances Control Act* defines trafficking 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…"***

22. In ***Gabriel Ojiambo Nambesi V Republic, [2007] eKLR,*** the Court of Appeal considered the definition of "trafficking" and proceeded to state as follows:

> ***"It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking." [Emphasis added]***

23. In this case, the prosecution case as stated in the particulars supporting the charge was that on 6th July 2016, the appellant was found trafficking in 929 grams of a psychotropic substance namely methamphetamine by conveying it in her rectum.

24. The evidence of PW3 and PW4 confirm that they intercepted the appellant at JKIA on the aforesaid date when she was preparing to travel to Dubai and Indonesia. They detained her for further investigations and observation after she failed to give a satisfactory account of why she was making a trip to Indonesia.

25. PW1, PW2, PW3, PW6, PW7, PW9 and PW10 all Police Officers attached to the JKIA Anti Narcotic Unit were clear and consistent in their evidence that the appellant emitted from her rectum through her anal orifice a total of 83 pellets when she was under their observation.

26. Contrary to the appellant's submissions, all the 83 pellets were properly accounted for by way of documentation produced before the trial court in the form of observation sheets, seizure notices and photographs as well as the actual production of the physical pellets as exhibits. The evidence of PW8 conclusively proved that all the 83 pellets contained methamphetamine, which is listed in the second schedule of the *Act* as a psychotropic substance.

27. As regards the inconsistencies in the evidence of some prosecution witnesses, I will do no more than to cite the Court of Appeal's decision in ***Philip Nzaka Watu V Republic, [2016] eKLR*** where the court held that not all inconsistencies were material and had the effect of rendering evidence unreliable. This is what the court said:

> ***"…….However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***
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> ***In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:***
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> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter…."***

28. I have noted the inconsistencies pointed out by the appellant in the witnesses' evidence but in my view, the inconsistencies were minor and immaterial. They did not go to the root of the prosecution case.

29. When rejecting the appellant's statement in defence and convicting the appellant, the learned trial magistrate stated as follows:

> ***"The accused person herself testified that she was arrested at JKIA on 6/7/2016 so this is not in dispute. After her arrest, she was placed on observation, then she started emitting the pellets containing methamphetamine the following day (7/7/2016) while under observation by the police; in police custody. And she was emitting them from her rectum; so the particulars of offence that she trafficked the same by conveying in her rectum is proved, because as at the time of arrest on 6/7/2016 the accused person already had the pellets inside her body; in her rectum from which she emitted them through her external orifice; on the various occasions detailed herein."***

30. The above passage demonstrates that the learned trial magistrate appreciated the essential ingredients of the offence of trafficking in narcotic drugs and was satisfied that the prosecution had proved the said ingredients against the appellant beyond any reasonable doubt.

31. After my own appraisal of the evidence, I find no reason to fault the trial court for this finding because it was based on concrete and cogent evidence on record which proved beyond any doubt that the appellant was conveying the drugs in question in her body before she was intercepted at the Airport.

32. If the appellant had been framed with the offence as claimed in her defence, it would have been impossible for her to emit the pellets containing the drugs from her body. It is obvious that she had moved with the drugs in her body from where she had ingested the pellets upto the Airport with the intention of transporting them out of the country. Consequently, I am satisfied that the appellant was properly convicted.

33. On the appeal against sentence, the appellant has complained that the sentence passed by the trial court was harsh, excessive and untenable. The Court of Appeal in ***Robert Mutungi Muumbi V Republic, [2015] eKLR***, cited with approval its decision in ***Bernard Kimani Gacheru V Republic, [2002] eKLR*** where it held thus:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

34. The penalty for the offence of trafficking in narcotic drugs is set out in *Section 4 (a)* of the *Narcotic Drugs and Psychotropic Substances (Control) Act* which is a fine of KShs.1 million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, imprisonment for life.

35. The court record shows that in sentencing the appellant, the learned trial magistrate took into account her plea in mitigation, the fact that she was a first offender and judicial precedents on the proper interpretation of the penalty prescribed in *Section 4 (a)* of the *Act* namely ***Mohamed Famau Bakari V Republic, [2016] eKLR*** and ***Caroline Auma Majabu V Republic, [2014] eKLR*** in which the Court of Appeal held that the prescription of life imprisonment as one of the punishments for the offence was only a maximum but was not a mandatory sentence; that the trial court had discretion to sentence the convict to any lesser sentence depending on the circumstances of each case.

36. The learned trial magistrate after considering all the above factors and precedents sentenced the appellant to pay a fine of KShs.20 million in default to serve 12 months imprisonment and in addition to serve 20 years imprisonment.

37. The record shows that the 929 grams of the psychotropic substance trafficked by the appellant had a market value of KShs.8,000 per gram according to PW11 who was a gazetted proper officer appointed under *Section 86 (1)* of the *Act*. This means that the 929 grams were valued at KShs.7,432,000 and when this amount is multiplied by three which is the amount that ought to have been imposed as fine, it translates to KShs.22,296,000 according to my calculations. The learned trial magistrate therefore erred in imposing a fine of KShs.20,000,000 which was less the amount prescribed by the law.

38. Considering that the maximum default sentence that can lawfully be imposed on a convict in lieu of payment of a fine exceeding KShs.50,000 is twelve months imprisonment (S*ee Section 28* of the *Penal Code*), I find that even if the trial court had imposed the correct fine of KShs.22,296,000, it would have imposed the same default sentence as it did with the fine of KShs.20,000,000. Bearing in mind that the appellant has already served over three years in prison which is in excess of the period she would have served in default of payment of the aforesaid fine, I do not find it necessary to disturb the trial court's sentence regarding the amount ordered as fine. In any case, the state did not file a cross appeal challenging the amount ordered as fine by the trial court.

39. In respect of the term of imprisonment, the learned trial magistrate in the exercise of his discretion sentenced the appellant to 20 years imprisonment. After looking at the trial court's presentence notes and the circumstances under which the offence was committed as well as the nature and the seriousness of the offence, I am unable to find any legal basis upon which to interfere with the sentence passed by the trial court. I am not persuaded to find that the sentence was harsh and manifestly excessive. It is my finding that the sentence was lawful and deserved.

40. For all the foregoing reasons, I am satisfied that this appeal is bereft of merit and it is accordingly dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Swaka for the appellant

Appellant present

Mr. Mutuma for the respondent

Ms Karwitha: Court Assistant