REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. 15 & 16 OF 2019 (CONSOLIDATED)

EMMANUEL CHACHA JOHN................................1ST APPELLANT

MOSES KIDIABA MIKWEBA...............................2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From the original conviction and sentence in the Principal Magistrate Court at Sotik Criminal Case 1653 of 2018, Hon. B. K. Kiptoo (SRM) dated 22nd May 2019)

JUDGEMENT

1. The Appellants were charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substance (Control) Act(NPSA) No. 4 of 1994. The particulars of the offence were that on 29th October 2018 at Chebole Shopping Centre in Sotik Shopping Centre within Bomet County, they were jointly found trafficking 20kgs cannabis sativa with motor vehicle registration No. KMEM 743Z. They pleaded not guilty and the matter proceeded to full trial in which the prosecution called three witnesses in support of its case.

2. No. 219735 CPC Kipkoech Cheruiyot (PW1), an officer attached to Chebole AP camp was the arresting officer. It was his evidence that on the 29th October 2018 he was heading to the river to wash the car when he was informed by members of the public that there were suspicious looking youths who were not from the village. Accompanied by some members of the public, he went to check and found three men standing next to a motor cycle that seemed to have broken down. That the Appellants tried to run away but PW1 managed to arrest them with the assistance of the members of the public. PW1 told the court that he found two bags, one black and one khaki, each containing 10 packets of bhang weighing a total of 20kgs. PW1 called for reinforcement and escorted the Appellants to the police station.

3. Bernard Rono (PW2), told the court that on the morning of 29th October 2018, he was at River Sisei washing cars when he saw suspicious people lying by the road next to a parked motorcycle and two bags. Together with other members of the public, they informed PW1 who in turn requested them to accompany him to the place where the suspicious looking people were. That as they approached them, the suspicious people tried to run away but they managed to apprehend them. Other police officers came and took them away.

4. No. 77710 CPC Sammy Langat(PW3) of Sotik police Station was the investigating officer. He told the court that on 29th October 2018 at around 9:30 am an Administration Police officer from Chebole camp escorted three suspects who were suspected to be in possession of bhang. PW3 rearrested them and also recorded witness statements. He forwarded the exhibits to the government chemist for analysis and the report indicated that the substance was bhang. PW1 produced the motorcycle (P.exhibit1), the two bags (P.Exhibit 2a and b), 20kgs of bhang (P.Exhibit 3), Exhibit Memo (P.Exhibit 4) and sample (P.Exhibit 5). In addition, PW3 produced the Government Analysts report (P.Exhibit 6) with the permission of the court due to the unavailability of the government analyst to attend court and testify.

5. At the close of the prosecution case, the Appellants were put on their defence.

6. The 1st Appellant (DW1) chose to give an unsworn statement. He denied the offence. He told the court that on 29th October 2018 he was heading to Tenwek hospital to see a patient when the motorcycle he was riding on had a puncture. That a police officer was called who took them to the DO's office where he (the police officer) picked two bags from a house. They were then escorted to the police station where they were shown the bhang.

7. The 2nd Appellant(DW2) also gave an unsworn statement and denied the offence. He stated that he was a boda boda rider and on 29th October 2018 he had been requested by a neighbour to take him to Tenwek. He stated that the passengers did not have any bags with them.

8. At the end of the trial, the learned magistrate found the Appellants guilty and sentenced them to a fine of KSh.1million each and in default to serve life imprisonment.

9. The Appellants being aggrieved by the conviction and sentence lodged their respective appeals. Their identical grounds can be summarized that: the prosecution did not prove the case beyond reasonable doubt; that the Government Analyst report was not produced in accordance with the Evidence Act; that section 74 of the NPSCA was not adhered to, and; that the sentence was harsh and unlawful.

10. At the hearing of the appeal, Mr. Kadet, learned counsel for the Appellants relied on their written submissions filed on the 4th November, 2018. The submissions were to the effect that the prosecution failed to show how substances were weighed and samples collected in contravention of section 74 of NPSCA. He relied on the case of **Moses Banda Daniel v Republic (2016) eKLR.**

11. Secondly, it was submitted that the production of the Government Analyst report did not comply with the Evidence Act as the court erred in admitting documentary evidence not proved by primary or secondary evidence. Counsel further submitted that the Appellants did not get a chance to cross-examine the deponent and this reduced the value and weight of the evidence. He relied on the case of **Rosemary Wanjiru kungu v Elijah Githinji & Another Nairobi HCCA No. 145 of 2010.**

12. It was the Appellants' further submission that there were contradictions as to whether the bags were found in the possession of the Appellants, on the motorcycle, or next to the appellant or in a thicket. It was argued that PW1 stated that the appellants were found standing with a motorcycle and bags while PW2 stated that they were lying on the roadside.

13. Finally, it was the Appellants' submission that the trial magistrate erred in imposing the mandatory sentence while failing to take into consideration mitigating factors such as their previous records and the quantity and value of the drugs. He relied on **Mohammed Famau Bakari v Republic [2016] eKLR** and, **Francis Karioko Muruatetu & another vs Republic [2017] eKLR.**

14. Mr. Mureithi, learned counsel for the Respondent opposed the appeal. In his oral submissions, he stated that the evidence produced by the prosecution was water tight and was not shaken by the Appellants' defence. That the evidence was sufficient to support the conviction and sentence. Counsel further submitted that the Appellants never raised the issue of non-compliance with section 74 of NPSCA at the trial despite being represented by an advocate.

15. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

16. I have considered the grounds of appeal, the record and submission of the parties. The issues for determination are: whether the provisions of the NPSCA were complied with; whether the prosecution proved the case beyond reasonable doubt, and; whether the sentence was unlawful.

17. I begin with the Appellants grievance that section 74 of the NPSCA was not adhered to as the police failed to weigh the drugs and also failed to explain how the sample was obtained.

18. Section 74A of the NPSCA provides:-

> ***"(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of police and the Directors of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorized officers") shall, in the presence of, where practicable –***
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> ***(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");***
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> ***(b) a designated analyst;***
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> ***(c) the advocate (if any) representing the accused person; and***
>
> ***(d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same."***
>
> ***2. After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.***
>
> ***3...***
>
> ***4. ...***

19. A reading of the above section shows the procedure to be followed when narcotic drugs are seized. The section requires that the drugs or substance be weighed by an authorized officer in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst before samples are released to the government (designated) analyst.

20. In the current case, it was the evidence of PW1 that he arrested the Appellants with two bags of what he suspected to be bhang and took them to Sotik Police Station. PW3 forwarded a sample of the substance recovered to the Government Analyst for testing.

21. From the evidence adduced, it is clear that neither PW1 or PW3 weighed the cannabis begging the question whether the failure to adhere to the proviso of section 74A vitiates the proceedings.

22. In **Moses Banda Daniel v Republic [2016] eKLR** the Court of Appeal stated as follows:

> ***"After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like "Where practicable" and "if any" convey the meaning that the procedure is not mandatory but directory and the use of the word "shall" must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure."***

23. In the case cited above, the Court of Appeal further looked at the purpose of section 74A of the Act as intended by the legislators and made a reference to the **Hansard record of Parliament of 6th December 2000** where The Attorney-General, Amos Wako (as he then was) moved a motion for the amendment of the Act. The Court of Appeal went on to hold that:-

> ***"Clearly the intention of Parliament was to ensure that the drugs or substance once recovered are not interfered with before the trial. That is why after ascertaining the nature and weight of the drug and obtaining the certificate of the analyst the rest of the drugs are to be destroyed immediately and only a sample and a certificate are presented as exhibits at the trial. The provision, in our view will be more relevant where a large haul of drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible."***

24. This position was further reiterated in ***Joshua Atula & Another v Republic [2016] eKLR*** where the Court of Appeal pronounced itself as thus:-

> ***"Accordingly, the objective of this provision74A was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances."***

25. In addition, I find that the failure to weigh drugs is not fatal as the as the weight of drugs is only considered in sentencing as was held by the Court of Appeal in **Kabibi Kalume Katsui v Republic [2015] eKLR** where it stated that:-

> ***"The law is clear on the offence of trafficking, the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself."***

26. Guided and bound by the above precedents, is evident that the proviso of section 74A is not mandatory but applicable only where practicable. The test is whether failure to comply prejudiced the accused. In the present case, there is no evidence that the failure to weigh the drugs prejudiced the Appellants as there were no complaints of tampering. Furthermore, the drugs recovered were not of such a large quantity to infer any tampering as the same was produced in court.

27. On whether the prosecution proved its case beyond reasonable doubt, the Appellants submitted that there were contradictions as to whether the bags were found in the thicket, on the motorcycle or next to the Appellants. PW1 stated that he found the Appellants standing next to a motorcycle and bags. In cross-examination, he stated that the motorcycle was in a thicket. PW2 on his part stated that he saw three suspicious people in a bush by the side of the road. In cross-examination he stated that the motorcycle was parked by the side of the road in a thicket. He further informed the court that the bags were besides the motorcycle on the ground.

28. I have examined the evidence and I find that there are no material contradictions. Both PW1 and PW2 testified that the appellants were off the road by a thicket with a motorcycle and two bags. PW2 gave a clearer testimony stating that the bags were on the ground. From this evidence, it is clear that the appellants had parked the motorcycle were on the side of the road in a thicket and that they had two bags with them which were on the ground. I find no material discrepancy in the evidence of the two witnesses.

29. The Appellants have also faulted the production of the Government Analyst Report (P.Exhibit 6) on the basis that it was not proved by primary or secondary evidence in accordance with section 65 and 67 of the Evidence Act and that the Appellants did not get an opportunity to cross-examine the witness.

30. Section 65 of the Evidence Act defines primary evidence as *the document itself produced for inspection by the court.* In the present case, PW3 after being granted leave by the court produced the original report by the Government Analyst as P.Exhibit 6 which going by the definition above is primary evidence. I therefore dismiss the wrong assertion by the Appellants.

31. The Appellants further contended that they did not get an opportunity to cross-examine the maker of the report. The record shows that the court granted leave for PW3 to produce the report for reason that the government analyst was unavailable and as allowed by section 77 of the Evidence Act. Further section 77(3) protects the right of an accused person to call for the maker of a document and cross-examine him on the subject matter, a right which the Appellants did not seek to exercise. The court of appeal dealt with a similar scenario in the case of **Ogeto -V- Republic (2004) 2 KLR 14**. In that case, when the Appellant complained that the post mortem report was produced by a police corporal,

the court held that:-

> ***"The appellant was represented by counsel at the trial who did not object to the act and the court did not see it fit to summon Dr. Ondungo Steven for cross-examination. In our view the postmortem report was properly admitted in evidence in accordance with the law."***

32. Similarly, in **Soki- V- Republic (2004) 2 KLR 21,** the Court of Appeal explained the section thus:-

> ***"Section 77(1) allows any document purporting to be a report under the hand of a government analyst medical practitioner or any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object."***

33. In the present case, when the matter came for hearing on 23rd January, 2019, the Appellants objected to the production of the Government Analyst's report by PW3. However, the Government analyst was not available and on 17th April, 2019 and the Appellants consented to the report being produced by PW3. I do not think that the Appellants suffered any prejudice because firstly, they consented and secondly, no cross examination would have upset the findings in the report. To this end, I find that the report was properly admitted into evidence.

34. Having reviewed the evidence as above, and having considered the technical grounds raised in the appeal, I have come to the firm conclusion that the case against the Appellants was proved to the required standard. I uphold the conviction.

35. On sentence, it is trite that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was highlighted by the Court of Appeal in **Benard Kimani Gacheru vs Republic [2002] eKLR** where it stated that:-

> ***"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."***

36. The Appellant was convicted of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act which provides that:-

> ***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;***

37. I must confirm therefore that the sentence was lawful and within the discretion of the court. It was however not a mandatory sentence as the term "shall be liable" provides for the maximum and not minimum sentence. Therefore it was open to the trial court to consider the proportionality of the sentence to the offence. See **Daniel Kyalo Muema v. Republic, (2009) eKLR.**

38. It is trite that the court in sentencing should taking into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR,** listed factors to be considered as: the age of the offender; being a first offender; whether the offender pleaded guilty; character and record of the offender; commission of the offence in response to gender-based violence; remorsefulness of the offender; the possibility of reform and social re-adaptation of the offender; and, any other factor that the Court considers relevant.

39. In **Caroline Auma Majabu v Republic [2014] eKLR,** the Appellant was convicted of trafficking 7 sachets of heroin, the Court of Appeal in reducing the sentence to 4 years pronounced itself thus:-

> ***"We are somewhat disturbed by the apparent disparity in the sentencing given the minimal amount of the narcotic drugs which the appellant was found in possession of. Given the gravity of the sentence provided for trafficking, it would appear to us that the sentence for trafficking was a maximum sentence intended for drug barons and serious drug dealers dealing with drug worth thousands if not millions of shillings, and not small timers such as the appellant found in possession of a few sachets of heroin worth a few shillings. While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders."***

40. In the present appeal, I have noted the mitigation recorded by the trial court. The first Appellant said that he had suffered in custody, was poor and had a wife and a child. The Second Appellant prayed for forgiveness and stated that he was an orphan and not married. The trial court observed that the Appellants were first offenders and also noted that the Appellants were seasoned traffickers going by the quantity of the drugs.

41. Considering the circumstances of this case, the mitigation on record as well as their submissions, I find that the sentence, though lawful, was harsh and excessive. There was no evidence that the Appellants were repeat offenders and the quantity of drugs was not so large as to warrant the maximum penalty.

42. I set aside the sentence of a fine of one million shillings (Ksh. 1,000,000/-) and the default sentence of life imprisonment and substitute therefor a fine of three hundred thousand shillings (Kshs. 300,000/-) and in default of the fine a term of 7years imprisonment from the date of conviction and sentence.

43. The appellants have 14 days right of appeal from the date of this judgment.

44. Orders accordingly

Judgment delivered, dated and signed at Bomet this 28th day of January, 2021.

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence Mr. Kadet for the Appellants, Mureithi for the Respondent and Kiprotich (Court Assistant).