REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO.66 OF 2018

FARID JAMAL SHEBWANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Lamu PMCCRC No. 339 of 2017 delivered by Hon. T. A Sitati (PM) on 13th September, 2018)

CORAM: Hon. Justice R. Nyakundi

The appellant in person

Mwangi for the State

JUDGMENT

1. The Appellant was charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994. The particulars of the offence were that on 26th November, 2017 at Mtangawanda village, Pate Location in Lamu East Sub-County within Lamu County, the Appellant was found trafficking in narcotic drugs by way of selling to wit fifteen (15) sachets of heroine with a street value of Ksh. 3,000/- by conveying in contravention of the said Act.

2. The accused person pleaded not guilty and the matter went to full trial. The prosecution called four witness in support of its case.

Background

3. **PW1 No. 246734 APC William Ombere** based at Mtangawanda A.P. Post. He stated that he recalled that on 26th November, 2017 at 5:00 p.m, he together with APC James Mitsanze were heading to Mtangawanda Village from their camp and upon arriving at Mtangawanda Jetty, they received information from the public that a group of people near a bush heading to Mtangawanda village and it appeared there was a drug trade near that bush. He further stated that they proceeded to the scene and just before they arrived, the group saw them and scattered. He informed court that they were fortunate to arrest on person by the name Farid Jamali Shebwana. He conducted a search on the accused person and found on him a matchbox. He further stated that in the matchbox he saw 15 brown powder substance which he suspected to be heroine.there was a razor blade and Kshs. 6,525/-. The OCS at Kizingitini were informed and officers from Siyu came to escort him to Faza Police Post.

4. On cross examination, PW1 confirmed that they received the information at Mtangawanda Jetty from members of the public. They had been informed that there was a crowd but he did not know exactly how many people were there.PW1 also confirmed that he knew the route very well and that both he and APC James Mitsanze were both in civilian clothes and upon pursuing the group, they were able to arrest the Appellant. It was also the evidence of PW1 that the crowd had given them the name of the Appellant and upon pursing the group, they were able to arrest him. He also stated that he was the one who searched the Appellant and that the drugs were hidden in the inner trouser which was held together with ties from the lining of the trouser. He further stated in his cross examination that he did not see the Appellant selling the drugs and that he did not know an inventory was to be prepared.

5. PW 2 APC James Mitsanze's testimony was that he recalled the events of 26th November, 2017 at about 6:00 p.m, that he and his colleague APC William were on their way to collect to Mtangawanda to collect their phones that were charging. On the way, they met some villagers who informed them that there were people selling drugs. They proceeded to the scene and as they approached, the group dispersed but the able to arrest the Appellant. He confirmed that APC William searched the Appellant and recovered a substance which they suspected

to be narcotic drugs. There were 15 satches, 2 razor blades and an amount of Kshs. 6,525/-. He also confirmed that the substance was found at the Appellant's waist.

6. PW3 Yahya Hamisi Maingu from the Government Chemist Mombasa. He is gazette officer No. 6934/27/7/2002. He testified that he had the report prepared on 29th December, 2017. The same were contained in a khaki envelope marked "N" containing 0.7 grams in a matchbox. He stated that he established that the 15 sachets were heroine and he marked the sachets as GCK-536/2017-YHM. The report was marked as Exhibit 1.

7. PW4 PC Benson Marwa based at Siyu Police Post under Kizingitini Police Station. He stated that he was the Investigating Officer in the case and that he recalled 26th November, 2017 at 5:00p.m when he received a phone call from OCS Kizingitini to be on standby to accompany him to Mtangawanda Village to respond to an intelligence that a male suspect had been cornered by the Rapid Border Patrol Unit with narcotics. He stated that on arrival they found the Appellant under arrest and he identified himself as Jamal Shebwana. He confirmed that APC James Musanzi and William Ombere were the arresting officers and that he recorded their statements. He also confirmed that the two arresting officers recovered a total of Kshs. 6,525/-, heroine in a nylon satchet numbering to 15 small bound satchets and a matchbox carrying 2 razor blades.PW 4 also stated that an inventory was prepared dated 26th November, 2017 and signed by the Appellant in his presence.it was also his testimony that he prepared an Exhibit Memo Form on 26th November, 2017 and forwarded 3 samples to the Government Analyst Mombasa. He confirmed that the report of the Analyst confirmed that the substance was heroine. The Exhibit Memo was produced as Exhibit 8.

8. On cross examination, PW4 confirmed that he recorded his statement on 26th November, 2017. He also confirmed that he visited the scene of crime. His testimony was that the reason why an inventory was not prepared is because the arresting officers did not know how to prepare one. He later stated that an inventory was prepared in the presence of the 2 arresting officers and the suspect. He told the court that the buyers ran off on seeing the police approach and that the Appellant hid the drugs in his boxers when the police showed up. He further informed court that the estimated value was Kshs. 3,000/-. upon reexamination PW4 stated that the inventory was signed and thumb printed by the Appellant and that the razor blade was used to cut up the heroine stones.

9. After the prosecution closed its case, the court found that the prosecution had established a prima facie case and the Appellant was put on his defence and he opted to give an unsworn statement.

10. He told the court that he is a fisherman and that he denied all the charges read to him. He stated that he recalled on the 26th day of November, 2017, he had gone to the bush to answer a call of nature since he did not have a toilet. After answering the call of nature, the police arrested him and found him with no drugs. He further informed the court that the police contradicted themselves as one told the court that they recovered the drugs from his belt and the other said that the drugs were recovered from his leg. He denied having signed the inventory and that the thumbprint did not belong to him.

11. At the end of the trial, the learned magistrate found the Appellant guilty and passed a sentence of a fine of Kshs. 1Million in default 5 years' imprisonment and in addition an imprisonment of 20 years in jail.

12. The Appellant being aggrieved by the conviction and sentence of the learned trial Magistrate lodged his appeal through his advocate Mr. Aboubakar on the following grounds;

> **i. That the learned trial Magistrate misapplied the provisions of Section 2 of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994 in so far as what amounts to trafficking in narcotic drugs with respect to evidence on record resulting in his convicting the Appellant with trafficking in narcotic drugs while the evidence did not support the said charge.**
>
> **ii. That the trial Magistrate erred both in fact and law in relying on the government Analyst's Report without the prosecution calling PC Khalif Mumo who prepared the alleged Exhibit Memo Form.**
>
> **iii. That the trial Magistrate erred both in fact and law in failing to find that the prosecution's evidence contradicted itself as to who prepared it between PW 3 and PW4 Constable Benson Marwa, the investigating officer.**
>
> **iv. That the trial Magistrate erred both in fact and law in relying on the inventory prepared by the police not the arresting officer and not at the scene of the alleged scene of crime at the police station by the investigating officer.**
>
> **v. That the trial magistrate erred both in fact and law in failing to find that the evidence of PW1 and PW2 contradicted each other as to where the drugs were found.**
>
> **vi. That the learned trial Magistrate erred both in fact and in law in disregarding the Appellant's defence without good legal basis thereby occasioning a miscarriage of justice against the Appellant.**

13. The Appellant filed his written submissions dated 17th July 2019 which he relied on during hearing. His submissions were to the effect that the prosecution failed to discharge the said burden to the required standard.

14. Mr. Aboubakar, learned counsel for the Appellant, also submitted that the provisions of Section 74A of the Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994 on the procedure upon seizure of narcotic drugs was not adhered to.

15. The Respondent filed written submissions dated 27th July, 2020 in opposition of the appeal which it relied on during the hearing. The

submissions were to the effect that the failure to conduct a valuation was not fatal as it was a mere technicality which did not affect the administration of justice relying on the authority of Joshua Atula & Another vs Republic (2016) eKLR. It was further submitted that failure to strictly adhere the provisions of section 74A of the NPSCA was not fatal. Finally, it was the Respondent's submission that the Appellant was accorded a fair trial as the court ordered that the Respondent to supply him with all the documents and further that the Appellant was represented by an advocate who never raised an issue throughout the trial. It was contended that the Appellant was given an opportunity to cross-examine all the prosecution witnesses.

16. 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 demeanor 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.**

17. I have considered the grounds of appeal, the record and submission of the parties. The issues for determination are whether the Appellant's defence was duly considered thereby occasioning a miscarriage of justice on the Appellant; whether the provisions of the NPSCA were complied with and whether the prosecution proved the case beyond reasonable doubt.

18. The Appellants submitted that section 74 of the NPSCA was not adhered to as the police failed to weigh the drugs and they failed to explain how the sample was obtained.

19. Section 74A of the NPSCA states as follows:-

> **"(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 –**
>
> **(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");**
>
> **(b) a designated analyst;**
>
> **(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. ...**

20. 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.

21. In the current case, it was the evidence of PW1 and PW2 that they arrested the Appellant with fifteen satches of brown powder substance of what they considered to be heroine and took them to their camp at Mtangawanda. PW4 forwarded a sample of the substance recovered to the Government Analyst for testing.

22. From the evidence adduced, it is clear that neither PW1, PW2 or PW4 weighed or valued the heroine begging the question whether the failure to adhere to the proviso of section 74A vitiates the proceedings.

23. 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."**

24. 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."**

25. 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."**

26. Additionally, 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."

27. Guided and bound by the above precedents, is evident that the proviso of section 74A is not mandatory but only where it practical and further if failure to comply prejudices the accused. In the present case, there is no evidence that the failure to weigh the drugs prejudiced the Appellant 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.

28. It was the Appellants further contention that the prosecution failed to adhere with section 86 of the NPSCA which states that:-

> **Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.**

29. The question on the production of a valuation certificate has been aptly discussed in Kenyan courts where it has been held that the value of drugs only arises during sentencing when issuing a fine. See in **Kabibi Kalume Katsui v Republic (supra).**

30. In **Antony Mbithi Kasyula v Republic [2015] eKLR** the Court of Appeal held that:-

> **"Finally, the appellant took issue with the failure by the prosecution to prove the value of the cannabis sativa. Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under section 4(a) of the Act, the value of the drugs do not constitute the ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs..."**

31. I am guided by the above case law and find that the failure by the prosecution to produce a valuation certificate as per Section 86 was not fatal. For this reason, I found this ground fails.

32. Another ground raised by the Appellant was that the prosecution's case was riddled with inconsistencies and contradictions. The role of an appellate court in dealing with discrepancies was discussed by the Court of Appeal in **Naftali Mwenda Mutua v Republic [2015] eKLR** where it was held that:-

> **"In Vincent Kasyla Kingo versus Republic Nairobi Criminal Appeal No. 98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See Josiah Afuna Angulu versus Republic CRA. No. 277 of 2006(UR) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellant's commission of the offence charged and proceeded to substitute conviction for the disclosed offence."**

33. In **Jackson Mwanzia Musembi Vs Republic(2017) eKLR** the Court of Appeal cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. Appeal No. 139 of 2001(2003) UG CA,6** where the court held that:

> **"…. With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. <u>The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case</u>." (Emphasis mine)**

34. In the present case, the Appellant submitted that PW3 Yahya Hamisi, the government chemist, testified to the effect that the Exhibit Memo Form was prepared by PC Khalif Mumo who handed over the same to him while PW4 Constable Benson Marwa, the Investigating Officer testified that he was the one that one who had prepared the Exhibit Form. Upon cross examination, PW4 confirmed that he prepared

the List and handed the same over to the Government Analyst.

35. On the issue of where the substance was found upon searching the Appellant, the evidence of PW1 was corroborated by that of PW2 that the substance was found in the inner trouser.

36. For the above reasons and based on the above cited authorities, I find that this ground fails as well.

37. On whether the sentence was lawful, 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 **Bernard 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 states is shown to exist."**

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

> **"Any person who traffics 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."**

39. I must confirm from the outset that the sentence was lawful and within the discretion of the court. It is not however a mandatory sentence as the term *"shall be liable"* provides for the maximum and not minimum sentence and It was open to the trial court to consider the proportionality of the sentence to the offence. See **Caroline Auma v. Republic (2014) eKLR** and **Daniel Kyalo Muema v. Republic, (2009) eKLR.**

40. 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** pronounced itself thus:-

> **'To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**
>
> > **(a) age of the offender;**
> >
> > **(b) being a first offender;**
> >
> > **(c) whether the offender pleaded guilty;**
> >
> > **(d) character and record of the offender;**
> >
> > **(e) commission of the offence in response to gender-based violence;**
> >
> > **(f) remorsefulness of the offender;**
> >
> > **(g) the possibility of reform and social re-adaptation of the offender;**
> >
> > **(h) any other factor that the Court considers relevant."**

41. Similarly, the **Judiciary's Sentencing Policy Guidelines 2016** sets out a list of aggravating and mitigating factors in paragraphs 23.7 and 23.8 respectively while paragraph 23.9.4 of the guidelines outlines the determination of a sentence where there are mitigating and aggravating circumstances.

42. Additionally, the court should be guided by purpose of sentencing as was considered by **Dalmas Omboko Ongaro v Republic [2016] eKLR** the court stated that:-

> **"10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:**

> **"In determining what is the appropriate sentence to mete out...<u>The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442)</u> and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118)."**
>
> **The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. <u>If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism."</u> (Emphasis mine).**

43. 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."**

44. On whether the prosecution proved its case beyond reasonable doubt, it was the evidence of both PW1 and PW2 that on the 26th November, 2017 at around 6:00 pm, they arrested the Appellant and upon searching him, found 15 satches of Heroine, 2 razor blades and Kshs. 6,525/- in different denominations. That the Appellant took off on seeing them. The 15 satches of the substance were forwarded to the government analyst, Yahya Maingu, who analyzed the substances and found them to be heroine. In the circumstances, I find that the prosecution proved its case beyond reasonable doubt.

45. In the final analysis, the appeal on conviction and sentence is dismissed. That is the order of the court.

46. Orders accordingly.

JUDGMENT DATED DELIVERED AND SIGNED AT MALINDI ON THIS 18TH DAY OF MARCH, 2021

.....

R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

Mr. Mwangi for the State – present virtually

Appellant – present virtually