



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 191 OF 2019**

**BETWEEN**

**LEBOGANG SIBANDA MAINAH.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the original conviction and sentence in the*

*Chief Magistrate's Court at Kibera Cr. Case No. 4300 of 2010*

*delivered by Hon. L. G. Nzioka (SPM) on 11<sup>th</sup> October, 2010).*

**JUDGMENT**

***Background***

1. The Appellant, **Lebohang Sibanda Mainah** was charged with the offence of trafficking in narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. The particulars thereof were that on the 22<sup>nd</sup> day of July, 2010 at Jomo Kenyatta International Airport within Nairobi Area, trafficked by conveying 1704.2 grams of narcotic drugs namely heroin with an estimated market value of Kshs. 1,704,200/= in contravention of the provision of the said Act.
2. The Appellant pleaded not guilty to the charge. After a full trial, she was convicted of the offence and sentenced to pay a fine of Kshs. 5,112,600/= in addition to serving life imprisonment. Aggrieved by both her conviction and sentence, she preferred the instant appeal to this court.
3. The Appellant raised thirteen (13) grounds of Appeal in her Petition of Appeal filed on 25<sup>th</sup> September, 2019. The said grounds have been reproduced as hereunder:

*i. THAT the learned trial magistrate erred in fact by failing to find that there was no sufficient evidence to sustain a conviction.*

*ii. THAT 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.*

*iii. THAT the learned trial magistrate erred in fact and law by failing to find that the evidence adduced was at variance with the particulars of the charge sheet.*

*iv. THAT the learned trial magistrate erred in fact and law by failing to find that the charge was incurably defective.*

*v. THAT the learned trial magistrate erred in fact and law by failing to find that the evidence was at variance and that there was disharmony and discordant voices.*

*vi. THAT the learned trial magistrate erred in fact and law by finding that the prosecution proved their case beyond reasonable doubt whereas the prosecution had not discharged their burden in law.*

vii. *THAT 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.*

viii. *THAT the learned trial magistrate erred in fact and law by failing to find that the maxim Actus reus non facit reum nisi mens sit rea was in favour of the Appellant since the Appellant had no mens rea.*

ix. *THAT the learned trial magistrate erred in fact and law in upholding the prosecution witnesses' testimonies which prima facie was incredible whilst proceeding on extraneous considerations which was not before the court to disregard the defence evidence, which was verifiable.*

x. *THAT 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.*

xi. *THAT the learned trial magistrate erred in fact and law by failing to find to uphold the rights to a fair trial as enshrined under Article 5 of the Constitution as to the right of an accused person to defend herself against the charge preferred against her.*

xii. *THAT 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 as there was no connection between the crime committed and the Appellant herein.*

xiii. *THAT the learned trial magistrate erred in fact and law by imposing a harsh, excessive and untenable sentence upon the Appellant.*

#### **Summary of Evidence**

4. I am minded that this is the first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

5. The Prosecution's case can be summarized as follows: On 22<sup>nd</sup> July, 2010 at 6.30 pm, **PW1, Corporal Agnes Muema** and **PW2, PC David Loisenger** both attached to the Anti-Narcotics Unit at the Jomo Kenyatta International Airport (JKIA) were on night duty at the international arrivals. While profiling passengers who had arrived in the country aboard Emirates Airline flight 721 from Dubai, PW1 intercepted the Appellant after she had just collected her bags from the conveyor belt. The Appellant had two bags, one big grey bag and a small green bag. PW1 requested for the Appellant's travel documents. The Appellant gave her a South African passport number A00525178 bearing her three names "LEBOGANG MAINAH SIBANDA" as well as her travel ticket number TS 1761601075753. The Appellant was from New Delhi via Dubai.

6. The Appellant's ticket indicated that she was from a drug source country. As such, PW1 requested the Appellant to accompany her to their office for a search and interrogation. PW1 also asked PW2 to accompany them so as to witness the search. On interrogation, the Appellant informed PW1 that she was to travel to Lilongwe the same night. PW1 asked her to open the grey bag which had a tag number 0176175718. The bag had assorted clothes and three small female hand bags of cream, light brown and dark brown colours. PW1 lifted the cream small handbag and became suspicious of its weight as it was unusually heavy. She decided to open it and found pieces of newspapers which she removed but the bag was still heavy. PW1 tore the lining of the handbag using a pair of scissors and found two packets of a whitish powder from the inner left and right side of the bag respectively. PW1 checked the other two small handbags and found four similar packets of whitish powder concealed in the same manner. The whitish powder was suspected to be a narcotic drug.

7. PW1 called **PW3, Chief Inspector Adan Guyo** who was in charge of the Anti-Narcotics Unit at the JKIA. **PW2** prepared an inventory of the Appellant's luggage plus all the contents retrieved therefrom. The inventory was signed by both PW3 and the Appellant. On the other hand, PW1 prepared three Notices of Seizure of the recovered drug and gave the Appellant one copy. Thereafter, all the items were handed to PW3 for safe keeping and the Appellant placed in custody.

8. On 23<sup>rd</sup> July, 2010, PW3 instructed **PW7, Corporal Ezra Serem** of JKIA Anti-Narcotics Unit to investigate the case. PW3 called the scene of crime support services and a government analyst to witness the weighing and sampling of the drugs. **PW6, Corporal Virginia Wanjiku** attached to the Crime Support Centre CID Headquarter took photographs of the Appellants luggage and the contents thereof before, during and after the weighing of the recovered powder. PW6 prepared a report in respect thereof as well as a certificate dated 17<sup>th</sup> August, 2010.

9. **PW5, Catherine Serah Muvambi**, a government analyst from the Government Chemist at Nairobi weighed the six packets of powder. They weighed 257.7, 260.9, 257.1, 256.9, 342 and 329.9 grams respectively. The total weight was 1,704.2 grams. PW5 prepared a Certificate of Weighing which was signed by the Appellant, PW1, PW2, PW3 and PW7. A copy of the same was given to the Appellant. Thereafter, PW5 cut open each packet and took a sample of the powder. She subjected the samples to a preliminary chemical test at the airport and established it was a narcotic drug. A Certificate of Sampling was prepared to that effect and a copy thereof given to the Appellant as well.

10. Thereafter, six samples of 10 grams each were taken from each of the six packets and PW3 detailed PW7 to send the samples to the government chemist for further analysis to establish whether the powder was a narcotic drug under the Act. The samples were marked L1-right, L1-left, L2-right, L2-left, L3-right and L3-left. PW7 prepared an exhibit memo form to accompany the six powder samples to the government chemist. PW5 carried out a further analysis of the samples and found them to contain heroin which is a drug under the Narcotics and Psychotropic Substances Control Act. PW5 prepared a report dated 28<sup>th</sup> July, 2010 in that respect.

11. PW3 prepared a Notice of Intention to Tender Records in evidence under the **Act and the Narcotics and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations, 2006**. He attached a copy of the report of the seized substance and gave the Appellant together with the said notice.

12. A valuation of the intercepted drug was carried out by **PW4, Superintendent Judy Odhiambo** who was in charge of the Anti-Narcotics Unit at the CID Headquarters. The drug was valued at Kshs. 1,702,200/= under the prevailing market value then. After concluding the investigations, PW7 preferred the charge against the Appellant. All the aforesaid documents were produced in evidence together with the items recovered from the Appellant's luggage and her travel documents.

13. When placed on her defence, the Appellant elected to give a sworn statement. She admitted that the three small bags were in her luggage but claimed that she did not know that they contained drugs.

14. She stated that she was a seventeen year old South African national but had gotten a baby while in school and discontinued upon reaching Grade 8. That in the month of June 2010 while in South Africa, a Nigerian man known to her as Chelsea whom she was dating, asked her if she could go to India to his brother called Kingsley to fetch stock for the shop since the girl who was supposed to go there was unwell. She agreed because he said she was only going to stay there for two weeks.

15. The man processed for her a visa and she left South Africa for India on 14<sup>th</sup> June, 2010. She was supposed to stay in India for ten days but stayed for one month. While in India, she was shown an Indian suit and jewelry in a big bag and told that those were the stock she had gone to fetch. She started suspecting that something was not right when she saw three passports in Kingsley's house with no photographs. She felt scared. Kingsley asked her to have sex with him but she refused so he left her with his cousin who also requested her to have sex with him but she also declined.

16. Kingsley told her the stock was ready and that they had to move to New Delhi the following day but did not want to tell her exactly when she was going home. Everyone left for work and she was left alone in the house. He left a school bag which had rupees and USD 1000. She took the USD 1000 because she was trying to run away. As she was preparing herself, he came back in a hurry to search for the money. He telephoned his girlfriend and asked the girl working for him where the money was. He searched her and found the money. He asked her why she was taking the money. She told him that she wanted to run away as he had developed an attitude towards her since she declined to have sex with him. He told her he had come to pick the money to get her a ticket which was ready.

17. He called the girls working for him and told them that since she had attempted to run away, he would not give her the stock but would ship it instead so he took it away. He left and came back at 11.00 am. He told her that he would give her good quality bags to take to her friend Valarie. He brought her the three small handbags which were new with papers inside and in plastic bags. He told her she would leave the following day. He gave his girlfriend money to take her to buy some clothes. He brought her a new phone and put an Indian line to check on her to make sure all was going well since it was her first time to travel. He asked one of the boys working for him to take her to the airport and he went back to his house.

18. When she got to Nairobi Airport, she met two police officers who were in civilian clothes. She agreed that they search her bag. The lady officer asked her why the bags were heavy and she told her that it was because they were of good quality. The officer who was searching the bag discovered a wall in the bag. He pushed his fingers through and saw something white and asked her what it was. She said she did not know. She was then arrested. Her ticket was from India, Dubai, Nairobi then Malawi. She had been given USD 250 to take a bus to South Africa from Malawi. When she asked Kingsley why the chain was so long, he told her that there was no direct flight from India to South Africa as they were fully booked.

19. In cross examination, she stated that she was raised by a single mother whom she lived with in South Africa and who sustains her needs. She said that she had never travelled anywhere else before. She also stated that her bags were packed in her absence in Delhi by Kingsley's employees and that the three small bags were given to her at the last minute to take to her friend Valarie. Finally, that she was never allowed to go anywhere while in India as she was told that if Indians saw her hair, they would complain.

### **Analysis and determination**

20. This appeal was canvassed by way of both written and oral submissions. The Appellant's written submissions were filed on 19<sup>th</sup> May, 2020 whilst those of the Respondent on 17<sup>th</sup> June, 2020. Highlighting of the same was via Microsoft Teams video platform when the Appellant was represented by learned counsel, Mr. Swaka whilst the Respondent was represented by the learned state counsel, Ms. Ndombi. Upon a careful reevaluation of the evidence on record and consideration of the parties' respective submissions, I find that what arises for determination is whether the Appellant's right to fair trial was violated, whether the prosecution proved its case against the Appellant beyond a reasonable doubt and whether the sentence was harsh and excessive.

#### **i. Whether the Appellant's right to a fair trial was violated.**

21. On this issue, counsel for the Appellant submitted that the conviction was extremely unsafe as the Appellant did not understand the trial proceedings. Counsel argued that this was evident from the onset when the Appellant first pleaded guilty to the offence despite stating that she did not know that her luggage contained illegal drugs and also from her failure to cross examine the prosecution witnesses. For that reason, Mr. Swaka faulted the trial court for failing to accord the Appellant *pro bono* legal representation in line with the provisions of **Article 50 (2) (h) of the Constitution** to aid her in building her case. He argued that with proper legal guidance, the Appellant would have been able to poke holes in the prosecution's case and highlight the inconsistencies in the testimonies of the prosecution witnesses.

22. On the part of the state, it was submitted that the contention that the Appellant did not understand the proceedings was misplaced as the same were conducted in English language which the Appellant confirmed to the trial court she was conversant with. Further, that no objection was raised in that regard throughout the trial and the Appellant also gave her defence in English language implying that she

understood the case she was facing.

23. As regards legal representation, Ms. Ndombi held the view that the same is not an absolute right as it is not mandatory that every accused person be accorded legal representation. The state counsel argued that **Article 50 (2)** of the **Constitution** is clear that criminal proceedings may proceed without legal representation where substantial injustice is unlikely to occur. Further, she argued that under the Legal Aid Act, the mere absence of legal representation does not vitiate a criminal trial. It was her view that the Appellant fully participated in the trial and was given a chance to cross examine witnesses but willfully elected not to ask questions. Accordingly, this ground lacked merit.

24. I have carefully perused the trial court's proceedings. I note that when the Appellant was presented in court on 23<sup>rd</sup> July 2010 for plea taking, the trial court noted as follows:

*“Court - The charges are read to the accused in the English language. She confirms to the court she understands well and replies as follows:*

*Accused in reply - It's true I had the drugs.*

*Hon. L.G. Nzioka*

*SPM*

*Cross examined by the court*

*I didn't know it's a prohibited drug. I didn't know its heroin.*

*Court – plea of not guilty entered.”*

25. From the record of proceedings, the charge was reread to the Appellant on 12<sup>th</sup> August, 2010 just before PW1 testified. She responded **“not true”** and the court maintained the plea of not guilty earlier entered. It is also clear that after each of the prosecution witnesses testified, the trial court informed the Appellant that she had a right to cross examine witnesses and explained to her the effect of failing to do so. However, she elected not to ask any questions and categorically confirmed that she understood what the witnesses stated. In addition, upon being placed on her defence, the Appellant gave a sworn statement in English language. It is therefore not factual that the Appellant did not comprehend the proceedings against her. She neither was prejudiced by her failure to cross examine the prosecution witnesses as this was out of her own volition.

26. On the question of legal representation, **Article 50(2)(h)** of the **Constitution** provides as follows:

*“Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”*  
[Emphasis added]

27. Clearly from the wording of the Article, right is not absolute as there are instances where it can be limited. It only accrues where an accused person would suffer substantial injustice if it is not provided. Notably, the question as to what constitutes substantial injustice depends on the circumstances of each case. In the case of **Republic v Karisa Chengo & 2 others [2015] eKLR**, the Court of Appeal stated as follows:

*“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result. And to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”*

28. The Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR** also set out the following as additional factors to determine whether substantial injustice will be suffered:

- i. The seriousness of the offence;
- ii. The severity of the sentence;
- iii. The ability of the accused person to pay for his own legal representation;
- iv. Whether the accused is a minor;

v. *The literacy of the accused;*

vi. *The complexity of the charge against the accused;*

29. In the instant case, whereas I agree with counsel for the Appellant that it would have been ideal for the Appellant to be accorded legal representation, it is glaringly clear from the trial court's proceedings and the evidence adduced that justice was served. To reiterate myself, the Appellant well understood the language of the court and the trial magistrate kept reminding her of the essence of cross examining the witnesses but declined to do so. The absence of legal representation did not therefore occasion substantial injustice to her. The contention that her constitutional right to fair trial was infringed therefore lacks merit.

**ii. Whether the prosecution proved its case against the Appellant beyond any reasonable doubt.**

30. On this issue, counsel for the Appellant contended that the prosecution did not satisfy the requirement of the charge of trafficking in narcotics since it was not proved that the Appellant had the *mens rea* which ought to accompany the *actus reus* in order to establish the offence. Mr. Swaka argued that the evidence tendered by the prosecution witnesses only focused on the arrest of the Appellant and confiscation of substances suspected to be narcotics. He submitted that the absence of *mens rea* on the Appellant's part was evident from her defence that she did not know that she was carrying the drugs found in her luggage. In his view, the prosecution only built a case on a lesser charge of being in possession of suspected narcotic drugs hence the Appellant ought not to have been convicted of trafficking. He placed reliance on the case of **Madline Akoth Barasa & Another v Republic [2007] eKLR.**

31. In response, Ms. Ndombi submitted that the prosecution proved its case to the required standard. She submitted that the Appellant's defence was a confirmation of what the prosecution had stated in court. She also stated that the fact that the Appellant did not cross examine the prosecution witnesses meant that the evidence of the prosecution was uncontroverted.

32. Ms. Ndombi added that the charge sheet disclosed the mode of trafficking as 'conveying'. She submitted that the prosecution tendered evidence to show that the Appellant was travelling between continents and had concealed the narcotic drugs inside the bags in order to convey them without raising suspicion. Further, that all the statutory steps were taken and the requisite certificates issued. She held the view that the weight of the drug was proof that the Appellant was conveying the same for sale and not for her own personal consumption so as to be convicted of a lesser charge of being in possession of a narcotic drug. Counsel relied on the case of **Gabriel Ojiambo Nambesi v Republic [2007] eKLR** to buttress the submission that the offence of trafficking narcotic drugs was established.

33. **Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994** criminalizes the *trafficking in any narcotic drug or psychotropic substance or any substance represented or held out to be a narcotic drug or psychotropic substance.*

34. "Trafficking" is defined under **Section 2(1)** of the said 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...."*

35. In the case of **Gabriel Ojiambo Nambesi v Republic [2007] eKLR**, the Court of Appeal when addressing what constitutes the offence of trafficking in narcotic observed 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."*

36. In the instant case, the prosecution adduced cogent, corroborative and uncontroverted evidence that the Appellant was trafficking in a narcotic drug by way of conveyance. PW1 and PW2 stated how the drug was found in six packets concealed on the linings of three small handbags. The handbags were in the Appellant's grey bag which had a tag number corresponding to the claim tag number on her passport. PW5 subjected samples of the whitish powder to an elaborate examination at the government chemist and established that it was heroine which is an illegal narcotic drug under the subject Act.

37. The Appellant in her defence admitted that the drug was found in her luggage in the manner stated by the prosecution witnesses. She however claimed that she did not know the three small bags contained the drug. It is for this reason that the Appellant's counsel argues that the prosecution did not prove that the Appellant had the necessary *mens rea* to establish an offence of trafficking. In my view, the circumstances under which the narcotic drugs were recovered from the Appellant's luggage clearly pointed to a plot which the Appellant was well aware of but is feigning ignorance to exonerate herself from the offence. She was being used to traffic the narcotic drug from New Delhi via Dubai, Nairobi and Lilongwe to South Africa. She knew that the bigger luggage bag contained the small bags into which the drug was packed. The only excuse she gave was that they were a gift to a friend called Valarie. I have no doubt in my mind that she travelled to India so that she could act as a conduit for the trafficking in the drug. Unfortunately, anti-narcotic officers at JKIA burst her bubble. I therefore find no merit in Mr. Swaka's contention that the prosecution did not establish the necessary *mens rea* on the part of the Appellant.

38. I thus conclude that the offence was proved beyond any reasonable doubt and the conviction was well founded.

**iii. Whether the sentence imposed upon the Appellant was harsh, excessive and untenable.**

39. Mr. Swaka submitted that the Appellant did not have an opportunity to give any mitigation that would have entreated the court to look at

her circumstances with eyes of mercy. Counsel argued that the law has since departed from the mandatory life sentence that was imposed on the Appellant. In support of this, he cited the case of **Carolyn Auma Majabu v Republic [2014] eKLR** where the Court of Appeal held that the word “liable” in **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substance (Control) Act** merely gives a likely maximum sentence. Counsel also relied on the cases of **Thomas Mutune v Republic [2019] eKLR** and **Kabibi Kalume Katsui v Republic [2015] eKLR** where the courts set aside the sentences imposed by the trial court and substituted them with lesser periods.

40. Finally, Mr. Swaka took issue with the fact that the age of the Appellant was never established by the trial court and urged the court to take into account the fact that the Appellant was in custody throughout her trial. He therefore prayed that the Appellant’s sentence be quashed or commuted to the time already served.

41. Learned state counsel partly conceded to the appeal against the sentence. She stated that the trial magistrate upon imposing the fine as stipulated by under Section 4(a) of the Act, failed to give a default custodial sentence pursuant to **Section 28** of the **Penal Code**. She argued that the trial magistrate also misdirected herself by holding that the life sentence under the second limb of Section 4(a) of the Act is mandatory and by failing to consider the Appellant’s mitigating circumstances. She supported Mr. Swaka’s submissions that the word liable under Section 4(a) of the Act connotes that the court has discretion to impose a reasonable penalty depending on the circumstances of each case. She relied on cases of **Herald Kurt Werthner v Republic [2017] eKLR**; **Elize de Jager v Republic [2020] eKLR**; and **Caroline Auma Majabu V Republic [2014] Eklr** to buttress the submission.

42. Ms. Ndombi further argued that on account of the conflicting evidence regarding the age of the Appellant, a reduction of the life imprisonment imposed by the trial court would be fair and just to the case.

43. **Section 4(a)** provides the penalty for trafficking in narcotic drugs or psychotropic substance as follows:

*“4. 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; ....”*

44. In the not so distant past, courts held the view that the above Section provided for a mandatory life sentence. This is why the trial magistrate intimated that her hands were tied in as far as the said sentence was concerned. However, that was a misreading of the law. The use of the word “liable” connotes that a court may impose any sentence with a possibility of a maximum life imprisonment. Thus, a trial court has the discretion to sentence an accused person to a lesser sentence depending on the circumstances of each case.

45. This position has severally been explained by the Court of Appeal. For instance, in the case of **Caroline Auma Majabu v Republic [2014] eKLR**, the Court had this to say:

*“.....the use of the word “liable” in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.”*

46. In **Kabibi Kalume Katsui v Republic [2015] eKLR**, the Court held held that:

*“In the premises we shall state without tiring, that under the Narcotic Drugs and Psychotropic Substances Control Act, sentence is still discretionary. We are of course in no way suggesting that under this Act, this court or the High Court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. See Wanjema v Republic [1971] EA 493 and Diego v Republic [1985] KLR 621. The trial court and High Court meted out a life imprisonment sentence inclusive of a one million fine, on the premise that such sentence was mandatory hence they misdirected themselves. That misdirection calls for our intervention. In arriving at the appropriate sentence that we should substitute we are bound to consider the quantity of the drugs, its value, the mitigation canvassed by the Appellant and her antecedents if at all relating to the same offence.”*

47. Having regard to the above case law, I hold the view that the Appellant is entitled to a reconsideration of the sentence imposed by the trial court in the interests of justice.

48. In so doing, I take into consideration the Appellant’s mitigation, the quantity and value of the drugs that were found in her possession as well as the custodial sentences that have been meted on those found with drugs in similar circumstances. On the first limb of the sentence, I order that the Appellant shall pay a fine of Kshs. 5,112,600/= in default to serve one (1) year imprisonment. On the second limb, I set aside the life imprisonment and substitute it with a custodial sentence of twelve (12) years imprisonment. If she does not pay the fine on the first limb, the sentences shall run consecutively with effect from 22<sup>nd</sup> July, 2010 the date of her arrest. The Appellant shall be repatriated to her home country, South Africa after she completes her sentence.

**DATED AND DELIVERED AT NAIROBI THIS 30TH JUNE, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Swaka *for the Appellant.*
2. Miss Akunja *for the Respondent.*