REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 178 OF 2017

JOSEPH MULI MWANZIA..................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the original conviction and sentence by Hon. Gacheru,

Principal Magistrate, in Mombasa Chief Magistrate's Court Criminal Case No. 2901 of 2011).

J U D G M E N T

1. The Appellant Joseph Muli Mwanzia has appealed against conviction and sentence in Mombasa Chief Magistrates Court Criminal Case No. 2901 of 2011 where he was found guilty of the offence trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

2. The Appellant was fined Kshs. One Million and Life Imprisonment. The amended grounds of Appeal relied upon by the Appellant on his appeal are as follows:-

> **i. "That the learned trial Magistrate erred in law and fact by finding conviction and sentence on failing to note that no certificate under the hand of improper officers was adduced in evidence to confirm the market value of the alleged narcotic drugs pursuant to Section 86 of the Act as charged.**
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> **ii. That the learned trial Magistrate erred in law and fact by failing to make a finding as to neither the stuff allegedly found him the possession of Appellant was narcotic drugs, heroine neither the defendant was given as the Act where the charge was raised.**
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> **iii. That the learned trial Magistrate erred in law and fact by finding the appellants conviction and sentence without considering that no 'photograph' of the appellant was produced in court showing possession of the said narcotic drugs or trafficking of them', no notice of seizure was produced in court to show that the alleged drugs were seized from the Appellant.**
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> **iv. That the learned trial Magistrate erred in law and fact by convicting & sentencing the Appellant without considering that the prosecution's case was not proved beyond all reasonable doubt as required by law.**
>
> **v. That the learned trial Magistrate erred in law & fact by finding Appellant guilty on insufficient, contradicting & uncorroborated evidence.**
>
> **vi. That the learned trial Magistrate erred in law and fact by finding Appellant guilty & convicting him and sentencing without considering that material witnesses were not called.**
>
> **vii. That the learned trial Magistrate erred in law and fact by sentencing Appellant to a harsh & excessive sentence without taking into consideration the circumstances of the case.**
>
> viii. **That the learned trial Magistrate erred in law and fact by finding Appellant guilty, convicting & sentencing him without considering his mitigation due to mandatory nature of the sentence thus denying him fair trial"**.

3. The Appellant prayed that his conviction be quashed and sentence set aside. Directions were taken that appeal be canvassed by way of

written submissions.

4. The Appellant entries submissions said that no proper officer testified as to the sheet value of the narcotic drug allegedly recovered from him. It was also submitted that the trial Magistrate erroneously wrote value of the said narcotic drugs as Kshs.24,000/= whereas charge sheet indicated Kshs.2,400/=.

5. The Appellant relied on the cases of ***Hamayuin Khan vs CR 159/00(UK); Buelvas vs Petrre*** and Anthony (1985) LRC (crim) 462, - ***Buelvas vs Pierre*** & Anthony (1985) LRC (crim) 462 from Ireland & Tobargo; - ***Barasa & Another vs Rep***. CR. Appl. No. 93 of 2005 – Cr. Appeal – Kisumu – where it was held that where there is no evidence about the marked value of the drugs by a proper officer as stipulated in Section 86 of Act No. 4 of 1994 a conviction cannot stand.

6. The Appellant further submitted that the prosecution witnesses gave contradictory evidence as to the amount and nature of packaging of the substance which was allegedly recovered from him and taken to Government Analyst for analysis, in the circumstances he asked that the conviction be quashed and sentence set aside as it was based on contradictory evidence. The authority of ***Wanjiku vs Republic*** CR. Appeal No. 139 of 2002 H.C. at Mombasa was relied on.

7. On further submissions, the appellant contended that the prosecution had not proved that he was arrested in possession of the alleged drugs as there was no photographs or seizure notice. While relying on the landmark case of ***Francis Mwanaletus & Another vs Republic*** – Petition No. 15 of 2015 the appellant argued that the mandatory sentence in Act No. 4 of 1994 was unconstitutional as it fetters the discretion of the trial court.

8. The Appellant argued that the sentence meted on him was excessive and di not serve either the interest of justice of the society and the urged the court to set it aside and acquit him.

9. The Respondents submissions contended that the case of ***Hamayian Khan vs Republic*** where certificate of valuation by an authorized officers was not relevant on this instance case because the fine was not market determined by the value. It was also submitted by the Respondent that PW 2 Government Analyst confirmed that the substance recovered from the appellant was heroine.

10. As to whether there was contradictious in the prosecution's case the Respondent's argued that the very issue the appellant raises is how the sachets were wrapped. He doesn't discount that they were found in his person. It is contended that the inconsistence is not material and does not go to the root of the prosecution's case.

11. The Respondent also argued that the failure by the prosecution to call serve witnesses did not in any way prejudice the appellant and that the Appellant didn't demonstrate that prosecution was activated with and ulterior motive.

12. Whether the sentence was harsh and/or excessive, it was submitted that this is the trial courts discretion which appellants court should not interfere with unless among principle was applied in passing sentence, on same material evidence was overlooked or sentence was manifestly excessive.

13. The Respondent (state) relied on several authorities, in its argument that sentence is discretionary:-

> i. In January Stephen vs Republic [2017] CR. Appeal No. 2 of 2016,
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> ii. Macharia vs Republic [2003] EA 559 and
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> iii. Livinstone Kakooza vs Uganda Sc. Criminal Appeal No. 17 of 1993,
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> iv. Ogalo & Ownora vs Republic [1954] 21 EACA 270
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> v. Republic vs Jayani & Another KLR[2001] KLR 593
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> vi. Josian Mutua Mutunga & Another vs Republic [2019] eKLR
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> vii. Republic vs Scott[2005] NSWCCA 152.
>
> viii. Bernard Kimani Gacheru vs Republic [2002] eKLR
>
> ix. Mohammed Kamau Bakari vs Republic (2016) eKLR – C.A.

14. The Respondent's conceded that time served by the Appellant was sufficient considering the strict value of the exhibits recovered from him although convicting was prosper.

15. I have considered the grounds of appeal submissions by the appellant and the Respondent counsel as well as the evidence on the trial courts record and judgment of the trial Magistrate and find that the arrest of the Appellant and the alleged finding him trafficking on drugs was evidence tendered by only one witness – PW 1. P.C. Mwaniki. He said he with P.C. Njoroge who had earlier testified but was stood down to cross examination at a later date but never turned up.

16. The evidence of PW 1 was not corroborated and the same was challenged by the evidence of the appellant as to how he was arrested when coming from his place of business. The evidence by P.C. Njoroge who initially testified as PW 1 not having been cross examined cannot be taken as evidence with any probative value.

17. The members of public who allegedly tipped P.C. Njoroge & P.C. Mwaniki that the appellant was trafficking on Narcotic drugs didn't also testify and the evidence of P.C. Mwaniki would not have been sufficient to sustain conviction of the appellant as it stands on the balance with evidence of appellant in defence.

18. The substance which was subjected to analysis by PW 2 ought to have been proved to have been recovered from the appellants that proof could not sufficiently have been given by alone witness without corroboration by an independent witness. On this ground alone the Appellant appeal succeeds. The conviction is quashed and sentence set aside.

19. The Appellant is set at liberty forthwith unless lawfully detained.

Dated, signed and delivered online by MS TEAMS, this 17th day of December 2020

HON. LADY JUSTICE A. ONG'INJO

JUDGE