



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.180 OF 2013

(An Appeal arising out of the conviction and sentence of Mrs. J.N. Wanjala – CM delivered on 31st July 2013 in Kibera CMC. CR. Case No.1756 of 2011)

CATHERINE BANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Catherine Banda, was charged with the offence of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic and Substances (Control) Act**. The particulars of the offence were that on the 21st day of May 2011 at Jomo Kenyatta International Airport, Nairobi within Nairobi County, the Appellant trafficked by conveying in a suite case 891.9 grams of narcotic drug namely cocaine with an estimated market value of Kshs.3,567,600/- in contravention of the provision of the said **Act**. When the Appellant was arraigned before the trial court, she pleaded not guilty to the charge. After full trial, she was convicted as charged and sentenced to pay a fine of Kshs.10,702,000 or in default serve five (5) years imprisonment. She was in addition sentenced to serve life imprisonment. She was aggrieved by her conviction and sentence and duly filed an appeal to this court.

In her petition of appeal, the Appellant raised two grounds of appeal challenging her conviction and sentence. The grounds of appeal were that the trial court relied on insufficient evidence of the prosecution witnesses to convict her and that the sentence imposed upon her was contrary to the prescribed sentence for the offence under the said **Act**. The Appellant therefore urged this court to allow the appeal, quash the conviction and set aside the sentences that were imposed on her.

At the hearing of the appeal, the Appellant presented to the court written submissions in support of her appeal. A response to the Appellant's submissions was made by Ms. Sigei on behalf of the State. In her submissions, the Appellant criticized the trial court for misdirecting itself in disregarding her defence on the basis that the prosecution's evidence was sufficient to support her conviction. The Appellant argued that in rejecting her defence, the trial court failed to consider the possibility of the drugs having been planted inside her luggage given that she was not present when the luggage was offloaded from the plane and further because she found her luggage already opened when she was called to identify it. According to the Appellant therefore, the prosecution's case was not proved to the required standard of proof beyond any reasonable doubt. In support of this submission, she relied on the cases of **Republic –versus- David Ruo Nyambura & 4 Others [2001] eKLR** and **Philip Muiruri Ndaruga –versus- Republic [2006] eKLR**. In submitting on the sentence imposed upon her by the trial court, the Appellant submitted that the court misdirected itself by erroneously importing a mandatory language in interpreting **Section 4(a)** of the **Act**. She relied on the cases of **Carolyn Auma Majabu –versus- Republic [2014] eKLR**, **Kabibi Kalume Katsui –versus- Republic [2015] eKLR** and **Moses Banda Daniel –versus- Republic [2016] eKLR**. She therefore urged this court to allow the appeal.

Ms. Sigei opposed the Appellant's appeal and submitted that the prosecution proved its case against Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the chain of evidence linking the Appellant to the narcotic drugs recovered was sufficiently established. The Learned State Counsel further submitted that the drugs were analyzed by a forensic expert and were established to be 891.9 grams of cocaine valued at Kshs.3,567,000/-. She attacked the Appellant's defence as being a mere general denial which did not raise a plausible defence to the prosecution's case. With regard to the sentence imposed by the trial court, the learned State Counsel submitted that the court exercised its ordinary sentencing discretion in imposing the sentences on the Appellant. Consequently, she urged the court to disallow the Appellants' appeal.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic and**

Substances (Control) Act to the required standard of proof beyond any reasonable doubt.

The facts of the case were as follows. On 21st April 2011 at around 6.30 a.m, police officers attached to the Anti-Narcotics Unit at Jomo Kenyatta International Airport in Nairobi, Kenya recovered from the Appellant, a Zambian national, 891.9 grams of cocaine estimated to be worth Kshs.3,567,600. On the day in question, PW1 Corporal Salome Kulubu of the Anti-Narcotics Unit was conducting routine patrol at the airport alongside her three colleagues namely Corporal Kimeli and Police Constables Kivavae and Kimunyi. PW1 testified that her interest on the Appellant, who was at the departures lounge near the airport's Gate No.6, was aroused due to the fact that her travel documents indicated that she had been to Pakistan and Dubai, countries which she deemed to be sources of narcotic drugs before arriving in Nairobi. The Appellant was in transit on her way to Ndola in Zambia.

PW1 testified that the Appellant had in her possession her Zambian passport No.2N145450 (*Exh.1a*), Zambian national identity card No.218968/16/1 (*Exh.1b*), two (2) air tickets nos. 70627865588556 (*Exh.1c*), and 70644025412826 (*Exh.1d*), 3 boarding passes (*Exh.1e*), a luggage tag no. PK 364325 (*Exh.1f*), a vaccination card (*Exh.1g*), and a claim card No.PK 364325 (*Exh.1h*). She testified that they requested the Appellant to accompany them to their office at the airport where they were joined by PW2 Corporal Agnes Mwema. Meanwhile, Police Constable Kimeli requested the airline staff to offload the Appellant's luggage from the plane she was to board as she had already checked in. The Appellant's luggage was offloaded and taken to the luggage claim office where she was asked to identify them in the presence of both PW1 and PW2. She had a black suite case (*Exh.2a*) and a washing drier machine with tag number 364325 which corresponded with the luggage tag and claim tag in her possession.

The Appellant was taken back to the Anti-Narcotics Office where PW2 conducted a body search. Nothing incriminating was found on her. She was then asked to open the suite case. Inside the suite case were the Appellant's personal effects and two paper bags. PW2 opened the first paper bag printed "*Beauty Ways*" (*Exh.2c*) and found nineteen (19) toothpaste and cosmetics tubes. She testified that she picked one of the tubes marked Aquafresh Florida Toothpaste (*Exh.5*) and noticed that the paste was leaking from the tube. She also noticed that it had a false bottom. A creamish powdery substance was stashed between the tube and the said false bottom. She also opened the second paper bag printed "*G Khan Western Single*" (*Exh. 2b*) and found two boxes labeled "*Arche Cream*" (*Exh. 2d*). The first box contained 25 cans of the said Arche Cream while the second one had 22 cans of the cream (*Exh. 3*). PW2 testified that she opened one of the cans and found that it also had a false bottom. The same creamish powdery substance had also been stashed between the bottom of the can and the false bottom of the can. She testified that they suspected the substance to be narcotic drugs and therefore reported the incident to their in-charge, PW3 Superintendent of Police Mrs. Ruth Muinde. PW3 testified that she went to their office where the Appellant had been held and examined the substance recovered from the Appellant's luggage. She also suspected the same to be narcotic drugs. PW3 testified that she therefore contacted officers from the Scene of Crime as well as the Government Analyst as PW2 prepared an inventory of the items seized from the Appellant (*Exh. 8*).

Officers of the Scene of Crime Services arrived and took photographs of the suite case with its contents. They also took photographs indicating how the substance was recovered. PW5 Cpl. Virginia Wanjiku, an officer from the Scene of Crime Support Services based at the CID headquarters produced into evidence the said photographs taken by her colleague Chief Inspector Fredrick Ochieng. The Photographs showed a general view of the suite case with the tag number PK 364323 together with the two paper bags that were marked **CB1** and **CB2**. The photographs also showed a close up view of the paper bags with the cosmetic tubes and containers. There were also several photographs showing the process of how the substances on the tubes and containers were recovered and weighed. PW5 produced 134 photographs into evidence as *Exh.16b*. She also produced into evidence a report prepared by the said Chief Inspector Fredrick Ochieng together with his certificate for the production of the photographs during trial as *Exh.16a*.

When the Scene of Crime Officer finished taking the Photographs, PW3, being a proper officer under the **Narcotic Drugs and Psychotropic and Substances (Control) Act** weighed the substance recovered and found it to be 891.1 grams. She prepared a weight certificate which was signed by everyone present including PW2, PW4, PW5 and the Appellant (*Exh.10*). PW4 Simon Nandi Sunguti, a government analyst working at the Government Chemist Department then sampled the substance and prepared a certificate of sampling which he signed together with PW3 and the Appellant (*Exh.11*). He testified that he received 15 polythene sachets labeled CB1a – CB1o (*Exh.15a*) containing a creamish powder, 1 empty sachet labeled CB1p and three other sachets labeled CB1q – CB1s (*Exh. 15b*) containing a creamish powder. He also received 47 Polythene sachets labeled CB2(1) –CB 2 (47) (*Exh.15b*).

The exhibits were accompanied with an exhibit memo form (*Exh.15*). He was required to ascertain whether the substance contained any narcotic drugs or psychotropic substances. PW4 testified that he analyzed the substances and found that they contained cocaine, a narcotic drug. He produced into evidence his report (*Exh.14*). The drugs were valued by PW6 Superintendent of Police Justus Maina, a proper officer under the said **Act**. He valued it at Kshs.3,567,600. PW6 prepared a certificate of valuation in that regard which he produced into evidence as prosecution's *exhibit no.18*. PW7 was assigned to investigate the case. After concluding his investigations he formed the view that a case had been established against the Appellant and charged her with the offence that she was convicted.

When the Appellant was put on her defence, she denied committing the offence. She stated that she had a sister in Pakistan who had been of ill health. She testified that they had organized for her return to Zambia but the airline officials in Pakistan refused to allow her to travel due to her illness and further because she was pregnant. The Appellant explained that the reason why she had been to Pakistan was because she had gone to pick her sister and bring her back to Zambia. She testified that her sister however died when giving birth. She testified that she was intercepted by the Kenyan police as she was enroute back to Zambia to make arrangement to ferry her sister's body back to Zambia. The Appellant stated that she travelled from Pakistan to Dubai aboard a Pakistan International Airlines plane on 18th May 2011. She was searched and her luggage was also screened. Everything was found to be in order before she was allowed to board the flight.

The Appellant stated that she arrived in Dubai and remained there for three days before booking a flight to Nairobi on 21st May 2011 aboard a flight operated by Kenya Airways. The Appellant stated that she was also searched and her luggage checked before she was cleared to board the flight. She arrived at Jomo Kenyatta International Airport on the same day at 6.30 a.m. At the airport, she was stopped by a police officer who asked to see her passport and air ticket. She stated that the said police officer confiscated her documents and took her to a small room where he asked her to wait.

The Appellant testified that she remained in the room until 10.45 a.m, when she was called to board her flight. She testified that before she

exited the room, she saw her luggage. It was opened. Her washing drier machine was on top of her suite case and her red sandals and two handbags were on the floor. She inquired from a police officer present why her luggage was opened but he dismissed her and told her to pick up her luggage. When she refused, the said officer picked them up and placed them on a table that was inside the room. She testified that PW3 was called to the room and when she arrived she asked her to take off her clothes and lie on the table. PW3 then pressed her stomach and told her that it was empty. She gave her a glass of juice and asked her to go to the toilet. Thereafter PW3 opened the suite case which was already tampered with. She testified that PW3 removed a charcoal green trouser suit revealing several containers inside the suite case. She testified that PW3 took a tube from the suite case and squeezed it. A white substance fell down. She testified that she was asked to identify what the substance was and when she was unable to, she was arrested and was later charged with the offence.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made by both the Appellant and the State. The Appellant was charged with the offence of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic and Substances (Control) Act**. The Appellant was convicted on the basis that she was found in possession of 891.9 grams of cocaine at the Jomo Kenyatta International Airport. It was the prosecution's case that she was intercepted at the departures lounge near the airport's Gate No.6 where she was waiting to board a flight to Ndola in Zambia. According to the prosecution, her travel documents, in particular her passport showed that she had been to Pakistan and Dubai before she arrived in Nairobi. It was the prosecution's case that the reason why the Appellant was stopped was because she had been to the said countries which are deemed to be drug sources before arriving in Nairobi. The prosecution's case was that the Appellant had a luggage tag and a claim card both Nos.PK 364325 which were used to retrieve the Appellant's luggage from the plane she was to board to Ndola in Zambia. The luggage was retrieved from the plane. The Appellant was called to identify it in the presence of PW1, PW2 and PW7. Her luggage also had the same tag number. She had a suite case and a washing machine drier.

Once the Appellant identified her luggage, she was taken to the Anti-Narcotics Office at the airport together with her luggage accompanied by both PW1, PW2. There, she was asked to open the suite case. When it was opened, they found her personal effects and two paper bags. PW2 opened the first paper bag and found items that appeared to be cosmetics and tooth paste packed in tubes. There were 19 tubes in number. She picked one of the tubes labeled "*Aquafresh Floride Toothpaste*" and saw that it was leaking. She examined the tube and noticed that it had a false bottom. The evidence of PW2 was that she found a cream powdery substance stashed between the bottom of the tube and the said false bottom. She testified that she opened the second paper bag and found two boxes marked Arche Cream. One of the boxes had 25 cans of the said Arche Cream while the other had 22. PW2 cut open one of the cans and saw that it also had a false bottom. She also found the cream substance stashed between the bottom of the can and its false bottom. She suspected the cream substance to be narcotic drugs.

PW2 informed PW3, their in-charge of the incident. PW3 saw the substance recovered from the Appellant and also suspected it to be narcotic drugs. She sought the assistance of the Scene of Crime Officers to take photographs of the items recovered from the Appellant's suite case. The scene of crime officers also took photographs as the rest of the substance was recovered. The photographs were produced into evidence. PW3 weighed the substance recovered and found it to weigh 891.1 grams. It was analyzed by PW4 found to contain cocaine, a narcotic drug. A report to that effect was also produced into evidence. The substance was valued by PW6 at Kshs.3,567,600/- and a certificate of valuation in that regard was produced into evidence.

In her defence, the Appellant denied possessing the said drugs. She claimed that her luggage had been tampered with before she was asked to open it. According to her, there was a possibility that she was framed with the offence as she was not present when the luggage was offloaded from the plane. However from the evidence of PW1 and PW2, the Appellant's suite case was not opened when she identified it at the baggage claims office at the airport. She did not dispute that the suite case belonged to her. She cannot therefore deny that she was not aware of the existence of the narcotic drugs in her luggage. This court finds that the prosecution did establish a direct connection between the Appellant and the suite case. The prosecution proved the required standard of proof that the Appellant was found with 891.1 grams of cocaine. Her defence does not displace the strong evidence adduced by the prosecution witnesses. For the above reasons, the Appellant's appeal on conviction is dismissed.

As regards the legality of the sentence meted upon her, relying on the case of **Mohamed Famau Bakari -versus- Republic [2016] eKLR**, the phrase "*shall be liable*" used in **Section 4(a)** of the **Act** does not import a mandatory sentence. In that case, the judges cited the case of **Anthony Mbithi Kasyula -versus- Republic, Criminal Appeal, No. 134 of 2012** to opine that **Section 4(a)** of the **Act** merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated. From the foregoing, this court finds that the sentence imposed by the trial court upon the Appellant was harsh and excessive in the circumstances. The appeal on sentence is therefore allowed. This court upholds the fine imposed by the trial court and the default sentence of five (5) years imprisonment. However, the additional sentence of life imprisonment is set aside and substituted with a sentence of ten (10) years imprisonment less the two (2) years that the Appellant was in remand custody. The sentence shall take effect from 30th July 2013 when the Appellant was convicted and sentenced by the trial court. In the premises therefore, the Appellant shall serve an additional term of eight (8) years imprisonment. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MARCH 2018

L. KIMARU

JUDGE