REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 9 OF 2016

BARAKA KAZUNGU MANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 784 of 2011 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The appellant 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 of the offence were that the appellant on 26.11.2011 at around 6.30 am at Mtangani area in Malindi District within Kilifi County, was found trafficking in narcotic drugs to wit twenty-seven (27) small rolls of cannabis valued at Kshs.540/= by storing in contravention of the said Act. The appellant was also charged with the offence of being in possession of narcotic drugs contrary to section 3 (1) (2) (b) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that on 26.11.2011 at around 6.30 am at Mtangani area in Malindi District within Kilifi County, was found in possession of narcotic drugs to wit one sachet of heroine valued at Kshs.150/= in contravention of the said Act.

The trial court acquitted the appellant on the 2nd count but convicted him the first count. He was sentenced to serve two years imprisonment and pay a fine of Kshs.1 million. The trial court also imposed an additional fine of Kshs.1,620/=. Initially the appellant did not file an appeal. The High Court vide Criminal Revision No. 179 of 2013 revised the sentence to life imprisonment and a fine of Kshs.1 million. This made the appellant to file an application for leave to appeal out of time and this led to the current appeal. The grounds of appeal are that there is a miscarriage of justice. That the sentence is not lawful. That the amount of the drugs was not determined by a proper officer as per the law and that the initial sentence of two years imprisonment was excessive considering the value of the drugs.

In his submissions, the appellant contend that he was not present when the sentence was reviewed to life imprisonment. He did not seek revision of the sentence. It is also submitted that the revision is not proper as the sentence could not have been reviewed to the detriment of the appellant. He was not accorded an opportunity to be heard contrary to the provisions of Article 50 of the Constitution. The revision of the sentence prejudiced the appellant. The market value of the drugs was also not determined.

The State opposed the appeal and submitted that the appellant was found with the drugs and the conviction is proper. It is also submitted that the sentence imposed by the trial court is lawful.

The record of the trial court shows that three witnesses testified for the prosecution. The appellant testified and called two of his sisters as witnesses. PW1 AP Cpl. ERNEST MWENDA was attached to the District Commissioner's office, Malindi. On 26.11.2011 at about 6.30 am he was at the Malindi police station when he got a tip off that someone was selling drugs at Mtangani area. He went with other police officer to the suspected house where they recovered 27 rolls of dry plant and one sachet of powder. The appellant was in the house and the search was done in his presence. They arrested the appellant and took him to Malindi police station.

PW2 P.C. NOAH KIPLAGAT was stationed at the Malindi police station. He is the investigating officer. On 26.11.2011 at about 6.30 am they went to a house at Mtangani where it was suspected that someone was selling drugs. They searched the bedrooms and discovered a hole under the bed. PW1 recovered a jar which had 27 rolls of dry plants and a match box which had one sachet of dry powder. On 5.1.2012 the exhibits were sent to the Government Chemist for analysis. The dry plants were found to be bhang while the dry powder was found to be heroin. They arrested the appellant who was in the house and took him to Malindi police station. The appellant was later charged with the offence.

PW3 GEORGE LAWRENCE OGUDA is a Government Analyst based at the Government Chemist Mombasa. On 5.1.2012 he received 27 rolls of dry plants material and one sachet of powder substance. He analysed the exhibits and found that the dry plants was bhang while the

dry powder was heroin.

In his unsworn evidence the appellant testified that on the material day he left home heading to his place of work. On his way, he was stopped by a vehicle which had three occupants. He was taken round and later found himself at the police station. He was charged with the offence. DW2 SIDI KAZUNGU and DW3 LUCY KADZO KAZUNGU are the appellant's sisters. Their evidence is similar. They testified that on 27.7.2012 they were in the house together with the appellant when the police officers went there and arrested the appellant. It is their evidence that they appellant was framed. The appellant is a mason and does not deal in drugs.

The first issue for determination is that of conviction. Did the prosecution prove its case beyond reasonable doubt. From the evidence of PW1 and PW2, it is stated that they got information that someone was selling drugs in a certain house at Mtangoni area. They went to that specific house; conducted a search and recovered the drugs. The defence evidence is that the appellant was arrested while on his way to his place of work. That evidence is not in line with that of the appellant's witnesses. According to the witnesses, the police entered their house and took the appellant.

I do find that the prosecution evidence sufficiently proved the offence. The trial court felt that the appellant was trafficking in drugs as they were found in the jar and not with strapped on the appellant's body. The conviction is on the count of trafficking. The defence evidence does not raise any doubt on the recovery of the drugs. I do hold that the conviction is proper.

The next issue relates to the sentence. The trial court sentenced the appellant to serve two (2) years imprisonment. This was on 10.10.2013. He would have completed his sentence by now. On 25.10.2013 the High Court unilaterally reviewed the sentence to life imprisonment. The division was made in the accordance with section 4 (a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994. Section 4 (a) of the Act states as follows: -

> **(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.**

The High Court reviewed the sentence on the assumption that life imprisonment is the only sentence under section 4 (a) of the Act. That assumption is erroneous. The imprisonment for life is the maximum sentence. A comparison can be made with section 205 of the Penal Code which states as follows: -

> **"Any person who commits the felon of manslaughter is liable to imprisonment for life."**

Both sections 4 of the Antinarcotic Drugs and Psychotropic Substance Control Act and Section 205 of the Penal Code use the term **"liable"**. The essence is that a life sentence can be imposed but it is not the only sentence. If that were to be the case, then all these convicted of manslaughter would be sentenced to life imprisonment.

The Revision gave the appellant 14 days to appeal. The appellant was not aware of the revision. Section 364 (1) (a) of the Criminal Procedure Act empowers the High Court to enhance a sentence imposed by the trial court. Section 364 (2) provides that no order under section 364 can be made unless the accused person has had an opportunity of being heard. The appellant was not heard. Ordinarily, he would have appealed to the Court of Appeal against the revision. The application for leave to appeal out of time was filed before the High Court. The matter proceeded like any other ordinary appeal against the conviction of the trial court. It is only in the submission which the issue of revision was raised.

The question as to whether the fine of Kshs. One Million plus life in prison is the minimum sentence has been dealt with by the Court of Appeal in several cases. In the case of **CAROLINE AUMA MAJABU V REPUBLIC**, Malindi Criminal Appeal No. 65 of 2014 (C.A.); [2014] eKLR, the appellant was charged was charged with the offence of trafficking in narcotic drugs worth Kshs.700/=. She was sentence to life imprisonment and pay a fine of Kshs.One Million. The Court of Appeal stated as follows: -

> **"Further, the appellant was sentenced to pay a fine of Kshs.1,000,000/= in addition to a life sentence for possession of seven sachets of heroin worth Kshs.700/=. We are of 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 heron 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."**

It is now well settled that the sentence under Section 4 (a) of Act number 4 of 1994 is the maximum. It is not to be construed as the only sentence. Wherever a person is charged under Section 4 of the Act and found guilty of the charge, he/she can be sentenced to a period less than life in prison. See the case of **PRISCILLA JEMUTAI KOLONGEI V REPUBLIC** (C.A) Nairobi Criminal Appeal No. 84 of 2004, and that of **DANIEL KYALO MUEMA V REPUBLIC Nairobi** (C.A.) Criminal Appeal No. 479 of 2007.

Given the circumstances of this case, I do find that there is a miscarriage of justice. The value of the drugs was Kshs.540. the sentence imposed on review is not proportionate to the offence. I would treat the appeal as both an appeal and a request to set aside the revision sentence imposed by this court. This court can review its own decision. The revision was done in 2013 soon after the appellant was convicted. Asking the appellant to pursue an appeal through the Court of Appeal will greatly inconvenience him. He has now served over three years yet he was sentence to serve two years.

I do find that the appeal is merited and is hereby allowed. The sentence imposed by this court of life imprisonment is set aside as it was imposed erroneously without hearing the appellant. the appellant lawfully exercised his right to appeal against the conviction by the trial

court.

In the end, the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 30th day of January, 2017.

S.J. CHITEMBWE

JUDGE