REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 601 OF 2010

ALLAN NYOMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court Kibera Cr. Case No. 2293 of 2009 delivered by Hon. G. Nzioka, SPM on 25th October 2010).

JUDGMENT

Background.

Allan Nyombi, the Appellant herein 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 on 31st May, 2009 at Jomo Kenyatta International Airport, in Nairobi within Nairobi Area, trafficked by conveying 167.6 grams of Narcotic Drugs namely Heroin with an estimated market value of Kshs. 167,600/- in contravention of the provision of the said Act.

The Appellant was found guilty and sentenced to pay a fine of Kshs. 1,000,000/- and in addition serve life imprisonment. He was dissatisfied with both the conviction and sentence as a result of which he has preferred the instant appeal. The Appellant set out his grounds of appeal as an addendum to his written submissions that were filed on 27th September 2017. They were that the charge sheet was defective, that **Sections 4, 67, 74(A), 75, 79** and **86** of the **Narcotic Drugs and Psychotropic (Control) Act. 1994** were violated, that his defence was not considered, that the case was not proved beyond a reasonable doubt that the sentence imposed was manifestly excessive.

Submissions

The Appellant relied on written submissions filed on 27th September, 2017. He submitted that the charge sheet was defective in that he was charged under **Section 4(a) c of the Narcotic Drugs and Psychotropic Substances Control Act, No 4 of 1994** which provision does not exist in the Statute. He added that the trial was defective in that he was charged on 2nd June, 2009 before the exhibits (drugs) were recovered. His contention was that the twelve pallets of drugs were emitted at 8.00 p.m. when he had already taken plea. It was also his submission that the charge sheet was defective in that it gave the value of the drugs in Kenya shillings contrary to the evidence of the valuation officer who valued it in Uganda shillings.

He took issue with the fact that the prosecution evidence was inconsistent and contradictory. Under this head, he submitted that there was contradiction on the number of pallets that he emitted. In addition, the evidence contradicted with respect to who analyzed the drugs. He submitted that PW6 testified that the drugs were weighed by a government analyst, one, Mr. Musyoka. This differed with the testimony of PW3 who testified as the government analyst but his name was William Kairu. He further took issue with the contradictory evidence of PW7, the investigating officer who at one time testified that an x-ray was taken to determine whether he still had more pallets in his body. The witness then backtracked in cross examination by stating that no x-ray had been done.

Finally, he submitted that the sentence imposed was harsh and excessive in the circumstances more particular taking into consideration the value of the drug recovered. He urged the court to quash the conviction, set aside the sentence and order for his release.

Learned State Counsel, Ms. Atina for the Respondent opposed the appeal. On whether the Appellant was charged under a provision not known in Law, she submitted that this was occasioned by a typographical error. She submitted that the charge sheet was properly drawn under **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. Furthermore, the Appellant took plea for the offence of trafficking in narcotic drugs for which he was tried and defended himself. She denied that the prosecution's case was riddled with inconsistencies and contradictions. In contrast, it was her case that the prosecution tendered a watertight and cogent case against the Appellant. On sentence, counsel submitted that the same was lawful and reasonable and urged the court not to disturb it. She urged that the appeal be dismissed in its entirety.

Evidence

The prosecution called a total of eight witnesses. In summary, the Appellant was arrested at Jomo Kenyatta International Airport on 31st May, 2009 at about 1.00 p.m. He was then travelling to Entebe via the airport having come from Dubai as a transit location from Kabul in Afghanistan. At the time, **PW1, PC Bernard Lebo and PW2, PC Stephen Ayatta** both of Anti-narcotics Drugs Unit were on patrol. They stopped and interrogated the Appellant and on realizing that he had come from Afghanistan which is a drug hub, they decided to conduct a search and further investigate him. They escorted him to their office and on a search on his baggage recovered nothing. They however suspected he could be trafficking in narcotic drugs in his rectum. They thus detained him for observation. On 2nd June, 2009 in the presence of PC Mbui Lebo and PC Mugi, he emitted one pallet which on analysis was found to contain heroin. Later in the day, he emitted another twelve pallets. Two more pallets were emitted on 6th June, 2009. They were valued by **PW5 Superintendent of Police, Judith Auma Odhiambo** who found that they weighed 167.6 grams valued at Uganda shillings. 167600. Other witnesses who witnessed the emission of the pallets were **PW4, PC David Oleisemai and PW8 PC. James Mbuyu.** The drugs were then recorded on observation sheets which the necessary officers and the Appellant signed. They were handed over to **PW6, Inspector Mary Jebkorir** who called in a government analyst for purposes of weighing and sampling them. According to PW6, the government analyst was one Musyoka. However, **PW3, William Kairu** testified as the government chemist who analyst samples from each pellet and found them to contain diacetyl morphine also known as heroine. He produced an analyst report in that respect. The matter was investigated by **PW7, P.C. Nyamosi.**

After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement of defence in which he denied committing the offence. He agreed that at the time of his arrest, he had travelled from Kabul in Afghanistan via Dubai then JKIA with a final destination in Entebe, Uganda. He stated that at JKIA, he was stopped by security officers, PW1 and 2 who searched him for drugs but found none. They then asked him to pay USD 3500 so that they could book him on the next flight. Since he did not have the money, he was taken to the Anti-narcotic drugs office where he asked that an X-ray be done on his body so as to confirm that he was not trafficking narcotic drugs. The police however declined to take him for an X-ray at that moment. Instead, they escorted him to a nearby police station where he was charged on 2nd June, 2009. It was on 3rd June, 2009 that he was taken to Kenyatta National Hospital for an X-ray which showed that he was

not carrying drugs on his body. On 6th June, 2009, he was forced to sign some documents which he did not know what they contained. He maintained his innocence.

Determination

It is now the duty of this court as the first appellate court to re-evaluate and re-analyze the evidence afresh and come up with its independent conclusions. **See Okeno vs Republic [1972] EA 32.**

After considering the entire evidence on record, and the respective rival submission, I conclude that the issues for determination are whether the charge sheet was defective and whether the case was proved beyond a reasonable doubt. On the issue of defective charge sheet, the Appellant submitted that he was charged with an offence not known in law. His contention was that the charge was drafted under **Section 4(a) c** of the **Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994** which provisions does not exist in the Statute. What constitutes a defective charge sheet was defined by Kimaru J. in **Sigilai *v.* Republic [2004] 2 KLR 480,** thus:

> ***"The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional under pinning."***

I have looked at the record of appeal. I note that the write-up of **Section 4(a) c** was purely a typographical error and more particularly at the point of photocopying the charge sheet. The original charge sheet clearly indicated that the charge is drafted under **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.** At the point of photocopying the charge sheet unfortunately, the word "of" was cut off and only one letter 'o' was photocopied which gave an impression that it was letter 'c'. That submission then is baseless. His other submission under this head was that the charge sheet indicated that the drugs were valued in Uganda Shillings which is not true because in the charge sheet the value was indicated in Kenya Shillings. Be that as it may, I shall revisit this issue later in the judgment as contradictory evidence was adduced with respect to what currency was used in valuing the drugs.

It was also argued that the charge sheet was defective because the Appellant took plea before the exhibits (drugs) were recovered. The record of proceedings shows that he first took plea on 2nd June, 2009. Subsequently, the charge sheet was amended and he was called to plead afresh on 8th June, 2009. A scrutiny of what transpired between 6th and 8th June, 2009 is that no evidence was adduced. Therefore, the contention that any exhibits were produced before he took plea is unmerited.

On prove of the case, the Appellant took issue with the evidence adduced insisting that it was riddled with inconsistencies and contradictions. He first argued that it was not ascertained how many pellets he emitted. My analysis of evidence has come up with the following chronology of events. PW4 testified that the Appellant requested to use the drug loo on 2nd June, 2009 at 11.30 p.m. when he emitted 12 pallets. This is reflected in the OB entry No. 8 of 2nd June 2009. According to PW1 and as reflected in the OB entry No. 14 of 2nd June, 2009 at around 9.30 p.m., the Appellant emitted two pallets. PW2 testified that on 3rd June, 2009 at 11.30 a.m., the Appellant again emitted one pallet as confirmed by OB entry No. 4 of 3rd June. In all, the Appellant therefore emitted fifteen pallets. I only take issue with the fact that in the charge sheet, the drugs were not indicated in what form they were recovered. However, according to PW3, the government analyst, he was categorical that he analyzed samples from each of the fifteen pallets which he concluded was heroine. In equal measure, PW6, the valuation officer did also confirm that he weighed and valued fifteen pallets.

The Appellant did also take issue with the fact that it was not certain as who analyzed and sampled the drugs. I entirely concur with him, as material contradiction is marked in the evidence of PW6 who testified that the sampling and analysis was conducted by one Musyoka a government analyst. In contrast, the government analyst who testified was PW3, one, William Kairu. It then begs who and whether the

analysis was done by a proper person. It brings into question the credibility of the witness (PW6) which casts aspersions on whether PW3 was merely called to seal the prosecution case.

There is also a further contradiction relating to the recovery of further pallets from the Appellant after he emitted the first two. According to PW7 who investigated the case, when the Appellant first took plea on 2nd June, 2009 the prosecution requested that he be taken to KNH for an X-ray because it was suspected that he was still carrying more pellets in his body. The witness confirmed that indeed an X-ray was done and an X-ray film handed over. In his examination in chief, he was unable to either identify or adduce the x-ray film. In a surprise turn of events, in cross-examination he denied that any x-ray was done on the Appellant. I am unable to agree with PW7's evidence in cross-examination because in the Appellant's sworn defence, he was categorical that he was taken for an X-ray at KNH on 3rd June, 2009. The prosecution in cross-examination did not challenge this piece of evidence. That then would vindicates the Appellant's defence that the X-ray film did not yield any positive results for the prosecution. Once again, it puts into question as to the culpability of the Appellant and indeed if he emitted any pellets not only on 2nd but also after 3rdJune, 2009. I cannot be dismissive of this contradiction as the alleged X-ray film was the basis on which the actual amount of drugs that the Appellant was charged with was ascertained.

There is also the issue of the value of the drugs. In the charge sheet, it was indicated that the drugs were valued at Kshs. 167,600/=. PW5 and 6 on the other hand testified that the drug was valued in Uganda Shillings 167,600, a fact the court confirmed from the handwritten proceedings. This is a defect that the court cannot wish away given that under **Section 4(a) of the Act**, the value of the drug may determine the sentence to be imposed. In fact, in the instant case, the Appellant was partly sentenced based on the value of the drugs. In view of the uncertainty as to what currency was used in valuing the drug, I can only hold and find that the valuation prejudiced the Appellant and could not be the basis on which the sentence could be imposed.

Another interesting scenario popped up. The court came across a document titled "**PROV CRIME KAPU (ANTINARCOTIC KJIA)"** which was a signal drafted by PW6, the officer in-charge of the Anti-narcotics Unit on 6th June, 2009 to other police officers in the Unit. The signal indicated that the drug recovered from the Appellant was valued at 284.3 grams contrary to the value of 167.6 grams indicated in the charge sheet. There is no doubt that such a scenario raised questions on the propriety of dealings in the matter casting doubt on the culpability of the Appellant.

With the above shortfalls in prosecution's case, there is more than reasonable conclusion that prosecution case did not meet the requisite standard of proof; proof beyond a reasonable doubt. I do accordingly find that the conviction of the Appellant was not safe. At this point, I need not delve into the issue of the sentence save to state that **Section 4(a) of the Act** gives a measure of discretion to the trial court to impose an appropriate sentence premised on the circumstances of the case including the value of the drug.

In the result, I find that the prosecution did not proof its case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 30th Day of November, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person

2. M/s Sigei for the Respondent.