REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 144 OF 2015

HERALD KURT WERTHNER…..… APPELLANT

VERSUS

REPUBLIC …….……..RESPONDENT

*(An appeal f*rom the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 3073 of 2010 delivered by Hon. E. Juma, Ag. SPM on 9th July, 2015).

JUDGMENT

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 the 1st July, 2010 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, trafficked by conveying 2066.4 grams of narcotic drugs namely heroine with an estimated market value of Kshs.2,066,400/ in contravention of the provisions of the said Act.

The Appellant was found guilty and convicted accordingly. He was sentenced to pay a fine of Ksh.6,199,200/ and in addition serve life imprisonment. He was dissatisfied with both the conviction and sentence against which he has preferred the instant appeal. The summary of his grounds of appeal are that he was not accorded a fair trial, that the trial court failed to facilitate him to conduct his defence, that the sentence imposed was improper and harsh and excessive in the circumstances.

Submissions

The Appellant's submissions were filed by Professor Hassan Nandwa on 4th September, 2017. He took issue with the fact that the Appellant's rights to a fair trial were infringed. This was with respect to the language interpreter who was provided to the Appellant, one Simon Wang'ombe Muteru. According to the counsel, the court did not enquire into whether the said interpreter understood the German language which the Appellant was conversant with. In that regard, he was of the view that the proceedings were conducted in a language that the Appellant did not understand, thus violating his right to a fair trial. He underscored the mandatory requirement as was held by the Court of Appeal in the case of **Abdalla vs Republic [1989] eKLR**, that court proceedings should be conducted in a language the accused is conversant with.

Counsel also took issue with the fact that the Appellant was not accorded free legal representation at the State expense yet it was apparent that he could not afford legal representation. He referred the court to the case of **Republic vs Khalisa Chengo and 2 others [2017] eKLR**, a decision of the Supreme Court of Kenya in which the court emphasized that the trial court is under a duty to assign a legal counsel to represent an accused if the accused cannot afford the legal representation. Counsel submitted that the right to free legal representation is provided under the Kenyan Constitution and should not therefore be denied where it is demonstrated that an accused cannot afford the same. Other cases cited in this respect were; **John Sakwa vs Director of Public Prosecutions, Ag. and two others [2013] eKLR and George Gikundi Munyi vs Republic [2015] eKLR**.

It was further the counsel's submissions that the Appellant's right to a fair trial was violated in that the court failed to order the release of his personal documents which had been confiscated by police during his arrest and which he required for his defence. It was submitted that on several occasions, the Appellant had requested for the release of the documents but the trial court did not take any action. As such, he was not accorded a fair platform to present his defence. In addition, it was submitted that the trial court failed to facilitate him to avail his defence witnesses from Uganda, further violating his right to a fair trial.

On sentence, counsel faulted the same citing that it was improper. He submitted that in the first limb of the sentence, the court failed to impose a fine pursuant to **Section 28(2) of the Penal Code**. Further, the life imprisonment imposed in addition to the fine was harsh and excessive in that **Section 4(a) of Narcotic Drugs and Psychotropic Substances (Control) Act** does not provide for a mandatory life imprisonment. Counsel referred to the case of **EE vs Republic [2015] eKLR** to buttress this submission. He submitted that the appeal was

meritorious and urged the court to quash the conviction, set aside the sentence and order the release of the Appellant.

Submissions on behalf of the Respondent were filed by learned Principal Prosecution Counsel, Linda Nyauncho on 30th October, 2017. She denied that the Appellant's right to a fair trial was infringed. She submitted that the language interpreter provided by the court was a German Language translator who was availed because the Appellant did not understand either English or Kiswahili which were the languages of the court. Furthermore, the Appellant actively participated in the proceedings and did not question the inability of the interpreter to understand the German language.

On the issue that the defence witnesses were not being facilitated by the court to travel from Uganda to Kenya, counsel submitted that the defence hearing was adjourned for a year on several occasions because the Appellant had indicated to the court that he was personally able to transport the witnesses to the court. She submitted that the defence case proceeded after the court noted that the Appellant was not willing to proceed with his case. Furthermore, he never at any one point requested the court to provide any assistance so as to enable him to transport his witnesses.

On the issue of legal representation, counsel submitted that throughout the trial, the Appellant was represented by advocates who unfortunately appeared in court to make interlocutory applications. Indeed, on several occasions, he sought adjournment so as to allow him to engage legal representation.

On sentence, while citing the case of **Mohamed Famau Bakari vs Republic Cr. Appeal No. 64 of 2015** a decision of the Court of Appeal,M/s Nyauncho submitted that life imprisonment under **Section 4(a) of the Narcotic Drugs and Psychotropic Substances and (Control) Act** (hereafter the said Act) was not a mandatory sentence. She submitted that the use of the word liable under the provision connoted that the court had discretion to impose a reasonable penalty depending on the circumstances of the case. She however submitted that on the whole, the appeal lacked merit and the same ought to be dismissed.

Evidence

The trial was heard four times. In the first instance, six witnesses testified. Two witnesses were named as PW1. PW1, Chief Inspector Adam Guyo however appeared in court not to testify but on summons to show cause why the Appellant should not be granted bail pending trial. Due to transfer of magistrates, the case was heard *de novo* effective of 18th October, 2012 after which one witness testified. The matter was taken over by another magistrate who ordered hearing *de novo* effective of 22nd May, 2013. Only one witness testified before Hon. E. Juma. She again ordered hearing *de novo* from 10th September, 2013. The summary of the evidence herein relates to the latter evidence.

In total the prosecution called seven witnesses. It was on 1st of July, 2010 at around 9.30 a.m. The Appellant was at Jomo Kenyatta International Airport (JKIA) and was travelling to Seychelles aboard flight KQ 450. **PW2, PC David Loisenger** then worked at JKIA in the Anti-Narcotics Unit. He bumped into the Appellant at gate No. 4 before he could board the flight. On interrogating him, he failed to give a proper account on why he was travelling to Seychelles. He was carrying a black bag. He thus asked him to accompany him to their office. He also informed **PW5, Chief Inspector Adan Guyo** who was then in-charge of the Anti-Narcotics Unit. Accompanying PW2 was **PLW6, PC Shellemia Ogutu.** The three witnesses conducted a search in the Appellant's bag. At the false bottom, they recovered whitish powder (granules) which they suspected was narcotic drug. They called in **PW1, Catherine Serah,** a government analyst of Government Chemists for purposes of analyzing the substance. She sampled the powder which was in a brown package which weighed 2066.4 grams. It was examined and found to contain Heroin also known as Diacetyl Morphine which is a narcotic drug under the Act. She identified the drug and produced her report marked as Exhibit 5. The Appellant was arrested and charged accordingly. **PW4, SSP Judith Odhiambo** valued the drug at Kshs. 2,066,400/=. At JKIA, a scene of crime officer namely **PW3, CPL Virgia Wanjiku** was called and took photographs of the seized drug as well as other items recovered from the Appellant. She produced twelve photographs which she took as exhibits.

In his unsworn defence, the Appellant did not deny that the narcotic drug was recovered from his bag. He however told the court that he did not know who parked the drug in the bag. He said that he checked out of a hotel on the same day at about 5.00 a.m. and that his travel bag was handed to him at the hotel reception. He stated that until the time of his arrest, he was not aware what was in the bag.

Determination

This is the first appellate court whose duty is to re-evaluate the evidence on record and come up with its own independent conclusions. In so doing however, the court must take into consideration that it has neither heard nor seen the witnesses and give due regard for that. See **Pandya vs Republic [1957] E.A, 336.**

I have accordingly considered the evidence on record and the respective rival submissions. The issues arising for determination are; whether the Appellant's right to a fair trial was violated and whether the case was proved beyond a reasonable doubt. On the first issue, it was the Appellant's submission that he was not accorded free legal representation as enshrined under **Article 50(2)(h) of the Constitution.** The same reads as follows:

> **"(2) Every accused person has the right to a fair trial, which includes the right-**
>
> **(h) 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;**

The case of **R vs Khalisa Chengo (Supra)** was cited to buttress the submission that the right to free legal representation should be provided in line with **Article 50(2)(h) of the Constitution**. In that case, the Supreme Court of Kenya delivered itself as follows:

> **"the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more…**
>
> **It is thus clear… that free legal assistance may be accorded to a person who does not have sufficient means to pay for it, and that representation should also be given where interests of justice so require."**

Under the said article, the State is enjoined to provide free legal representation ***"if substantial injustice would otherwise result***". It then behooves this court to re-evaluate the circumstances of the case and determine whether the Appellant was unreasonably denied a right to free legal representation at the State expense. A close scrutiny of the record of proceeding does show that the Appellant was throughout the trial represented by various advocates. In a surprising state of affairs, no advocate appeared in court during the substantive hearing. They only came to court to make interlocutory applications which included applications for bail or adjournments or to enable them prepare for trial. They thereafter vanished in thin air. However, at each hearing, the Appellant did not object to the evidence being taken in the absence of his advocate. It can then be deduced that he was able to procure for himself the various advocates save that he never required them at the time the evidence was adduced. That being the case, the Appellant cannot argue that his right to a fair trial on account that he was not afforded free legal representation at State expense was violated. His submission in that respect is rendered moot.

The other limb of submission under this head is that the trial court failed to facilitate him to procure his defence witnesses from Uganda. Nothing can be further from the truth because the record of proceeding does show that the defence case was adjourned for close to a year to accord the Appellant an opportunity to avail his witnesses. In fact, he never at any one point indicated that he could not afford the cost of transporting the witnesses from Uganda. To be more specific, the prosecution closed their case on 5th February, 2014. On the following day, the Appellant indicated that he would give an unsworn statement of defence but sought an adjournment to avail witnesses. Defence was put off to 7th March, 2014 when he again asked for adjournment so as to ensure that transport money reached his witnesses in Uganda. His request was granted and defence case set for 3rd April, 2013. On this date, he informed the court that he had given the money to one Julian who was to facilitate the witnesses to travel from Uganda and asked for adjournment. On 29th May, 2014 an advocate came on record and asked for an adjournment to enable him prepare to conduct the defence. The court once again allowed the adjournment. On 15th September, 2014 the Appellant in person asked for two weeks to allow him avail his witnesses. The court granted his request and further informed him that if his witnesses travelled from Uganda, the court would reimburse their travelling and subsistence costs. On 26th September, 2014, he asked for another one week as witnesses had not arrived which request was given. On 24th October, 2014, he again asked for two weeks and the court was kind enough to adjourn the defence hearing to 21st November, 2014. On this date, an advocate appeared in court and requested for time to prepare for the defence hearing. The request was granted but the date was marked as the last adjournment. On 18th February, 2015 the Appellant addressed the court as follows:-

> **"I cannot have my witnesses. I pray for one week to make my submission. I close my case. I will not call any witnesses. I pray for two wees to prepare my submission…"**

The above chronology of events completely ousts the Appellant's submission that the court deliberately failed to facilitate him to avail his witnesses. At no point did he indicate that he had no money to transport the witnesses. Furthermore, as the court procedure requires, the court informed him that once the witnesses came to court, it would reimburse their travelling and subsistence costs. No further facilitation would have been expected from the court. At the end of the drama, it is clear that the Appellant informed the court that he had no witnesses. He was therefore seeking adjournments with a view to delaying the trial but not because he intended to procure witnesses. Once again, his submission in this regard is totally unmerited.

The Appellant also did make submission that the court failed to order release of some documents he intended to use for his defence. Whereas according to Chief Inspector Guyo (PW5), all the items recovered from the Appellant were brought to court, the Appellant did not state how the documents would have aided him in his defence. He also did not outline which documents he required for this purpose. This submission is equally unmerited.

On prove of the case, there is no doubt from the testimony of PW2, 5 and 6 that the Narcotic Drug was recovered from the Appellant's bag and in his presence. The same was also weighted and valued in his presence. It was analyzed by the government chemist, PW1 and found it to be heroine, a narcotic drug under the said Act. His submission that the police who arrested him did not give a reasonable account that his arrest was founded on the suspicion that he was trafficking in narcotic drugs does not lessen the fact that the heroine was recovered from him. He intended to travel with it to Seychelles. Furthermore, under **Section 72** of the said Act, the police are empowered to stop and search a person and any package in the possession of the person or under his control and further seize and detain such package if they reasonably believe there is evidence of commission of an offence under the Act. Further, such person should be arrested and detained until such a time he is brought before a magistrate and dealt with in accordance with the law. None of the provisions of Section 72 was violated. PW2, who first confronted the Appellant interrogated him on his reasons for travel to Seychelles which he failed to give. On that account alone, the police were mandated to stop and search him for purposes of determining whether he had committed an offence under the Act or any other offence. The Appellant's explanation that he did not know who staffed the bag with the narcotic drug was just but a mere denial founded on escapist excuse at all. In the circumstances, I find that the prosecution proved their case beyond a reasonable doubt and that the Appellant's conviction was safe.

On sentence, I agree with the Appellant that the first limb was improper because upon the imposition of the fine, the court ought to have given a default custodial sentence pursuant to **Section 28(2) of the Penal Code**. In this respect, the default sentence ought not to have been more than twelve months.On the second limb of the sentence, courts of concurrent jurisdiction and the superior courts have severally held that **Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act** is not couched in mandatory terms with respect to imposition of life imprisonment. Indeed, the use of the word 'liable' under the provision only gives a guideline for a possible maximum sentence of life imprisonment. Therefore, the court should exercise a measure of discretion depending on the circumstances of the case to impose a reasonable sentence.

In the instant case, the value of the drug was about Kshs.2 million which in my view should not have attracted a life imprisonment. The

Appellant first appeared in court on 2nd July, 2010. As at date, he has been in custody for more than seven years which in my view is more than sufficient punishment. He has ably mitigated for his freedom having indicated to this court that he is ready to be repatriated to his country of origin, Germany at his own expense.

In the result, the appeal partially succeeds. The same is dismissed with respect to conviction. With regard to the sentence, I find that the Appellant has served sufficient sentence. I order he be forthwith set free and shall be repatriated to his country of origin, Germany at his own expense. He shall be released to the Industrial Area Police Station, Immigration Department for purposes of processing him for repatriation.

DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Prof. Nandwa for the Appellant

2. M/s Sigei for *the Respondent.*