



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 129 OF 2011

JOHN KINYAJUI NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 329 of 2011 of the

Chief Magistrate's Court at Malindi – L.W. Gitari, CM)

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 are that the appellant, on 28.5.2011 at around 10.00 am at Mbuyu Wa Kusema in Malindi District within Kilifi County was found trafficking in narcotic drugs to wit 37 sachets of heroin valued Kshs.3,700/= by conveying in contravention to the said Act.

The trial court found the appellant guilty of the offence and sentenced him to life in prison plus a fine of Kshs. One Million. The grounds of appeal are that the sentence is harsh and unlawful, that the prosecution did not prove its case beyond reasonable doubt, that the appellant's defence was not considered yet it raised reasonable doubt on the prosecution case and that the alleged quantity of drugs could not sustain a sentence of life in prison.

The appellants written submissions expound on the above grounds. It is submitted that there was no certificate of a gazetted officer proving that the drugs were worth Kshs.3,700/=. This was contrary to Section 2 of Act number 4 of 1994. It is further contended that the offence of trafficking was not proved. There is no evidence as to how the appellant was trafficking the drugs. The charge sheet ought to have specifically stated the conduct of the appellant which amounted to trafficking. It is also submitted that the sentence is excessive as the value of the drugs was only Kshs.3,700/=

The state opposed the appeal. Mr. Fedha, prosecuting counsel, submitted that the case was proved beyond reasonable doubt. The appellant was arrested by PW1 and PW2 during the day. Upon being searched, the drugs were recovered from his pockets. PW3, a Government chemist analyst testified that the drugs were heroin. The defence evidence did not disprove the prosecution case.

The record of the trial court shows that three witnesses testified for the prosecution. PW1 Corporal EZEKIEL ORONDE was stationed at Malindi police station testified that on 28.5.2011 at 10.00 am he was on patrol with other police officers including PW2 when they reached an incomplete building at

Mbuyu Wa Kusema area. They saw a crowd of men who started running. He managed to arrest the appellant. PW2 conducted a search on him and recovered 37 sachets containing powdery substance. The appellant was taken to Malindi police station.

PW2 Sergeant CHARLES KARANGI was also based at Malindi police station. On 28.5.2011 at about 10.00 am he was with PW1 when they arrested the appellant. He searched the appellant and found a packet of sportsman cigarettes on his left trouser pocket. He checked inside the packet and found 37 sachets of some powder. They arrested the appellant. He forwarded the sachets to the Government Chemist in Mombasa for analysis. The powder was found to be heroine. PW3, JOHN NJENGA is a Government analyst who was based in Mombasa. He received the 37 sachets from PW2 on 3.6.2011. He analysed them and concluded that the white powder was heroine.

In his sworn defence, the appellant testified that he deals in business of buying scrap metal. He walks from house to house with a weighing machine. On the material day he was at Mbuyu Wa Kusema area conducting his business when he saw a group of people running. Two men arrested him and he was taken to the Malindi police station. He was later charged in court.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt and whether the sentence is excessive. According to PW1 and PW2 they arrested the appellant at 10.00 am. A crowd of people started running and they gave chase. They managed to arrest the appellant. It is evident that the incident occurred during the day. The defence evidence confirms that the appellant was at the area but conducting his own business. PW1 and PW2 did not know the appellant. The appellant admitted in his defence that PW1 and PW2 had no reason to frame him.

From the evidence on record, it is confirmed that the appellant was arrested at Mbuyu Wa Kusema area in Malindi. He was searched and the 37 sachets of drugs were found with him. The defence evidence does not raise any doubt on the prosecution case. The prosecution proved its case beyond reasonable doubt. The appellant was in possession of the drugs. He was found in a group of people who were smoking and it can be presumed that they were smoking drugs. The appellant must have been the one who had supplied the drugs. The 37 sachets were not meant for the appellant's own consumption. The appellant was arrested at a public area while carrying the drugs.

Section 4 (a) of the Anti-Narcotic Drugs and Psychotropic substance control Act states as follows: -

a. Penalty for trafficking in narcotic drugs, etc.

Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable -

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 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:

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“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.”

I 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.

The value of the drugs in this case was Kshs.3,700/= The appellant was sentenced to life imprisonment on 11.11.2011. He has now served over 4 ½ years in jail. I do find that to be enough punishment for the offence. The sentence imposed by the trial court of life imprisonment and a fine of Kshs. One Million is excessive and is hereby set aside. The sentence is replaced with the period already served.

The appeal conviction is hereby disallowed. The appeal on sentence is hereby allowed. The sentence is replaced by the period already served. The appellant shall be set a liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 23rd day of May, 2016.

S.J. CHITEMBWE

JUDGE