REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 10 OF 2015

EUGENE ODERA OTIGBU……………………….…….…...APPELLANT

VERSUS

REPUBLIC……………………………………......…...RESPONDENT

(*Appeal against conviction and sentence by Hon. Ogolah D.O. Chief Magistrate delivered on 4th March, 2015 in Busia CM's Criminal Case No. 763 of 2014)*

JUDGMENT

1. The Appellant, Eugene Odera Otigbu was charged, convicted and sentenced to serve twenty years imprisonment for 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 charge disclosed that on 6th April, 2014 at Busia Township he was found trafficking in narcotic drugs to wit 7kgs of heroin with a market value of Kshs. 7 million.

2. The Appellant had also been charged for being unlawfully present in Kenya in contravention of the provisions of the Citizenship and Immigration Act No. 12 of 2011. He pleaded guilty to this count when he came for plea and was sentenced to one year imprisonment. He had completed serving sentence by the time his trial for the first count came to conclusion.

3. The Appellant being dissatisfied with his conviction and sentence has appealed to this Court. From the undated petition of appeal filed on 17th March, 2015, the Appellant's grounds of appeal are

> **"1. THAT, I pleaded not guilty to the appended charges.**
>
> **2. THAT, I was convicted on a defective charge sheet.**
>
> **3. THAT, the prosecution witnesses testimonies were contradicting.**
>
> **4. THAT, the trial magistrate relied on hearsay evidence ignoring the primary evidence.**
>
> **4. THAT, the prosecution's evidence lacked the ingredients to support the charge.**
>
> **6. THAT, my rights as an arrested person as enshrined in the Constitution of Kenya were grossly violated, infringed and threatened.**
>
> **7. THAT, I was not accorded an opportunity to prepare for and submit my defense.**

8. THAT, I was dissatisfied by my advocate since I was not accorded an opportunity to recall and re-examine the previous prosecution witnesses.”

4. This being the first appeal, I have a duty to re-evaluate the evidence adduced before the trial Court so as to reach my own independent conclusion. In doing so, I must remember that I did not have the opportunity to see and hear the witnesses testify - see **Okeno v Republic [1972] EA 32.**

5. When the matter came up for appeal, the Appellant indicated that he would rely on his written submissions which he had filed in Court. Through the submissions filed on 30th June, 2016 the Appellant contended that the charge was defective in that the purity of the heroin he was allegedly found with was not included in the particulars of the charge.

6. It was the Appellant case that the government chemist talked of the heroin being mixed with flour and it was imperative for the prosecution to specify the quantities of the flour and the heroin. The Appellant relied on the case of **Evans Masese Mose v Republic [2006] eKLR** in which it was that where an offence involves property, the property should be clearly identified as required by Section 137(c)(i) of the Criminal Procedure Code, Cap 75.

7. On grounds 3, 4 and 5 the Appellant submitted that whereas the evidence shows that he was arrested together with a Ugandan, nothing was said about his whereabouts and whether the bags were recovered from the Appellant or the said Ugandan. Further, that no evidence was adduced as to the circumstances leading to the release of the Ugandan even though the Exhibit Memo Form through which the suspected substances were submitted to the government chemist had indicated that the substance had been recovered from two persons.

8. Turning to the evidence of the government chemist, the Appellant submitted that he did not differentiate between what he concluded was heroin and what he found to be flour. It was the Appellant’s case that the government chemist was quick to conclude that the substance was heroin meaning that he had prior information about what to test for in the substances. It was further Appellant’s case that there was a conflict in the report of the government chemist pointing to a possibility of mistakes or errors. He pointed to the place and time the exhibits were recovered and from whom as the conflicting information.

9. On grounds 6 and 7, the Appellant submitted that it is the duty of the prosecution to disclose to an accused person the statements of witnesses and the exhibits it intends to use in a trial. It was the Appellant’s case that the witness statements and the exhibits were kept away from him and he was only given the report of the government chemist on the hearing date and ordered to peruse it and proceed with the trial immediately. The Appellant asserted that non-disclosure is a potent source of injustice. He submitted that the failure to supply him with the necessary documents breached his constitutional right of access to information. The Appellant therefore urged this Court to allow his appeal.

10. Counsel for the Respondent opposed the appeal. It was submitted that the charge was properly drawn as provided under Section 4(a) of the Narcotic Drug and Psychotropic Substances Act. It was the Respondent’s case that the Appellant was found by police officers on patrol with a substance which upon examination was found to be heroin. It was submitted for the State that the evidence of the prosecution witnesses was not contradictory and neither was hearsay evidence adduced. Counsel for State pointed out that the Appellant did not give evidence in his defence and there was no defence to be considered by the trial magistrate.

11. On the Appellant’s alleged violation of his constitutional rights, it was asserted for the State that the Appellant did not specify the rights alleged to have been violated. According to the Respondent, the Appellant was given adequate time to prepare his defence. The State urged this Court to dismiss the appeal.

12. In his response, the Appellant submitted that he had asked for recall of witnesses which was denied. He then appealed the decision. It was his view that he did not have adequate time to prepare his defence.

13. The issues raised by the Appellant in his appeal are intertwined and I will proceed to address them together. The Appellant's case is that he was convicted based on contradictory evidence and his trial did not meet the parameters of a fair trial as set out by the Constitution. His concerns can only be addressed by looking at the proceedings that took place before the trial Court.

14. PW1 Police Constable Daniel Busienei and PW2 Police Constable Jackson Lemotei told the Court that on 6th April, 2014 at around 6.30 p.m. they were on patrol at the Kenya-Uganda border when they stopped a motor cycle rider who was carrying two passengers. Upon searching the passengers they discovered that one of them was a Nigerian and the other one was a Ugandan.

15. They checked the Nigerian's passport and found that the same was not stamped and he had no visa. They then proceeded to search the manila bag he was carrying. In the bag they found assorted clothing, sculptures, beauty products and two black polythene bags with flour-like substance. The flour like substance in one of the bags was whitish and that in the other bag was yellowish.

16. Upon interrogation, the Nigerian informed the officers that he was going to Kampala to attend his brother's wedding. The flour was to be used in the wedding ceremony. Seeing that he was unlawfully present in Kenya, the Appellant was arrested and escorted to Busia Police Station. At the police station the items recovered from the Appellant were handed over to PW5 Inspector Walter Ongaga who later passed them to PW4 Police Constable Roseline Opondo. An Exhibit Memo Form was prepared and submitted together with samples from the two polythene bags to the government chemist at Kisumu.

17. PW3 Richard Kimutai Langat a government chemist based at Kisumu carried out analysis on the substances and formed an opinion that the white flour like substance had more components of heroin and the yellow flour like substance was heroin mixed with flour. He formed the opinion that the substances that were submitted for examination contained heroin, a narcotic drug. He prepared a report which he produced in Court as an exhibit.

18. The evidence that was adduced by the prosecution witnesses was consistent. PW1 and PW2 clearly told the Court that the Appellant is the person who had the bag that contained the suspected substances at the time they stopped the motor bike. Although no evidence was adduced regarding the stage and circumstances under which the Ugandan dropped off the matter, the evidence consistently pointed to the Appellant as the person who was carrying the bag that contained the flour like substances which later turned out to be heroin. From the line of cross-examination taken by the Appellant, it is clear that his defence was that he was arrested with flour. It is therefore reasonable to reach the conclusion that he was indeed found with the substances that later turned out to be heroin.

19. The Appellant alleges that the charge was not specific enough. I do not seem to get his line of argument. It was not necessary for the prosecution to conduct an analysis as to the percentage of flour in the yellowish substance so as to charge the Appellant with the exact percentage of heroin present in that substance. The charge was clear enough that the Appellant had been found with 7kgs of heroin whose market value was seven million Kenyan shillings. His appeal cannot therefore succeed on the allegation that the charge sheet was defective for not specifying the quantity of heroin in the substances. The manner in which he cross-examined the prosecution witnesses shows that he understood what he was charged with.

20. In **Mohamed Famau Bakari v Republic [2016] eKLR,** the Court of Appeal held that it was necessary for the charge to disclose in what manner an accused person is said to have been trafficking in narcotic drugs. The Court stated that:

> **"The main complaint in this appeal is that the charge as framed did not specify the manner in which the appellant was trafficking in drugs, since under section 2(1) of the Act, trafficking can entail the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution; and that the charge sheet ought to have identified one of the foregoing transactions that the appellant was allegedly engaged in at the time of his arrest. We agree that since trafficking under the law involves 12 distinct activities,**

> **the specific transaction or transactions a suspect is accused of must be specified in the charge. As part of a fair trail the suspect must know the case against him. In this case the appellant was entitled to know whether he was accused of buying, selling, giving, supplying, conveying or distributing the drugs. Having said that, we are satisfied that in the circumstances of this case the appellant was not prejudiced by the failure to specify the transaction because the transaction in which he was engaged at the material time was not in controversy."**

21. In the case before me the manner in which the Appellant was trafficking in in the narcotic drugs was not specified. However, no prejudice was suffered by the Appellant as the kind of activity he was engaged in at the time of his arrest was not in dispute. In the words of the Court of Appeal in the just cited case, **"[t]he answer to the nature of the transaction the appellant was engaged in when he was arrested is to be found in the words *"illicit traffic"* in section 2."** It cannot thus be said that failure by the prosecution to specify in the charge sheet the kind of trafficking the Appellant was engaged in occasioned him any injustice.

22. The only issue that left me with some anxiety is the alleged breach of the Appellant's constitutional rights. A perusal of the record clearly shows that the Appellant was not defended when PW1, PW2, PW3 and PW4 testified. The record, however, shows that when PW5 testified on 22nd October, 2014 one Mr. Miano was acting for the Appellant and he clearly indicated to the Court that he was ready to proceed. After PW5 finished testifying the prosecution closed its case and the Appellant was put on his defence. The matter was then slated for defence hearing on 12th November, 2014.

23. On 12th November, 2014, the defence counsel applied for recall of PW3 the government chemist. The application was opposed by the prosecution and in a ruling delivered on the same day the magistrate rejected the application for recall of PW3.

24. After the ruling was delivered, counsel for the Appellant asked for adjournment so as to advise the Appellant on the defence to be raised. The matter was then adjourned to 3rd February, 2015. When the matter came up for hearing on 3rd February, 2015, the Appellant sacked his advocate in open Court. He then proceeded to apply for an adjournment saying that he was not ready to proceed with his defence. The prosecutor strongly opposed the application for adjournment. Nevertheless, the Court granted the Appellant a last adjournment to decide how to proceed with his case. The matter was then adjourned to 18th February, 2015.

25. On 18th February, 2015 the Appellant indicated to the Court that he was not ready to proceed and that he had filed an appeal in the High Court. Once again the prosecutor opposed the application for adjournment. The magistrate rejected the application for adjournment observing that the proceedings had not been stayed by the High Court.

26. For the purposes of this appeal it is important to reproduce what took place thereafter. The handwritten proceedings are captured as follows:

> **"<u>Court</u>: Section 211 of the CPC explained to accused in English language which he understands.**
>
> **<u>Accused</u>: I insist on my High Court case. I shall not give evidence.**
>
> **<u>Court</u>: I have pleaded with accused on the issue of making a choice under section 211 of the CPC. Accused has adamantly refused to make any election at all. I rule that accused has no evidence to give. I order defence case closed. I shall proceed to give date for judgment. Judgment 3-2-2015"**

27. The chronology of events that took place from 22nd October, 2014 to 18th February, 2015 clearly shows that the Appellant was given sufficient time and opportunity to prepare his defence. His refusal to

make any election under Section 211 of the Criminal Procedure Code, Cap 75 cannot by any stretch of imagination be said to amount to a breach of his constitutional entitlement to a fair trial. Once the Court discharged its obligation of extending an opportunity to the Appellant to make his defence, it was upon the Appellant to decide what to do with that opportunity. Under Section 211 of the Criminal Procedure Code he could give evidence under oath or make an unsworn statement. He never picked any of those options.

28. The magistrate proceeded to conclude that the Appellant had no evidence to give. The magistrate was correct in what he did for under Article 50(2)(i) of the Constitution a fair trial includes the right of an accused person **"to remain silent, and not to testify during the proceedings."** The Appellant could not have been forced to give evidence as that would have breached his constitutional right to remain silent and not to testify.

29. I have also considered the reasons given by the trial Court for rejecting the Appellant's application to have PW3 recalled. Although I do not agree with the magistrate's statement that the power provided by Section 150 of the Criminal Procedure Code, Cap 75 is solely reposed on the Court, I find that the Appellant's counsel did not established any basis for the recall of PW3. The magistrate correctly observed that PW3 had been subjected to intense cross-examination by the Appellant and there was no need for recalling him.

30. Under Article 50(2)(j) of the Constitution, an accused person has a right **"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."** It is the duty of a trial court to ensure that an accused person's right to a fair trial is protected.

31. In the case at hand, I note that when the matter came for hearing on 7th May, 2014, the Prosecutor applied for adjournment. The Appellant opposed the application saying that the case was old and he was ready to proceed. The matter was nevertheless adjourned.

32. When the matter came up for hearing on 9th June, 2014 the Appellant said he was not ready to proceed as he wanted to contact the Nigerian Embassy. His request for adjournment was granted.

33. The matter came up again for hearing on 2nd July, 2014. On that day the Appellant is recorded to have told the Court that he would be ready to proceed if he was given the analyst's report. The prosecution was directed to supply the Appellant with the report and the matter was put off to 11.00 a.m.

34. In view of the fact that the Appellant asked for a specific document, which document was supplied to him, in order to enable him to prepare his defence, I cannot say that he did not undergo a fair trial. However, in serious offences like this, where a conviction would result in a long custodial sentence, the trial Court should ensure that the accused person has access to witness statements and exhibits (where practicable) as a matter of course. It is the duty of the trial Court to ensure that a trial is in conformity with the requirements of the Constitution.

35. However, considering what I have stated in this judgment, my finding is that the Appellant was convicted after his case was proved beyond reasonable doubt. His trial was also fair and within the confines of the Constitution and the laws of this country.

36. As for the sentence, I find the same was within the provisions of the section under which he was charged. The Appellant could have as well have been imprisoned for life. It was not excessive in view of the quantity of the heroin found in his possession.

37. The only thing I note is that the trial Court did not impose the full sentence as required by Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. The maximum sentence as provided by that Section is **"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."** In order for the sentence to be complete, imprisonment should be imposed in addition to a fine which of itself will attract a default sentence. In the case at hand the magistrate did not

impose a fine which is mandatory. In the circumstances the Appellant will continue serving the twenty years imprisonment meted out by the trial Court. In addition he will pay a fine of Kshs. 3 million and in default to serve one year imprisonment which will start running upon completion of the 20 years imprisonment.

38. Apart for the correction of the sentence, the summary of it is that the appeal fails in its entirety and the same is dismissed.

Dated, signed and delivered at Busia this 28th day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT