



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 65 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 726 of 2011 of the Chief Magistrate's Court at Mombasa – J. Gandani, SPM)

ALEX NJUGUNA KIMANI APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

1. 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, 1994 herein after called the Act. The particulars of the offence were as follows-

“ALEX NJUGUNA KIMANI: On the 1st day of March 2011 at Mtwapa area in Kilifi District within Coast Province was found trafficking Narcotic Drugs by selling 150 (one hundred and fifty) satchets of Heroin with a street value of Ksh. 30,000/- in contravention of the said Act.”

2. The Appellant was convicted as charged and was sentenced to 20 years imprisonment. He was aggrieved by that sentence and has appealed before this Court against both the conviction and sentence.
3. The evidence presented at the trial by the prosecution was that the Police having obtained information that the Appellant was suspected to be selling Narcotics they followed him as he rode on a motor bike from Shanzu to Kenol Petrol Station in Mtwapa. The police saw the Appellant speak with people they suspected were his customers. The Appellant according to PC Abdullahi Wako was collecting money from those people. PC Evans Macharia PW2 stated-

“He (Appellant) started distributing some substance to some people.”

PC Wako said in evidence-

“We searched him and recovered 15 'boosters' which is like dozen in street language from his right pocket and cash Kshs. 3,350/- from his customers.”

4. The substance that was recovered by PW1 and 2 from the Appellant was taken to the Government Analyst by PC Anthony Yegon. He later received a report from the Government Chemist confirming the exhibit to be Heroin. In total it was 150 satchets of 15 bundles each containing 10 satchets. PC Yegon had this to say-

“The accused (Appellant) was charged with trafficking by selling. I know this to be true from the witness statement and the cash found on the accused. The drugs were valued with a street value of Kshs. 30,000/-. I have dealt with drug cases so I know the street value.”

5. The Chief Chemist of the Government Chemist at Mombasa confirmed receipt of 150 satchets of brownish powder. On examination he found it to be Heroin. He produced a report before Court in that regard.
6. Although the learned Counsel for the Appellant Mr. Magolo filed 8 grounds of appeal he argued those grounds together.
7. He argued that the sentence of 20 years imposed by the trial Court was illegal. Learned Counsel submitted that the words in Section 4(a) of the Act was 'liable'. He submitted that that word did not connote provision of a mandatory sentence.
8. Section 4(a) provide as follows-

“4. 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.”

From what the learned Counsel Mr. Magolo argued before me I understood him to imply that in the use of the word liable in Section 4(a) Parliament retained the Courts discretion in sentencing a person convicted under that Section. In my humble view that is the wrong interpretation of that word. In my reading of the various definitions which include Blacks Law Dictionary it is clear to me that the word 'liable' does not connote discretion given. The word talks of responsibility for example where one would say someone is liable for damages for a wrong doing see Oxford Advanced Learners Dictionary, 7th Edition. Liable talked of ones accountability. For example where one says that someone is liable to punishment by law for something it means that the sentence set out thereof will be meted out to them. It would seem from the short discussion above that the word liable in Section 4(a) does not afford the Court a discretion on the sentence imposed when one is convicted on that Section.

9. On behalf of the Appellant it was argued that the charge the Appellant faced was defective. It was defective according to the submissions before Court because after it was amended from 15 satchets to 150 satchets the value did not correspondingly change. In that regard the Appellant relied on the case **KITSAO ALI KADENGE -VS- REPUBLIC CRIMINAL APPEAL NO. 304 OF 2010** where the Court stated-

“Punishment in drug trafficking is predicated upon the value of the drugs. There was no evidence adduced at all as to the value of the drugs in question. I find the conviction of the Accused to be unsafe. His appeal succeeds, the conviction is quashed and sentence set aside.”

10. That argument in my view can well be responded to by referring to the evidence of PC Yegon. That officer gave evidence about his experience in drug cases and stated-

“ I know the street value.”

That officer made that statement in reference to the drugs that were recovered from the Appellant. He gave the value of those drugs as Kshs. 30,000/-. He was not cross examined on that evidence and the Appellant cannot at this appeal raise issues of value of the drugs when that issue was not subjected to cross examination and yet he was ably represented by learned Counsel.

11. The Appellant submitted further that the charge sheet was defective for having failed to disclose the offence of Trafficking. It was submitted that the charge sheet should have indicated whether the Appellant was distributing or conveyancing the drug for the Appellant to have been convicted of the offence of Trafficking. Appellant relied on the case **MARGARET ACHIENG NYAMBERE -VS- REPUBLIC [2010]eKLR CRIMINAL APPEAL NO. 316 OF 2010** and in particular the following portion-

“On the whole I find that the evidence adduced in the lower court was at variance with the allegation of trafficking by ‘selling’ contained in the charge and particulars. At the very most the Appellant could have been held to have been in ‘possession’ of the Cannabis. No charge of possession was brought against her. I am not satisfied that the Appellant’s conviction was sound and I do hereby quash the same. The subsequent sentence is also set aside. This appeal succeeds.”

12. Section 2 of the Act defines Trafficking as follows-

“Trafficking means the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof.”

The evidence of PC Wako and PC Macharia was to the effect that the Appellant was surrounded by his customers at Mtwapa. PC Macharia in that regard stated-

“He (Appellant) started distributing some substance to some people.”

When they arrested the Appellant those that were around him ran away and escaped. I find that the prosecution's evidence well met the definition on Trafficking and the Appellant's submission in that regard is hereby rejected.

13. The Appellant's submission that the charge should have indicated whether the Appellant was distributing or selling is also rejected. The charge that the Appellant faced was that he Trafficked Heroin. We have seen that definition of Trafficking to include selling and distributing which acts the police officers stated that they observed the Appellant do.

14. Appellant further submitted that Section 74(a) was not complied with.

That Section contains the procedure of seizure of Narcotic Drug. It was submitted that that procedure was not followed because the drug was not handled by a person authorized in writing as required under that Section. The portion of that Section that Mr. Magolo stated was not complied with is as follows-

“Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorized officers shall ... weigh the whole amount seized”

15. It ought to be noted that the Appellant did not direct his cross examination to the officers who gave evidence at the trial to confirm whether they were authorized as stated in the above Section. That being so there is no evidence before me which shows that PC Wako, Macharia and Yegon or Mr. Oguda the Government Chemist were not authorized to carry out the procedure of seizure. That ground of appeal is therefore rejected.
16. The Appellant was charged with the offence of Trafficking Drugs contrary to Section 4 of the Act. That Section is reproduced above in this judgment. That Section provides that when one is convicted of Trafficking the sentence would be a fine of Kshs. 1 million or three times the market value of the recovered drugs whichever is greater and in addition a life imprisonment. The trial Court on convicting the Appellant sentenced him to 20 years imprisonment. Learned Counsel for the State Mr. Jami submitted that this Court is bound by the Court of Appeal decision in the case **KINGSLEY CHUKWU -VS- REPUBLIC CRIMINAL APPEAL NO. 259 OF 2007**. In that case the Court of Appeal faulted the High Court which had made a finding that Section 4 gives the Court discretion in sentencing. The Court of Appeal went on to state as follows-
- “Finally, with regard to sentence, we are of the view that the sentence imposed by both Court's below contravened Section 4 of the Act The above Section is clear as it relates to sentence. A person convicted for an offence under Section 4(a) of the Act, such as the Appellant before us shall be fined Kshs. 1 million or 3 times the value of the drug whichever is greater and in addition to imprisonment for life.”***
17. Learned Counsel Mr. Jami submitted that the Court can proceed to alter the Appellant's sentence to comply with the provisions of Section 4(a).
18. Having considered the provisions of Section 4(a) and the Court of Appeal decision quoted above I invited the parties to address me on sentencing before finalizing my judgment. The learned Counsels sought and obtained adjournments for various reasons and the matter was finally heard on the 18th March, 2014.
19. Learned Counsel for the Appellant largely reiterated his earlier submissions which have been dealt with above in this judgment. There is however some other issues raised by the learned Counsel which I shall proceed to consider.
20. The learned Counsel submitted that under Section 28 of the Penal Code Cap. 63 there should always be a default clause for failing to pay a fine imposed as a sentence. I am afraid I was unable to fully follow learned Counsels argument in this regard and my lack of understanding becomes clear when one considers the provisions of Section 28. That Section provides amongst other provisions that where the law does not provide for the amount of fine to be imposed, the amount of fine to be imposed is unlimited but should not be excessive; where the law provides for imposition of a fine or imprisonment the sentence the Court shall impose is at the discretion of the Court and where the sentence imposed is a fine the Court can pass sentence that in default of payment of a fine the offender shall serve a prison sentence of a certain term.
21. How that Section can have a bearing to the provisions of Section 4 of the Act, reproduced above is not clear to me. That Section 4 indeed provides for the imposition of a fine and of life imprisonment when one is convicted of the offence of Trafficking Narcotic Drugs. In that regard I reject the submissions of the Appellant's learned Counsel that the Court of Appeal decision in **KINGSLEY** (supra) was in error. In my view that decision is sound and in my humble view took into account the provisions of Section 4 of the Act.
22. The decision of the Court of Appeal in **CRIMINAL APPEAL NO. 21 OF 1998 AHMED MOHAMED ALI -VS- REPUBLIC** does not assist the Appellant. Learned Counsel submitted that, that should persuade this Court not to interfere with the lower Court's sentence, if this appeal does not succeed as the Court did in the case of Ali (supra). In the case the offence he faced and was convicted of was possession of narcotic drugs. It is true that the Court did not interfere with

the sentence of the Appellant in the Ali (supra) case but then the Court did not also state what the sentence was. It may therefore very well have been a legal sentence. That is why that authority does not assist the Appellant hereof.

23.I have considered the parties submissions. I am of the view that I am bound by the decision of **KINGSLEY** (supra). I have also reevaluated the evidence tendered at the trial. I am of the view that the prosecution proved its case to the required Criminal standards against the Appellant and accordingly the Appellant's appeal against conviction is dismissed.

24.In regard to sentencing I hereby set aside the trial Court's sentence and I do hereby sentence the Appellant to pay a fine of Kshs. 1 million and to serve life imprisonment.

DATED and DELIVERED at MOMBASA this 31ST day of MARCH, 2014.

MARY KASANGO

JUDGE