REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 210 OF 2012

MARY WAITHERA IRUNGU…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 6527 of 2006 in the Chief Magistrate's Court at Kibera – Mrs. Nyakundi (PM) on 14/09/2011)

JUDGMENT

1. The Appellant, Mary Waithera Irungu 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 were that on the 25th November 2006 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area Province, she trafficked by conveying 2071.6 grammes of Narcotic Drugs namely Cocaine, with an estimated market value of Kshs.8,286,400/- in contravention of the provisions of the said Act.
2. In the appeal before me the Appellant advanced fifteen grounds which Mr. Oundu learned counsel appearing for the appellant condensed into four grounds for purposes of submission, as follows:

   First, **that Sections of the law and in particular sections 200, 210 and 169 of the Criminal Procedure Code were not complied with.**

Second, **that the charge sheet was defective as it stated that the value given was the estimated market value.**

Third, **that manner in which the evidence was presented should have resulted in an acquittal, for reasons that the substance the appellant was charged with trafficking was not properly identified in court.**

Lastly, that the trial magistrate in her judgment shifted the burden of proof to the appellant, by blaming the appellant for failing to state how many suitcases she took from the conveyor belt.

3. Mr. Kadebe the learned state counsel, conceded the appeal on grounds that provisions of the law were not complied with, and in particular **Sections 200** and **210** both of the **Criminal Procedure Code**. He contended further that under **Section 169 Criminal Procedure Code**, the judgment

was irregular. He urged the court to find that the charges are serious and refer the matter for retrial because it is in the interest of justice that a retrial be held, and all affected be accorded occasion to canvass their arguments at the trial. He further averred that the charge sheet did state an estimated value, and that cocaine is a prohibited substance which does not have a value that is known through normal channels of commerce, and therefore the value attached to it will always be an estimate.

4. On the ground that the manner in which the evidence was presented should have resulted in an acquittal, for reasons that the substance the appellant was charged with trafficking was not properly identified in court. I have analysed and re-evaluated the evidence on record afresh to draw my own conclusions as is required of me. The mandate of the first appellate court is expressed in many cases including ***OKENO VS. REPUBLIC 1972 E.A. Pg. 32***. In so analysing the evidence I remained alive to the fact that I did not have the advantage that the trial court had, of observing the witnesses as they tendered their evidence.

5. **PW1** P.C. Bernard Nyamosi was on duty at Jomo Kenyatta International Airport together with **PW3** P.C. Mbithi and **PW8** P. C. Leboo profiling passengers who had just arrived on Flight No. KQ 0513 from Dakar Senegal to Nairobi. They stopped the appellant who had cleared with immigration and collected her luggage from the conveyor belt and checked her travel documents which included her passport, vaccination certificate, her tickets and various boarding passes.

6. The documents showed that she had travelled to Sao Paulo in Brazil through Johannesburg but had not utilized her return ticket from Sao Paulo through Johannesburg to Nairobi, choosing instead to travel a different route to Nairobi through Dakar Senegal. It was observed that both Sao Paulo in Brazil and Dakar in Senegal were profiled as countries of source for drugs, hence the suspicion of the officers that the appellant was a drug trafficker. The officers briefly interviewed her and invited her to their office within the baggage hall to check her luggage.

7. **PW2** P.C. Woman Mary Chepkorir testified that upon searching the appellant's luggage, she found a total of 4 cartons each containing 16 cans of cream, in each of the 2 large suitcases making a total of 128 cans. Her evidence was corroborated by **PW1, PW3, PW7** and **PW8** who were present during the search. **PW2** noticed that the depth of cans seemed to be shallow and did not correspond with the size of the can viewed from outside. Upon breaking the bottom of one of the cans, it was found to have padding around its circumference made up of a white powder in a satchet. There was a total of 128 cans, 127 of which contained the satchet with the white powder.

8. The white substance was weighed and sampled by **PW4**, Mr. Timothy Osoro the Government Analyst. The total weight of the substance contained in the 127 satchets came to 2,071.6 grams and an analysis on the spot confirmed that the substance was Cocaine, a prohibited substance under **Act No. 4 of 1994**. **PW6** I P Irungu, the Gazzeted Proper Officer, issued a certificate of weighing relying on the weight given by **PW4**. **PW6** assigned a market value of Kshs.4000/= for each gram which added upto a total of Kshs.8,282,400/= worth of cocaine in market value for the 2,071.6 grams. **PW8**, subsequently transmitted the white substance to the Government laboratories where **PW5** Mr. Kang'ethe, also a Government Analyst, tested the contents in all the 127 satchets and confirmed that indeed it was cocaine.

9. The appellant's unsworn defence was that she was returning to Nairobi from Dakar in Senegal, where she had been visiting a friend called Doris Ndirangu to scout for business opportunities when she was arrested at the airport. She confirmed that she was stopped by a police officer at Jomo Kenyatta International Airport after she had disembarked from the plane and retrieved her luggage from the conveyor belt. She however denied that the search upon her and her luggage yielded anything, and stated that she did not know where the drugs allegedly found on her came from.

10. On the ground that charge sheet was defective for stating that the value given to the drugs was estimated market value, I have made reference to the meaning of market value as addressed in

KOLONGEI V REPUBLIC CR. APP NO. 84 O F 2004 1 KLR pg. 7. Therein Judges of Appeal Githinji, Waki & Otieno JJA, rendered themselves thus:

> ***"There was no definition of "market value" in the Act although the term was used in the section creating the offence. In common parlance it connoted the price which an item ought reasonably to be expected to fetch on a sale in the open market, that is between a willing seller and a willing buyer. It was a matter of notoriety, of which this Court took judicial notice, that prohibited or illegal transactions would normally be carried out in the "black market" or the "street market". There would still be a willing seller and a willing buyer there and it is no less a "market" in that sense. The illegal item would have its "market value" there".***
>
> ***There was no fundamental difference in reference to "street value" instead of "market value". At all events, there was no prejudice caused to the appellant in adopting such terminology during the trial".***

11. This being a commodity sold on the black market it cannot have an exact price. **PW6**, I P Irungu testified that the estimated market value was arrived at from figures usually obtained from abusers of the substance and recovering addicts, in market surveys carried out once or twice a year to keep up with trends in the black market. For the foregoing reasons I do not find that the charge sheet was rendered defective by dint of the use of the terminology **"estimated market value".**

12. On the ground that the court shifted the burden of proof to the appellant by stating that she failed to disclose how many pieces of luggage that she picked from the conveyor belt, I find that this did not occasion her any prejudice, since it was not the failure to disclose the number of pieces of luggage that she had which led to her conviction, nor was it a material consideration in that regard.

13. The ground that provisions of the law were not complied with, and in particular **Sections 200** and **210** both of the **Criminal Procedure Code** has merit. I am satisfied that the proceedings were irregular in particular for failing to comply with **section 200 (3)** of the **Criminal Procedure Code** when Mrs. Wanjala took over the proceedings from Mrs. Odero, Chief Magistrate (as she then was) and also when Mrs. Kidula, Chief Magistrate took over the proceedings from Mrs. Wanjala, Senior Principal Magistrate.

14. The question that remains therefore, is whether or not to order a re-trial. The principles upon which a court should order a re-trial were restated in the case of **Fatehali Manji v Rep [1966] EA pg. 343**, by Judges of Appeal Sir Clement de Lestang, Ag. P., spry, Ag V-P and Law, J.A.

15. In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.

16. These principles were reiterated in the more recent case of **Muiruri v Republic [2003] KLR, pg 552**, where Kwach, Githinji & Waki JJA said:

> **"It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's.**

17. Generally therefore, whether a re-trial should be ordered or not must depend on the circumstances

of the case. The alleged offence herein occurred on 25th November 2006 within Jomo Kenyatta International Airport, and I have not been told that it would be difficult to trace the eight witnesses for a re-trial. Although the trial was defective, there was overwhelming evidence on the part of the prosecution and the mistakes leading to the quashing of the conviction were not entirely of the prosecution making. Taking into account the circumstances of this case, and the principles set out above, the order which does commend itself to me, and which I now make is that there shall be a re-trial.

I therefore quash the conviction, set aside the sentence and order a re-trial.

SIGNED DATED and **DELIVERED** in open court this **19th day** of **September 2013**.

L. A. ACHODE

JUDGE