**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 38 OF 2011**

*(From the original conviction and sentence in criminal case no. 1030 of 2009 the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM)*

**KABIBI KALUME KATSUI.....….....…..……APPELLANT**

**VERSUS**

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

**JUDGMENT**

1. Kabibi Kalume Katsui, the appellant herein was charged in the Lower Court with Trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. In that on the 25th day of July, 2009 at about 11.00am at Mtangani area in Malindi Location within Malindi District she was found trafficking in Narcotic Drugs to wit 187 (one hundred and eighty seven) sachets of heroin valued at Kshs, 18,700/- by storing in contravention of the said Act.

2. Following a full trial, she was found guilty and convicted. On 2nd March, 2011 she was sentenced to pay a fine of shs. 1Million and in addition to serve life imprisonment. She has now appealed to this court through Mr. Mouko advocate against both conviction and sentence.

3. Grounds 2, 3, 4, 6 and 7 attack the quality of evidence upon which the conviction was based. The remaining grounds are as follows:

> **"2) The honourable the principal magistrate erred in law and in fact by convicting the appellant on a charge that was not proved to the required standards.**

3. **The honourable the principal magistrate erred both in law and in fact in that she disregarded the cogent defence given by the appellant.**

4. **The honorable court erred in law and in fact by holding that the sum of Kshs. 490/- recovered from the appellant were proceeds of sale of narcotic drugs, without any evidence whatsoever, that indeed it was such proceeds**

6. **The honourable principal magistrate erred both in law and in fact by convicting the appellant against the weight of the evidence tendered before the court.**

7. **The honorable principal magistrate failed in law by not addressing the contradictions raised**

**in the proceedings and resolving the same in favour of the appellant."**

4. Before the hearing of the appeal, the appellant filed a Notice of Motion dated 18th June, 2012, under Section 358 of the Criminal Procedure Code, seeking leave to adduce further evidence, being the proposed cross-examination of PW1 and PW2, as well as adduction of further defence evidence through her own testimony and the calling of one witness known as George.

5. The main grounds were that:

> **"a. The matter before this court is an extremely sensitive matter which carries serious consequences.**
>
> **b. There are issues that ought to have been raised in this Lower Court, but were inadvertently not raised by this counsel on recording then and which if they had been raised the outcome may have been different;**
>
> **c) The appellant would be prejudiced in this appeal unless this issues are raised for the honourable court to consider.**
>
> **d) No prejudice will be suffered by the respondent in the event that this applicant is granted leave to adduce further evidence."**

6. The application was supported by the appellant's affidavit pointing out that her counsels at the trial failed to raise "pertinent issues that were necessary for (her) defence" with PW1 and PW2. She also took issue with the search certificate prepared in English and which she allegedly signed. She therefore wanted a chance to "explain the circumstances under which (she) signed the said certificate which was never explained to (her)."

7. The State through Mr. Naulikha offered a prevaricating response to the application, in part asserting that the stated issues could have been raised earlier in the trial. On the other hand observing the life sentence was a "serious matter" and that the State would concede if the "court is convinced". In its summary ruling delivered on 19th October, 2013, the court rejected the application and reserved reasons until the judgment.

8. The Notice of Motion was brought under Section 358 of the Criminal Procedure Code. Section 358(1) of the Criminal Procedure Code states:

> **"In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."**

The court has discretion under this section to grant an application made under the section, for reasons to be recorded, "if it thinks additional evidence is necessary." On a plain reading, the section does not contemplate a full re-opening of the trial. This however, appeared to be the object of the appellant's Notice of Motion. Despite having been represented by two advocates at the trial, her application sought to recall two prosecution witnesses for cross-examination, to have the appellant give own further testimony and to call a defence witness. The scope of the application clearly falls beyond the "necessary" limit set by the section. The appellant was effectively asking for a retrial before the hearing of her appeal.

10. It is true that the life sentence imposed on her is a serious matter. However, it is my considered view that where an appellant has been represented by counsel at the trial, it might amount to an abuse of the section to allow him or her to throw wide all over again the doors of the closed trial, under the guise of adducing "further evidence". For these reasons I rejected the application by Mr. Mouko on behalf of the appellant.

11. The appellant filed written submissions in support of her appeal, the State opting to rely on the evidence on record. As the first appellate court, this court is obligated to evaluate afresh the evidence tendered in the Lower Court. In so doing the court must bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify (see **Okeno v R 1973 EA 322**). Additionally, an appellate court ought not to interfere with the factual findings made at the trial unless it "is clear that no reasonable tribunal could make such a finding or the finding is clearly wrong" (See **R v Francis Otieno Oyier [1958] KLR 353).**

12. The prosecution evidence at the trial was as follows:

On 25th July, 2009 APC Shadrack Opondo (PW1) and CPL Peter Ouma (PW2), in the in the company of other Anti Narcotic Unit officers, including CPL Titus Munyalo (PW4) received a tip off while at Mtangani area that a certain lady was trafficking in narcotic drugs. They proceeded to the house where they found the appellant. She was seated. On a table near her were an assortment of cigarette wrappings (Exh.2). They also recovered 187 sachets of suspected heroin packed in bundles of 14 x 13 satchets and five sachets more in one extra bundle (exh.1). They also found Kshs. 490/- (exh.3) and retrieved the appellant's identity card (Exh.5).

13. PW2 prepared a search certificate which the appellant signed (exh.4). The appellant was arrested. Thereafter PW4 prepared an exhibit memo form (exh.7) and forwarded the suspected drugs to the government analyst, enclosed in a marked exhibit bag (Exh.8). John Njenga, the analyst upon examination of the exhibits confirmed that they consisted of diacetylmorphine (heroin), and he prepared his report dated 28th July, 2009 (exh. 6).

14. Upon being placed on her defence the appellant elected to give a sworn statement and did not call any witness. She stated that she was a resident of Mtangani and operated a beauty salon at Kisumu Ndogo. She said that on the date of her arrest she was at her house alone, with her young child preparing lunch for her children. It was 11.00am. Her house was close to her neighbours' houses. While in her house she heard people running, and presently a male and female police officer entered her neighbour's house, while others stayed outside. The Police then came in to search her house ostensibly because those who had escaped had run into her house.

15. A boy arrested from the neighbour's home was brought to her house. Police took her and the boy to the police station and incarcerated them; eventually interrogating them. The boy was subsequently released while she was arraigned before the court. She denied that police recovered any drugs from her house but confirmed that a female officer searched her and retrieved Kshs. 490/= from her bag.

16. The particulars of the charge stated that the appellant trafficked in the drugs by storing them. The learned trial magistrate having considered prosecution evidence on recovery, believed the police officers PW1, PW2 and PW5, namely, that the drugs were found on a table in the appellant's house. The defence assails the learned magistrate's judgment stating that she "did not analyse the facts and the law but took the evidence as given by the prosecution witnesses as gospel truth without considering that the appellant version could be the correct one (sic)".

17. It was contended that PW1 and PW4 having contradicted themselves about the actual place from whence shs. 490 was recovered, followed by their assertion that the appellant was a "known" drug trafficker should have rendered their credibility doubtful. The contradiction stated is neither here nor there. It was in my view immaterial. Besides, if indeed the appellant was a known drug trafficker, it cannot be said without more that the officers were out to fix her. As it is, the oral evidence on the recovery is supported by the search certificate (exh.4) signed by the appellant at her house. The said certificate indicates that the drug in question was recovered therefrom. The appellant herself told the court that the boy, George, whom I presume to be the second signatory on the certificate was brought from a different house.

18. This boy George must be the witness the appellant by her Notice of Motion sought to call as a

witness. He was not called in the Lower Court by the prosecution or the defence. Indeed there were other officers and members of community police who were involved in the arrest of the appellant who were not called as witnesses. There is no requirement in this case for the prosecution to call any number of witnesses. Section 143 of the Evidence Act states:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

19. In my considered view nothing turns on the failure by the prosecution to call the boy or any of the other participants. As indicated earlier, the appellant signed the search certificate which confirms that recoveries were made from the house of Kabibi Kalume. No objection was raised concerning the production of the said certificate by the prosecution, and as the trial magistrate observed, the appellant did not refer to it in her defence. The contention now being raised by her counsel that the certificate "had no translation in a language the appellant was well versed with and the circumstances of its signing are not clear" should have been raised during the trial. She was represented by counsel.

20. The trial magistrate in her judgment observed that the appellant's defence was a plain denial. The denial suggested that the police maliciously framed her with the drugs, a suggestion not canvassed during cross-examination even though the officers freely declared that she was a "known drug" trafficker. The large volume of the drugs and the appellant's signature of the search certificate tend to displace the suggestion of a frame up.

21. Secondly, I think the purpose of the possession of the drugs can be implied from the volume. The court concluded it was intended for sale. Mr. Mouko for the appellant has relied on the case of **Ali Mohamed vs R Criminal Appeal No. 61 of 2000** on this score. In that case the appellant had been charged under Section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act. However, in grappling with the issue of the purpose of drugs held the court stated:

> **"The court must proceed on the basis of evidence before it to determine whether in the peculiar circumstances of the case the drug was for personal consumption or for any other purpose in order to decide whether to mete out the sentence under the first or second limb of the said Section 3(1)"**.

22. As in this case, the appellant therein had denied recovery of the drugs in question. The court stated that:

> **"He could not therefore offer any explanation regarding the purpose for which he had the drug....Besides the quantities of the drug found on him could to possibly have been intended for his own consumption."**

In the instant case, the court took into account the sum of Shs. 490/- recovered and concluded that the drugs were not for personal consumption but for sale, thus trafficking was proven. The court had already found that a total 187 sachets were recovered. In these circumstances she was entitled to conclude that the drug was not for personal consumption but for sale. Trafficking under the Act includes sale; storing etc. These can be implied from the amount of drug involved.

23. Finally, I will deal with two related issues raised in this appeal concerning the value of the drug and the chain of handling the same by police. Starting with the latter the defence submitted that it was not clear who had possession of the drugs from recovery to analysis as there was evidence by PW4 that the drug value was given by Pc Evayo. The case of **Bernard Omondi Odullo v R Criminal Appeal No. 66 of 2000** was cited in support of the submission that there should be a clear chain of handling of a drug exhibit.

24. In that case, the court found for a fact the existence of lacunae in the handling of the drug – who took the same to government chemist, who had custody thereof until then and why it took the

government chemist 22 days to prepare a report. A doubt was created thereby as to whether the same drug recovered was taken to government chemist due to the "break in the chain of evidence".

25. The chain in the present case was unbroken from recovery to analysis even though PW3 admitted the failure to mark the individual sachets. PW4 had the possession of the drugs, prepared the exhibit memo form and labeled the drugs in a special bag CR No. 313/493/2009 in the appellant's names (Exh.8) before taking it to the government chemist (PW3) on 28th July, 2009, two days after the recovery. PW3 marked the bag as GCK 420/09 JKM upon receipt and carried out the examination of the 187 sachets recovered on the same day. He confirmed the same to be diacetylmorphine (heroin). The chain is clearly recorded in the search certificate (Exh.4) the exhibit memo form (Exh.7) and the government chemist report (Exh.6). I cannot find any basis for the contention that the chain of evidence had any breach.

26. Concerning the value of the drug, there is no reason for the assumption now imputed by the defence that PC Evayo handled the drug while framing the charge. PW4 said the value used is the street value. No suggestion was made at the hearing at Pc Evayo handled the drug as she drafted the charge sheet.

27. In the case of Ali Mohamed, the particulars and evidence did not state the value of the drug. The question was tied by the appellate court to the legality of the sentence and not the conviction itself. The court did not state that in every case the failure to prove the value may fatally affect the conviction.

28. In the instant case, a street value was given and the fine imposed was the minimum provided for an offence under Section 4(a). It is important to distinguish that the **Ondullo Case** was in respect of Section 3(2) (b) of the Act which prescribes different sentences for drugs held for personal consumption or otherwise. This is not true of Section 4(a). There is no requirement to distinguish between drugs held for own consumption or otherwise even though the issue could overlap when considering if any of the forms of trafficking have arisen. Nothing therefore turns on the question of the value and handling of the drugs.

29. I am satisfied that the learned trial magistrate properly applied the law to the facts and her findings cannot be faulted.

This appeal has no merit and is accordingly dismissed. I confirm both conviction and sentence.

Delivered and signed at Malindi this **20th** day of **December, 2013** in the presence of the appellant, Mr. Obaga holding brief for Mr. Mouko for her, Miss Mathangani for State

Court Clerk – John

**C. W. Meoli**

**JUDGE**