REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Appeal 60 of 2011

ANTONY MBITHI KASYULA .....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in Criminal Case no. 2410 of 2009 of the Chief Magistrate's Court Mombasa – J.Omburah – SRM)

JUDGMENT

The Appellant **ANTONY MBITHI KASYULA** was charged before the Chief Magistrate's Court at Mombasa 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 (**hereinafter referred to as the Act)

The particulars thereof are that:

"**On the 19th day of July 2009 at Mariakani area in Kaloleni district within Coast Province, jointly with others not before court trafficked in narcotic drugs by transporting 60 kilogrammes of cannabis with a market value of Ksh. 120,000 in a motor vehicle Registration No. KAR 583V Toyota Corolla in contravention of the said Act."**

He was tried, convicted and sentenced to serve **7 years imprisonment**. He has appealed against both the conviction and sentence.

The circumstance of the case in brief are that on the 19th day of July 2009, police officers attached to Highway Patrol Base were on patrol duties along Nairobi to Mombasa Highway. They stopped a motor-vehicle Reg. No. KAP 583V Toyota Saloon traveling towards Mombasa. The driver stopped. One of the occupants got out and ran away. Inspector Hassan Elema (PW3) shot in the air to stop him. He disappeared. However, the officers managed to arrest two of the other occupants who did not manage to escape. One of those arrested is the Appellant herein. Subsequently, the arresting officers searched the boot of the motor-vehicle and recovered four sacks of plant material suspected to be narcotic drugs. The Appellant and the other were arrested and taken to Mariakani Police Station. They were later handed over to the Anti-Narcotics Police officers. The recovered plants were weighed and found to weigh 60 Kgs. The Government analyst, Jackson took samples thereof for analysis. A sampling certificate was prepared to

that effect. Upon examining of the same, he certified it to be bhang, a narcotic drug. The suspects were charged accordingly.

The Appellant's defence was that, on the 18th July 2009, one Alois Wambua Maundu, who was his co-accused in the Trial Court, went to his place of work at Kongowea. The Appellant told the Trial Court that he works at Oil Libya Petrol Station, Kongowea, where he repairs punctures. That, the said Wambua had a motor vehicle registration No. KAP 583V and requested him to inflate the tyres. He did and proceeded to wash them. He then requested Wambua for a lift to Kisauni. Wambua agreed. When they reached Kisauni, Wambua parked the motor vehicle and was approached by someone. Wambua spoke with that person for about ten minutes. That, that other person sought from Wambua, whether the Appellant could accompany them. Wambua agreed. They went to Changamwe area then proceeded on and turned off the Nairobi – Mombasa Highway, at a distance of about 100 meters away to a house. At the house, they were approached by a lady and a child. The lady and the child had four plastic bags, they placed them into the boot of the motor vehicle registration no. KAP 583V. He did not get out of the motor vehicle. As they drove back to the main road, their motor vehicle got a puncture. They stopped to repair it. At that point, the police officers on patrol stopped by and inquired into the matter. They talked to the customer in the motor-vehicle for about 10 minutes and that, shortly he heard a gun shot and the police officers started beating them. That, they were taken back to the house where the bags were gotten from and the police officers arrested the lady therefrom. She allegedly told the officers the sacks were taken to her house by a charcoal seller. She was released by the police officers. That, Wambua who was the driver of the motor vehicle was asked by to give them Kshs. 20,000 as an inducement. He did not have. The figure was reduced to Kshs. 10,000 but still he did not. Later, they were taken to the cells and charged. He testified that he did not know the contents of the sacks ferried in the motor vehicle.

The Learned Trial Magistrate, after considering the evidence adduced, observed in the judgement as follows:

"**the question now to determine is whether the two accuseds (sic) knew about the content of the luggage or the issue of transporting them".**

In answer to this question, the Trial Magistrate ruled that, the Appellant herein could not hike a lift from Kongowea only to end up at Sumburu at 3.00 a.m. when his intention was to alight at Kisauni, without a single question. The Magistrate observed further that the Appellant heard the co-accused and the hirer who ran away negotiate, and therefore he knew of the movements and purpose of the hirer and mission. That, although the hirer was to ferry a patient the appellant did not witness his co-accused, Wambua ferry a patient from Mombasa to Samburu and therefore, the purpose was to go and ferry the bhang. The Trial Magistrate then concluded:

"It is my finding therefore that even though the bhang could have belonged to the suspect or the hirer who ran away, the two accused knew about the nature of the business they were undertaking and is why they planned to executive the same at night after being paid handsomely. They had the right to ask what the mission was all about if they were suspicious which they never did and they had the right to ask what was being loaded to the motor vehicle which they never did and the police who they were not expecting at that time fortunately or unfortunately crossed into their business plans and the long arm of the law caught up with them."

It is against this finding that the Appellant has filed a petition of appeal based on eight (8) grounds. In an nutshell, he alleges that the Learned Magistrate erred in law and fact in that:

i. He proceeded with the trial and reached a conviction on a charge that was defective.

ii. There was no proof that the items found were cannabis sativa.

iii. He convicted the Appellant after finding as a fact that, the Appellant and another had only been hired.

iv. He denied the Appellant the benefit of doubt.

v. He failed to consider his defence.

vi. The sentence meted was manifestly excessive and harsh.

Mr. Magolo, the Learned defence counsel, appeared for the Appellant and argued all the grounds as consolidated. He submitted that on the issue of sentence that, the sentence imposed upon the Appellant, of **seven years** in prison and **a fine of Kshs**. **1 million** was irregular, in that the fine has no default clause, and therefore the sentence is **illegal** and **prejudicial** to the Appellant. This is because, it means the Appellant will remain in jail as long as he is unable to raise and pay fine. He further submitted that, the sentence was also harsh and excessive. That the Appellant in mitigation told the Trial Court that he had just finished his Secondary school, and therefore, he should have been allowed to lead a more useful life. That his mitigation should have been considered. That, if the conviction is to be sustained, then, the Appellant sentence should be reduced to the period already served.

On the issue of the charge sheet, he submitted that the charge itself was defective. He submitted that the charge of trafficking **by transporting**, is not a known offence under the Narcotic Drugs and Psychotropic Substance (Control) Act, No. 4 of 1994. That, particulars of the charge herein refers to trafficking by "**transporting**" yet the Act refers of "**conveying",** which is not in the particulars of the charge herein. He cited to the case of **Jerim Ouma Nimrod –Vs- R Criminal Appeal No. 89 of 1997** High Court at Mombasa.

In relation to the evidence adduced at the trial, Mr. Magolo submitted that, the Trial Magistrate convicted the Appellant, merely because he was on the subject motor-vehicle and failed to question where they were going. He submitted that failure to question the driver of the motor-vehicle as to where they were going did not amount to aiding or abetting a crime and does not make the Appellant guilty.

The appeal was opposed at the hearing of the appeal, the State was represented by the Learned counsel Mr. Gioche. Mr. Gioche submitted that, the motor-vehicle the Appellant was traveling in was a **"private**" and not **"public"** motor vehicle, therefore the Appellant was not a passenger. That, the Appellant was given a lift from Kongowea to Kisauni and instead of going to Kisauni, he was taken round and round from place to place and ended up at Taru/Samburu about 70 Km away. He did not protest. The Counsel posed a question:

Was he kidnapped?

He answered in the negative.

Mr. Gioche submitted further that the Appellant trafficked in the narcotic drugs by transporting. He argued that Section 2 of the Act, make reference to trafficking by "**conveying, supplying** and **distributing".** He argued that "**distributing"** and **"conveying"** is a process of moving something and therefore transporting. He submitted the charge was therefore not defective.

As regards the sentence, the Learned State Counsel submitted that, sentencing is the discretion of the Court and that, the Court gave reasons for the sentence imposed. He submitted that, an order for a re-trial would not be an option, because the substance, the subject matter of the case has already been destroyed.

In final reply, Mr. Magolo submitted that failure to specifically include the words **supplying, distributing or conveying"** in the charge was prejudicial to the Appellant and that, a re-trial does not necessarily entail the Court going to view the exhibits in the store. The parties closed their submissions.

The role of a first appellate Court was stated in the Court of Appeals decision in **James Otengo Nyarombe & two Others -Vs- R Criminal Appeal No. 184 of 2002** as follows:-

"**It is trite law that a trial court has the duty to carefully examine and analyse the evidence adduced**

in a case before it and to draw conclusion only based on the evidence before it. In the same way a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same.

In this matter, I have re-evaluated the evidence recorded by the trial Court, the submissions of both Counsels and the authorities cited. I find that this appeal has raised three main issues for consideration.

- Whether the charge is defective.
- Whether the evidence adduced by the prosecution was adequate to sustain a conviction.
- Whether the sentence was harsh and/or illegal.

As regards the issue of the charge sheet. I find that Appellant was charged with the offence of trafficking in narcotic drugs contrary to section 4 of the Act.

Section 4 provides;-

"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. . ."

What then is trafficking? Section 2 the Act defines it as:

"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 State Counsel has submitted that, the Appellant was conveying, supplying and/or distributing the drug, hence transporting. The word transporting is not listed under the various mode of trafficking under the Act. The question is this: **Does the failure to use any of the words specified under the Act, render the charge defective or prejudicial to the Appellant?** I shall revert to that question at the end of this judgment.

I now turn to ground two on the issue of the evidence adduced. I have re-evaluated and/or reviewed the evidence. I agree with the submissions by the State Counsel and the Trial Magistrate that the Appellant was on a private motor-vehicle upon arrest. He was arrested 70 Km away from Kisauni, his intended destination. He cannot have been led thereto without his knowledge. He was arrested at 3 a.m. This is an unholy hour. He was not under threat, duress, coercion or even kidnap at the time of arrest. He was on the motor-vehicle by choice. He choose to accompany the other two occupants voluntarily. Under normal circumstances one does not accompany strangers on night shifts or errands without knowledge of their mission. If indeed he decided to accompany the other occupants, he definitely must have known or heard from their conversation the purpose of the journey. The co-accused testified that he picked the Appellant before picking the other passengers i.e. the hirer (if at all). That, he then negotiated with the hirer the hire charges Kshs. 2000 and agreed to drop, the hirer's sick child to Mariakani. He then went with the Appellant as "**security, as an assistant".** This conversation was in the presence of the Appellant. **But did they deliver the sick boy and/or the drugs to Mariakani?** The answer is NO. This evidence of Wambua contradicts the evidence of the Appellant. He the Appellant testified that **it is the hirer who asked Wambua whether he, the Appellant could go with them.** That, they drove off to Changamwe and when he inquired as to where they were going, he was told he would know later, so he kept quiet. Therefore, at no time, does the Appellant make reference to a sick child the hirer was transferring from Mombasa General Hospital taking home. Infact the Appellant testified that;

"**We got into a house and the customer (hirer) got into a house and a child and a woman <u>came out".</u> They came out with four plastic bags and placed them into the boot.**

So there was no sick child from Mombasa to the area of arrest. That is why there is no corroboration in the version of the evidence of Wambua, and the Appellant, although they were on the same motor-vehicle. That is also reflected even in the alleged amount of money the police officers allegedly demanded from the driver of the motor vehicle (as an **"inducement").** Whereas the driver says it was Kshs. Ten thousand the Appellant said it was Kshs. Twenty thousand. I, therefore, find upon re-evaluation of the evidence, that the evidence the appellants evidence casts a lot of doubt as to its credibility and thus becomes unbelievable. I agree with the trial Magistrate and the Learned State Counsel that the Appellant was well aware of the purpose and motive of the trip from Mombasa to Samburu. If he was not aware, what then was his benefit in the entire ride? Was he an escortee or silent listener? The circumstances herein leads only to one conclusion that the Appellant knew where they were going and their mission.

The next question is this – ***Did he know the substance ferried was bhang?*** In his evidence, PW3 Inspector Hassan Elema told the court:-

"**PC Ondia went and held the boot which swung open and we were met with strong smell of bhang".**

The question is this, is it possible four bags of plastic plant material, would be packed into a boot of a motor vehicle, while one is seated therein and he fails to even get the slightest **"smell"** thereof, even the smell therefrom, blown by the wind? I have taken judicial notice of the fact that "**Bhang"** in such an unprepared form would definitely attract the nose. Does it mean the Appellant sense of smell was not aroused at all? Almost impossible! As already stated, the circumstances of the case exempt him from lack of knowledge of bhang on the motor-vehicle. It's not, possible, that the Appellant merely sat in that motor vehicle, as passenger, without total knowledge of the contents of the goods ferried.

The next question there is: **Did he then traffick in the drug?** Trafficking entails moving from one position to another. Transporting is a mode of movement. The Appellants moved from Mombasa to where they were arrested. I therefore find the use of the word transporting in the charge was not prejudicial to the Appellant. In fact, Section 137 of the Criminal Procedure Code requires particulars of the charge to be simple and clear. Transporting is clearer then conveying. If anything, the prejudice is not evident. The Appellant was represented throughout the trial by a very competent Counsel. The charges were read. He took a plea of **NOT GUILTY.** He fully participated in the trial. At the close of the prosecution case, the Appellant's Counsel tendered submissions on no case to answer. Apparently he did not raise the issue of a defective charge sheet at all. This ground of appeal would have been well served if it was raised at the trial. All the same, I find no prejudice was occasioned to the Appellant. I agree with the Learned State Counsel transporting by a motor vehicle can legally and lawfully fall under inter alia **<u>conveying.</u>** Therefore, 1 rule that the charge was thus not defective nor prejudicial. I have already ruled that the circumstances herein lead to a conclusion that the Appellant knew or ought to have known where they were going and what they were ferrying. The circumstances herein, taken in totality leads to only one conclusion, that the Appellant was aware of the mission in Samburu and the purposes of the mission. This is more so because, the Appellant had traveled all the way from his intended destination without a query. As stated it was in the night. He was told he was escorting a patient. He did not see any. He saw four bags of substance, plant materiel loaded into the motor vehicle. He did not question. It was around 3.00 a.m. I find he was involved in the whole transaction.

The law on circumstantial evidence requires that, it must be such as to be explainable only upon the hypotheses of the accused's guilt and incompatible with other innocent explanation. **<u>Karanja –Vs- R. Criminal Appeal 63/83.</u>** The Appellant's conduct leads to only one conclusion, he was well aware of the entire transaction. I have considered his defence. That he knew nothing about the entire trip. I don't believe him. He is merely trying to save his skin.

I now turn to the issue of sentence. Section 4 of the Act, under which the Appellant is charged provides

the relevant sentence under sub-section 4(a) as follows-

4 (a) In respect of any narcotic drug or psychotropic substance to a fine of 1million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is greater and in addition, to imprisonment for life".

In the instant case, the Appellant was sentenced to pay **a fine of Kshs. 1 million** and **in addition to serve seven (7) years imprisonment.** As I was writing this judgment and having taken into account the sentence provided for under Section 4 (a) of the Act, the issue of the possibility of enhancement of the sentence arose. I then invited the parties to address the Court on the same, just in case, that was to be the case. I invited them to because of two main reasons

- in the interest of justice, and
- to allow the Appellant an opportunity to consider and elect whether to pursue the appeal or decide otherwise.

The parties addressed the issue at length. Mr. Magolo, the Learned Defence Counsel submitted that the sentence imposed herein was indeed illegal. The reasons being that although the Trial Magistrate imposed a fine of Kshs. 1 million, the Court did not give a default sentence in case the fine was notpaid. Mr. Magolo therefore concede that the sentence was illegal. In that case, he invited the Court to move on it's own motion and interfere with the sentence. However, he submitted that while the Court is entitled to interfere with the sentence, the Court should not do so in a manner prejudicial to the Appellant. The Counsel invited the Court to consider the view taken in the case of **Emmanuel Kwaku Arabio – VS – R. Criminal Case No. 467 of 2010,** where the judge released the Appellant upon realizing the sentence imposed was illegal. He submitted that any interference should be for the benefit of the Appellant.

Mr. Magolo further submitted that for the Court to enhance the sentence under, the Provisions of 354 (3) of the Criminal Procedure Code, the Attorney General must the notice of enhancement of sentence to the Appellant. That, the Court cannot move ***suo moto***. This, he argued, is because, the other party is content with the sentence, and only an illegal sentence can be altered. He further submitted that, there is a misconception that sentences under the Act, are subjectto minimum sentences. He disagreed with that school of thought and submitted under the Act, the words used are "**liable to".** He further submitted that Hon. Justice J. Ojwang, Judge of the High Court (as he then was) held that the words **"liable to"** do not foreclose the Court's discretion.

In reply to the issues raised on enhancement of the sentence, the State represented by Counsels, Mr. Jami and Mr. Gioche argued that the issue of failure to give a default sentence would be cured by Section 28 of the Penal Code. That, Section 28(2) of the Penal Code provide for the relevant periods of imprisonment in case of default of payment of a fine, and in cases where no other law specifies otherwise. That, that section states it should be the period which in the court's opinion will satisfy the justice of the case. That, that gives the maximum custodial period in case of default.

The State Counsels, invited the Court to consider the relevant default period under Section 28 (2) of the Penal Code and apply in the case herein. The Counsels submitted further that, the Court has discretion as to whether to give default sentence, or not and in this case, the Court exercised it's discretion. Mr. Jami submitted that, the Trial Magistrate gave a valid and legal sentence. He argued that, indeed even the failure to give the default period did not prejudice the Appellant, because, even if he does not pay the fine, he can just go home. Still on sentence the State Counsels invited the Court to note that the minimum fine provide for by the **law** is Kshs. 1 million and prayed the sentence be enhanced accordingly.

In addition, Mr. Gioche submitted that, there is no prejudice occasioned to the Appellant due to the failure by the court to order for a default sentence. He argued that, the Appellant was free to walk away from the fine but not from the prison. He submitted that the provisions of Section 4(a) of the Act provides for a maximum sentence of life imprisonment, therefore the sentence imposed herein of Seven(7) years is lawful. He submitted that lack of a default sentence did not take away the imprisonment sentence. He

argued the Court to uphold both the conviction and sentence.

In a final reply, Mr. Magolo argued the Court to appreciate what happens upon the Conviction of a suspect. He submitted that, a warrant of committal is written and he is sent to prison. He has to serve the Seven years. What then, if he does not pay the Kshs. 1 million? He told the Court that that becomes prejudicial to the Appellant. He submitted further that under Section 28(2) of the Penal Code, the maximum period of default to pay a fine of Kshs. 1 million is a custodial period of one year. Therefore, the Appellant has already served that period. He told the Court that, in fact, there is a misunderstanding of Section 28 (c) of the Penal Code. He submitted that under that Section, the Court has discretion to send a person to prison or levy the amount through attachment. In this case, he submitted a fine cannot be recovered through attachment where the sentence is already served. He submitted that, the Court has no discretion on the default clause. He invited the Court to find that Section 382 of the Criminal Procedure Code invoked by the State Counsels has no relevance in this matter and is of no assistance. This is because the error envisaged therein relates to proceedings and not an error on sentence as in this case. The parties rested their submission on the issue of enhancement of the sentence.

I shall now deal with several issues that have arisen from the oral arguments of both parties in relation to the sentence herein. I summary them as I understand them as follows:-

- Is the sentence imposed herein of Kshs. 1 million and in addition a sentence of seven (7) years imprisonment illegal?

- Does the failure to provide a default sentence, in default in payment of the fine of Kshs. 1 million imposed herein render the sentence herein;

o illegal? and/or

o prejudicial to the Appellant?

- Does the Court have the power to interfere with the sentence and more so, on it's own motion?

- Can the sentence if at all is illegal, be cured by the provisions of Section 382 of the Criminal Procedure Code and/or Section 28 (2) of the Penal Code?

- Does the Court, while passing a sentence of a fine have the discretion whether or not to impose a default sentence?

In view of the fact that, all these issues relate to the main issue of the sentence herein, I shall deal with all of them jointly. First and foremost, I find that the Court has powers under Section 354 (3) (a) (b) of the Criminal Procedure Code to review sentence.

These powers are exercisable subject to the provisions of Section 354(1) and (2) of the Criminal Procedure Code which states

354 (1) At the hearing of the appeal the Appellant or his advocate may address the court in support of the particulars set out in the petition or appeal and the respondent or his advocate may then address the court.

(2) The court may invite the Appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.

The power to interfere with sentence is under –

SS. (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may then –

(a) in an appeal from a conviction

i. reverse the finding and sentence and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction. Or

ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

iii. with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.

iv. in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

Thus, the reduction or enhancement of sentence is purely within the power and discretion of the Court and the Court does not have to give the parties a notice of enhancement of sentence, before enhancing it and it can move on it's own motion. On the other hand if the State requires the sentence to be enhanced, they are duty bound to give such notice. But I do appreciate rules of natural justice and practice, requires that the Appellant be warned. That is exactly what I did herein.

I, therefore, don't agree with the defence submissions that, the Court cannot move on it's own to review sentence. It can, and can enhance or reduce it. There was an argument by the State that, even under Section 364 of the Criminal Procedure Code the Court can review a sentence and enhance it. Although that may be correct but the provisions of Section 364 of the Criminal Procedure Code relate to powers of the Court on revision. The matter herein is on appeal and as much as these provisions are relatively similar to those of appeal, the matters before the court must be restricted within to the provisions applicable, that is, provisions relating to appeals as the case herein.

I shall now consider the issue of default sentence. It's a fact that the Trial Magistrate did not give a default sentence. The question is this ***Is the sentence herein then illegal?***

The Counsels submitted a lot on this. I was invited to consider Section 28 of the Penal Code and Section 382 of the Criminal Procedure Code. I agree Section 28 gives default custodial period. I equally agree, if I was to apply it, then the maximum period applicable would be one year imprisonment which the Appellant has served. However, Section 28 (2) of the Penal code empowers the Court to issue warrants for distress and sale of a Convicts' moveable property to satisfy a fine. But this attachment and sale is not allowed if the convict has served imprisonment indefault unless for special reasons to be recorded in writing. It's also noteworthy that a sentence of imprisonment indefault of fine cannot be made concurrent with any other sentence of imprisonment, as was held in the case of: **Republic -Vs- Ofunye1970 EA 78** thus, imprisonment consequently upon non-payment of a fine terminates immediately the fine is paid. Thus if I were to rule that the appellant serves one year in default of the fine of Kshs. 1 million, he will have to serve it upon completion of the custodial sentence herein of seven years.

I was also invited to find that, a Court has discretion whether to give a default sentence or not where fine is ordered. I don't agree with that argument especially in relation to criminal cases especially for the offences under the Penal Code. Section 28 (i) (c) of the Penal Code, empowers the Court to direct that indefault of payment of the fine, the Convict will be imprisoned for a specified period as held in the case of (**Karanja –Vs- R (1985) 1 KLR 384.)** Where however, the offence is punishable with a fine or a term of imprisonment, it is the discretion of the Court to impose a fine or imprisonment (Section 28 (i) (b) of

the Penal Code.) I therefore don't think the intention of Section 28 of the Penal Code was to give the Court the discretion as to whether or not to impose a default sentence. I must be quick to add that, the entire issue of sentencing is guided by the general principles of sentencing and the specific penalties provided for each offence.

Again, I was referred to Section 382 of the Criminal Procedure Code, under that Section the sentence can only be reversed or altered on appeal if there is an error on inter alia, an order or judgment, which error has occasioned a failure of justice. In my opinion, this Section 382 does not assist herein much. The injustice presumed should have occurred during or before the trial or proceedings. I think I have said enough on the submissions of the parties.

I shall now revert to the matter herein. **Is the sentence illegal? Can the court enhance the sentence.** The conviction, of the Appellant herein is based and founded on Section 4 (a) of the Act. Mr. Magolo has argued that, the custodial sentence under that Section is not a mandatory sentence. He has cited an authority of **Emmanuel Kweku Arobio –Vs- R Cr. App. NO. 467/20**. Being a decision of the High Court, its only of persuasive value to this Court and therefore not binding. However, the Hon. Justice J. Ojwang (now a Judge of the Supreme Court) who gave the decision in that case took a lot of time and analysed in depth and at length the issue of sentencing under section 4 (a) of the Act. He ruled that the words **"liable to**" therein leads to:

"a logical inference that the expression "liable to" when used in respect of a prescribed sentence, reposes in the court discretion, to be exercised judicially, in determining the exact penalty to be imposed"

He went on to state:

"**I would hold that Section 4 (a) of the said Act does not foreclose the judicial discretion".**

The State Counsel did not contest this argument, and generally supported it, only arguing

0that the Court should interfere with the sentence in terms of default period. I took note that the decisions by the Hon. Judge was delivered on **6th September 2011** at Mombasa High Court. But on the **16th day of April 2010** the Court of Appeal in the decision of **Kingsley Chukwu -Vs- R Criminal Appeal No. 259 of 2007,** a decision by Judges of Appeal namely Justice Onyango Otieno, D. Aganyanya (as he then was) and A.R. Visram discussed the issue of sentencing under Section 4 (a) of the Act, at length.

In that, case, the Appellant was charged with the offence of trafficking in narcotics contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. He was tried in the Chief Magistrate's Court and sentenced to imprisonment for 15 years. The Appellant being dissatisfied by the conviction and the sentence, appealed. The High Court upheld the conviction but interfered with the sentence by ordering that:-

"The Appellant shall pay a fine of Kshs. Twenty-Eight Million, Eight Hundred Thousand (Kshs. 28,800,000?-) and in default he shall serve a term of twelve (12) years in jail.

In addition, the Appellant shall serve a prison term of Three and a half (3 ½) years – this period to be counted from the date of the judgment of the trial court."

The Appellant was still dissatisfied and appealed to the Court of Appeal. The Court of Appeal held as follows -

"**Finally, with regard to sentence, we are of the view that the sentences imposed by both courts below contravened Section 4 of the Act.**

The Court further stated -

"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. One million or three times the value of the drug (whichever is greater and in addition to imprisonment for life."

The Court then observed that the trial Court was wrong for imposing a 15 year jail term, without a fine and the Superior Court was wrong for imposing a jail term of **12 years in default** of the fine and then in addition imposing a jail term **of 3 ½ years** instead of a life imprisonment. The Court then observed that –

"The Act does not permit either of those – That is a default jail term, and a jail term of 3 ½ years."

Accordingly they interfered with the sentence under Section 361 (1) (b) of the Criminal Procedure Code and corrected the same as follows;

1)"The Appellant shall pay a fine of Kshs. 28,000/- (Kenya Shillings Twenty Eight Million, Eight Hundred Thousand) AND in addition.

2)The Appellant shall be imprisoned for life."

This is a Court of Appeal decision. The decision is legally binding to this Court. Although, I however, note that the Court did not discuss how the fine would be recoverable if the Appellant did not pay it. I can only imagine, the same would then became recoverable under Section 28 (2) of the Penal Code, that is, the fine becomes recoverable by the court issuing a warrant for distress and/or sale of convicts moveable and immoveable property to satisfy the fine.

As observed that decision binds this Court. Thus my hands are tied. I have searched for any other authority that has been passed to reverse it or give any other different interpretation of Section 4(a) of the Act, and I have not come across any.

I am bound by this decision. I realize that other Courts have been faced with a similar situation. This is reflected in the case of **R –Vs- Omar Ali Abdalla & others Cr. Appeal No. 10/2011,** where Hon. Justice H. Omondi, observed,

"I am bound by the decision of the Court of Appeal, although I will respectfully state I find it difficult to then reconcile the provisions on fine and the additional sentence for life".

What seems to be irreconcilable is what happens to the fine if the Appellant is not economically able to pay and yet there is no default period.

To conclude this matter and guided by that Court of Appeal decision, I find failure to give a default sentence was not irregular or improper. Default sentence is not envisaged under Section 4(a) of the Act. The life imprisonment is mandatory and is in addition to the fine.

In conclusion I find the appeal herein on conviction and sentence has no merit. I dismiss it and I accordingly confirm the conviction. I interfere with the sentence as follows by setting aside the sentence imposed by the trial Court, and substitute it as follows:-

1. The Appellant shall pay a fine of One million shilling (1,000,000) **AND** in addition

2. The Appellant shall be imprisoned for life.

Orders accordingly.

Dated, signed and delivered at Mombasa on this 18th day of May, 2012.

G.L. NZIOKA
JUDGE

In the presence of:

Mr. Magolo Advocate: for Appellant

Jami: for State

Philip: Court clerk