REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL 429 OF 2010

ALLY JUMA HASSAN…….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 4063 of 2007 in the Chief Magistrate's Court at Nairobi – Mrs. U. V. Kidula (CM) on 07/06/2010)

JUDGMENT

1. The applicant Ally Juma Hassan 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 26th June 2007 at Jomo Kenyatta International airport in Nairobi within Nairobi Area Province, trafficked by conveying 1273.5 grammes of Narcotic Drugs namely heroin with an estimated market value of Kshs.1,273,500/- in contravention of the provisions of the said Act.

2. Upon conviction he was sentenced to pay a fine of Kshs.3,820,500/- in default to serve one year imprisonment. In addition the appellant was sentenced to life imprisonment. The sentences commenced on 7th June 2010.

3. On 1st July 2010 the appellant filed an appeal and put forth the following grounds:

1) That his rights were violated under Section 72(3)(6), 72(5) and Section and section 77 (i)(a)(b) of the repealed Constitution, thus rendering the charge against him defective and null and void.

2) That the prosecution's evidence was contradictory and inconsistent and fell below the standard of proof.

3) That the court failed to consider his mitigation thereby entering a very harsh and excessive sentence against the appellant.

In the amended grounds of appeal the appellant urged that Section 200 of the Criminal Procedure Code

was contravened during the trial and that the court failed to record the coram on various dates.

4. The state opposed the appeal through learned state counsel Mr. Muriithi. The learned state counsel submitted that the appellant was arrested at the Jomo Kenyatta International Airport on 26th June 2007. He was detained upto 4th July 2007 during which time he emitted 81 pellets of a substances suspected to be narcotics.

5. The learned state counsel submitted further that an explanation was provided to the trial court, as to why the appellant was detained beyond the constitutionally provided time. The appellant was under observation. The issue was subsequently canvassed and ruled upon by the High Court in **Misc. Cr. App 170 of 2008**. I will therefore not revisit it in this appeal.

6. Being the first appellate court, I have analysed and re-evaluated the evidence on record afresh keeping in mind that I neither saw nor heard the witnesses' testimonies as expressed in ***OKENO VS. REPUBLIC 1972 E.A. Pg. 32***

7. The prosecution's evidence was that while on duty at Jomo Kenyatta International Airport on 26th November 2007, **PWI** PC Kimeli stopped the appellant who had just disembarked from an Emirates Flight EK 721 coming in from Dubai. **PWI** detained him for observation on suspicions of trafficking drugs. **PW4** PC Mbui and other officers were with **PWI** when he stopped the appellant.

8. The appellant went on to emit pellets on different dates between the 26th June 2007 to 4th July 2007 while under observation as follows:

(i) On 27th June 2007 under the watch of PW4 PC Mbui and PC Woma Joan, he emitted 15 pellets at 1.40 a.m. and a further 27 pellets at 7.10 a.m.

(ii) On 27th June 2007 under the watch of PW8 Cpl Faisal Juma and PC Leboo, the appellant emitted a total of 18 pellets at 3 p.m.

(iii) On 28th June 2007 under the watch of PWI P.C. Kimeli and P.C. Laisenger, the appellant emitted a total of 19 pellets at 6.45 p.m.

(iv) On 2nd July 2007 under the watch of PW3 PC Eyatta, and P.C. Simiyu, the appellant emitted a total of 2 pellets at 12.42 a.m.

In total the appellant emitted 81 pallets.

9. PWI, PW4, PW5 and **PW8** the officers who were on duty when the pellets were emitted at the various times, all testified that the appellant used a special toilet made specifically for recovery of anti narcotic drugs. They ensured that the toilet was clean and that the appellant confirmed this before he used it. Each of the witnesses prepared an observation sheet for the exhibits they recovered and they signed it together with the appellant. The appellants line of defence in cross examination seemed to suggest that the exhibits came from the stock of exhibits the police held at the police station or in the alternative they obtained it from another suspect who was under observation at the same time as he was.

10. I noted that the learned trial magistrate considered this defence and found that, the prosecution witnesses failed to disclose the fact that there was another suspect under observation besides the appellant, and that he too like the appellant was a Tanzanian national, who had just arrived from Iran. The learned trial magistrate however found that they were both couriers. I did not have the benefit the trial magistrate had of trying both suspects, but I have no basis from the evidence on record to doubt her conclusion. The learned trial magistrate held thus:

"they were therefore both couriers out of Iran and I have no doubt in my mind that they each emitted the pellets that they had carried in their rectums"

11. PW6 the government Analyst testified that he marked each satchet and each polythene bag in which the pellets were sealed before being submitted to him for analysis, with a code. He testified that the code No. GC Q36/07 WK was personal to him and would ensure that the exhibits once analysed could not be resubmitted to him, for analysis in respect of another case.

12. This means that the exhibits could not have been resubmitted to him for analysis in respect of the appellant, if they had already analysed them in respect of the case pertaining to the first suspect.

13. I also noted the elaborate system in place for the retrieval, weighing and sampling of the exhibits. The officers under whose watch the pellets were emitted were responsible for bagging and sealing them. They would then fill in an observation sheet in respect thereof, and the observation sheet would be signed by both the officers on duty and the appellant.

14. PW5 CP Kokai took over the exhibits from Clp Aden who was proceeding on leave. **PW5** witnessed the weighing and sampling which was done in the presence of the appellant. The 81 pellets weighed 1,273.5 kg. **PW2** Clp Irungu who is the Gazetted Proper Officer in terms of Section 86 of Act No. 4 of 1994, valued the recovered substance and assigned it a market value of Kshs.1,273,500/=.

15. The meaning of market value was addressed in **KOLONGEI V REPUBLIC CR. APP NO. 84 O F 2004 1 KLR pg. 7**. The Hon. 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".

16. PW6 the Government Analyst, analysed the samples taken from the 81 pellets and submitted to the Government Chemist Laboratory, for analysis. **PW6** determined that all 81 samples contained heroin and fell within the provisions of Anti-Narcotic **Drugs** and **Psychotropic Substances Act No. 4** of **1994**. He prepared a report which was produced in evidence.

17. I considered all this evidence alongside the appellants evidence in defence. His testimony was that he was enroute from Tehran where he had been invited by the Shia Muslims when he was arrested. That nothing was recovered from him when he was searched in the Anti-Narcotics office but that non-the-less he was taken to court and charged.

18. The learned trial magistrate considered his defence alongside the prosecution evidence and concluded that it was a mere denial. I have also re-evaluated his defence alongside the rest of the evidence on record and respectfully agree with the learned trial magistrate. The defence amounts to no more than a mere denial and does not dislodge the prosecution case.

19. I have also re-examined the record in light of the appellant's amended grounds that **Section 200** of the **Criminal Procedure Code** was contravened during and the trial and that the court failed to record Coram on various dates. The record shows that the hearing was consistently conducted by the learned trial magistrate Mrs. U. P. Kidula the chief Magistrate. The Coram was properly indicated as including Chief Inspector Musyoki as the prosecutor and one Mrs. Chivoli as the court clerk/ interpreter.

20. The language used by the witness was also indicated and at no time did the appellant bring it to the attention of the court that had difficulty following the proceedings on account of the language in use or at all.

21. On the appellants ground that his mitigation was not considered and that the sentence was harsh and excessive, the record shows that the appellant was offered the opportunity to mitigate but his response was reflected as:

"I have no mitigation to put before the court."

The learned trial magistrate gave reasons for the sentence she imposed upon the appellant. The fine imposed was three times the market value which was assigned by the gazetted Proper Officer. In default the appellant was to serve one year imprisonment; in addition she also sentenced the appellant to life imprisonment. The sentence imposed is therefore, as provided by the Narcotic drugs and **Psychotropic Substances Control Act No. 4** of **1994**, and was neither harsh nor excessive beyond the provisions of the law. For the foregoing reasons I find that this appeal is lacking in merit. I dismiss the appeal and uphold both conviction and sentence.

L. A. ACHODE
JUDGE

SIGNED DATED and **DELIVERED** in open court this **17th** day of **May 2012**.

F. A. OCHIENG

JUDGE