REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Appeal 98 of 2010

(From original conviction and sentence in criminal case No.754 of 2009 of the Chief Magistrate court at Malindi Before Hon. L. W. Gitari - CM)

BEN MANASE GUNGU ……...…….....….……APPELLANT

-VRS-

REPUBLIC …….....……...……RESPONDENT

JUDGMENT

1. BEN MANASE GUNGU was tried and convicted in the Lower Court for the offence of Trafficking in Narcotic Drugs contrary to section 4 (a) of the Narcotic Drugs Psychotropic substances control act (NBPSC Act). He was sentenced to life imprisonment and ordered to pay a fine of shs.1000, 000/-.

2. He now appeals to this court challenging both conviction and sentence which he terms "arbitrary and unconstitutional" citing several legal provisions which allegedly stand to be breached in execution of the said sentence. He refers inter alia to article 50(2)k of the Constitution, section 137 of the Criminal Procedure Code and section 72 (10 (a) of the NDPSC Act. His complaints as elaborated in the written submissions are that;-

a. the charge sheet was defective by failing to indicate the manner of trafficking – an essential element of the offence

b. that the charge sheet was defective for duplicity in that it contained two offences; one relating to heroin, the other to cannabis sativa

c. the value of the drug was not proved, hence the fine imposed was without proper basis

d. contradictory description of the alleged drug by witnesses

e. prosecution failure to call informer

f. authority of the police officers who searched, arrested the appellants, under the NDPSC Act

g. his defence was not given due to consideration in the lower court

3. The state through MR KEMO has opposed the appeal, reiterating the prosecution evidence at the trial which he described as overwhelming.

4. On a first appeal the court must evaluate afresh the trial evidence and make its own conclusions (**OKENO VS R 1972 EA** 322) .

Three witnesses testified on behalf of the prosecution; **CORPORAL OPONDO(**PW **1), PC KETER (**PW 2**)** and the government chemist, **JOHN NJENGA**(Pw 3). In summary their evidence was that Pw 1 and Pw 2 were on duty at the Kisumu Ndogo Serena area in Malindi township. They got a tip off that the appellant was selling drugs. They were shown him and pursued him as he walked in the direction of his home, stopped and searched him. Pw 1 found 22 satchets of heroin and dried cannabis sativa. The appellant was arrested and charged.

5. The appellant gave an unsworn defence statement to the effect that he works as a matatu conductor. In 2009 he was at the market when one of the police officers approached him to assist him trap suspected drug traffickers from whom the officer intended to extort money. He refused to get involved. On 23/5/09 police officers in the company of the said police man arrested him as he went home and framed him up with drugs.

6. In my view two of the appellant's complaints cannot stand and can be disposed of right away. The Prosecution was not obliged to call their informer, or indeed any set number of witnesses (See section 143 of the Evidence Act). The prosecution evidence on the recovery was direct as adduced through Pw 1 and Pw 2 hence the question of hearsay evidence does not arise. Regarding the authority of the witnesses, Pw 1 and Pw 2, the appellant did not raise these matters at the hearing and in my view it is too late in the day to raise them now. Section 72 of the NDPSC Act does not provide that police officers require written authority from the commissioner of Police to search persons suspected of drug-related offences. The section requires such authority for "any other person" and not police officers, whose general power to stop and search is also provided for in the Civil Procedure Code. The appellant`s submissions are based on a misreading of the section and have no basis.

7. With regard to the evidence on record, two witnesses gave consistent evidence on the arrest and recovery of drugs from the suspect. The evidence was precise in terms of the wrapping – cigarette packs and black polythene bag -and the number. The fact that Pw 1 described the powder as "brownish-whitish" while Pw 3, the expert termed it a "brownish powder" or brown powder does not amount to the sort of contradiction suggested by the appellant. Pw 3 is the expert. The appellant did not pursue the issue of the colour of the powder at the trial.

8. What the appellant took up with Pw 3 only is the issue of receipt of the powder, whether received personally by Pw 3. At no time did he suggest through cross-examination or evidence that the handing-over chain had any lapses. His defence was that he was framed. The allegation concerning the extortion bid was so vaguely put to Pw 1 that it was not clear if he was the unnamed officer who tried to rope in the accused in an extortion bid. But the witness freely admitted being familiar with the appellant.

9. The Lower Court correctly accepted the prosecution evidence and was entitled to reject the defence of the appellant as unbelievable. On the complaint that the charges were duplex in so far as the particulars referred to two types of drugs, I would partly agree with the appellant that the complaint has some merit. However the issue was not raised at the trial and moreover the appellant was not prejudiced as the proceedings show he clearly misunderstood the charge. The fact that he escaped with one count instead of two counts of Trafficking is to his benefit.

10.Any irregularity in the charge sheet is cured by section 382 of the Criminal Procedure Code. A similar complaint was raised in the Court of Appeal in **CHARLES CHEMASWETI and another V R (2005)e KLR,** where the word "or" was used in the charge particulars – a more serious anomaly than in this case. The court found that the cure is in section 382 Criminal Procedure Code and stated that no prejudice or failure of justice had been caused by the alleged defect. For the main reason that the appellant had understood the charge facing him.

11. This reason also applies to the complaint that the charge sheet did not indicate the manner of trafficking. It is enough that the particulars of the charge stated that the appellant trafficked in the drugs. And the evidence clearly spelt out how. Section 134 provides that a charge shall contain "and shall be sufficient if it contains, a statement of the specific offence .....with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge"(See also section 137 Criminal Procedure Code). The particulars in the charge sheet presented in the Lower Court in my view satisfied the requirements of section 134 Criminal Procedure Code.

12. The appellant has correctly argued that there was no evidence tendered with respect to the weighing of the plant material (cannabis sativa) by the police of the Government Chemist. Even if the evidence relating to the cannabis sativa is abandoned, the 22 sachets of heroin would remain standing as evidence against the appellant. The prison sentence imposed is mandatory notwithstanding the amount of drug trafficked. As for the fine, it is the minimum provided under the section so that it matters little whether the weight and value of the drugs were accurately taken calculated and presented.

13. For the foregoing reasons, I find no merit in the appellants` appeal and will dismiss it in its entirety. Both conviction and sentence in the Lower Court are upheld.

Delivered and signed at Malindi this **11th May, 2012** in the presence of the appellant, Mr. Kemo for the State and the appellant.

[cc Evans].

C. W. MEOLI
JUDGE