REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Appeal 110 & 111 of 2011

AMAEFULA OWUKE JOHNSON.....APPELLANTS

DANIELA TOPEY

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case no. 3344 of 2010 of the Chief Magistrate's Court Mombasa – L. Mutende – SPM)

JUDGEMENT

AMAEFULA OWUKE JOHNSON and **DANIEL TOPEY** hereinafter, referred to as the appellants were jointly charged before the Chief Magistrate's Court at Mombasa with four offences namely:

1st Count

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 of thereof states that:-

On the 30th day of October 2010 along Jomo Kenyatta Avenue at Majengo area in Mombasa district within Coast Province, jointly were found trafficking in narcotic drug wit 4.94 grammes of cocaine, with street value of Kshs. 20,000 by way of selling in contravention of the said Act.

2nd Count

Being unlawfully present in Kenya contrary to section 13(2) of the Immigration Act, Cap. 175 of the Laws of Kenya.

The particulars thereof are that;

On the 30th October 2010 at about 1700 hours at Majengo in Mombasa District of the Coast Province being Nigerians citizens were found being unlawful present in Kenyan without any valid documents from the Immigration Department.

3rd Count

Failing to report entry into Kenya contrary to regulations of the Immigration Act, Cap. 172 of the Laws of Kenya.

The particulars thereof are that;

On the 30th day of October 2010 at about 1700 hours at Majengo Mombasa District of the Coast Province being Nigerians citizen failed to report entry into Kenya to the nearest Immigration officer.

4th Count

Failing to register as an alien contrary to section 3(2) of the Alien Restriction Order 1973 as read with section 10 of the Alien Act.

The particulars thereof states;

"On the 30th October 2010 at about 17 hours at Majenga in Mombasa District of the Coast Province being Nigerian citizens were found to have failed to register as aliens."

All the charges were read to each appellant and each pleaded NOT guilty to each count. Consequently, the case proceeded to a full trial. The trial Court found each one of them guilty on all the four counts and sentenced, each as follows:-

1st Appellant

1st Count: 20 years imprisonment

2ndCount: 6 months imprisonment

3rd Count: 3 months imprisonment

4th Count: 3 months imprisonment

2nd Appellant

1st Count: 15 years imprisonment

2nd Count: 6 months imprisonment

3rd Count: 3 months imprisonment

4th Count: 3 months imprisonment

Being aggrieved by both the conviction and the sentence, the appellants have appealed as herein.

The brief circumstances of the case are that, on the 30th day of October 2010, police officers attached to Central Police Station Mombasa, received information that there were people dealing in narcotic dugs within the Gulshen area. Acting on that information and in the company of the informer, they set off to the area. They were into two motor-vehicles, the informer's motor-vehicle leading. The informer parked his motor vehicle near the Gulshen Hotel while the police officers parked their motor vehicle near the petrol station in a strategic position to monitor the events. The informer got out of his motor vehicle and made a call. After a short while he was joined by someone, that person has been identified as the 1st

appellant, herein, one Daniel Topey. That, the 1st appellant also made several calls for about 30 minutes as the police officers waited Shortly thereafter, the informer and the 1st appellant were joined by yet another person, identified as the 2nd appellant herein. Allegedly, the 2nd appellant handed over "something" to the 1st appellant and all the three entered the informer's motor vehicle. The informer signaled the police officer via the agreed signal of hazard signs. The police officers moved in and surrounded the informer's motor-vehicle. They ordered the occupants to come out. They complied. That, as the 1st appellant herein, who was seated on the co-driver's seat came out of the motor-vehicle, he dropped **"something**" wrapped in a polythene paper. The officers recovered it and found it was a whitish powder substance. The suspects, the appellants herein were arrested. Investigations commenced and thereafter they were charged as herein stated.

At the close of the prosecution case, the trial Court ruled each appellant had a case to answer on their respective counts. They were placed on their defence. In a sworn statement, the 1st appellant told the trial Court that, he is a Nigerian national and a businessman. That he came to Kenya where he met the 2nd appellant herein and they became friends. He testified that on the 20th October 2010 he came to Mombasa on site seeing trip and was staying at the Gulshen Hotel. That, the 2nd appellant called him and requested to join him, (the 1st appellant) at Mombasa for holiday. The 1st appellant agreed. Subsequently on the 29th October 2010, the 2nd appellant called him again to inform him, that he was on his way to Mombasa. He kept in communication with the 2nd appellant as he traveled to Mombasa. That upon arrival, he directed the 2nd appellant where to find him, at the Majengo area. That, as he was waiting for the 2nd appellant, he was approached by two people who demanded that he produces his identification documents. He explained that he had lost his passport and produced a police abstract to that effect. That, as he conversed with these people, the 2nd appellant arrived. He joined them and the two people equally demanded that the 2nd appellant do identify himself. That, the 2nd appellant told them that his passport was in Nairobi. That, at that point, the two men conducted a search on both appellants and took his wallet which had Kshs. 40,000/- and the police abstract. Both appellants were then arrested and taken to the police station where they were placed in the cells. On the following day, the 30th October 2010, the police officers demanded to be given the Kshs. 40,000 recovered, which the 1st appellant declined as that money was meant for his daily needs. At that point, allegedly, the police officers threatened to **'deal"** with them the **"Kenyan way**". Subsequently, they brought a white powder and threatened to plant it on the appellants if they did not let the money go. The appellants declined to succumb and on the 1st day of November 2010 they were arraigned in Court and charged accordingly. He testified that the police officers did not return the police abstract he had given them after taking it away.

On his part, the 2nd appellant told the court that, he too is a Nigerian national. That, he stays at Mlolongo in Nairobi, Kenya. That he is a visitor in Kenya having come to visit his brother's wife, one Nancy Ntamaye Kakura Amafula. He testified that he came to Kenya in February 2010. That, he met the 1st appellant and they become friends. He learned the 1st appellant had traveled to Mombasa and he requested to join him in Mombasa. That when the 1st appellant agreed to have him in Mombasa, he traveled and they agreed to meet near Horizon bus stage. When he arrived, he was directed by the 1st appellant where he was. The 2nd appellant boarded a tuk tuk and met the 1st appellant in the company of three people. They were arguing. That, these people asked for his identification documents, he told them that he did not have it. They took the 1st appellants money and told them they were under arrest. That they argued over the money but they refused to let go. They were locked up in the cells. The following day of Sunday, the police officers sought to know if they were ready to release the money. The appellants refused. They were threatened with dire consequences. That, the following day as their finger prints were being taken, a white power substance was placed on the table. That, they were told they would be charged with trafficking. He thought they were joking but on 1st November 2010, they were charged accordingly.

At the close of the entire case, the trial Magistrate wrote the judgment and concluded that: -

"the prosecution has therefore proved the case beyond reasonable doubt. They are guilty and

convicted for the offences accordingly".

Each appellant filed an appeal as herein stated against both conviction and sentence, the appeals, numbers 110/2011 and 111/2011 were consolidated accordingly. Although each appellant filed separate petition of appeal, through the firm of J.O. Magolo and Company, the grounds of appeal, therein are the same. In a nutshell the appellants lists the grounds of appeal

That the trial Magistrate erred by;

1. Finding that there were valid charges before her.

2. Placing the appellants on their defence when at the close of the prosecution case, the evidence did not disclose the offences charged.

3. Finding that there was evidence to warrant a conviction when the ingredients of what could amount to offences were not proved.

4. Reaching a finding of guilt against the weight of the evidence.

5. Failing to give proper consideration to the gaps and failing in the prosecution case and thereby denying the appellant the benefit of doubt.

6. Offering excuses for the prosecutions' failure to the prejudices of the appellant.

7. Failure to find the proceedings were infact a nullity.

8. Imposing sentences that were harsh and manifestly excessive.

At the hearing of the appeal, both appellants were represented, by the Learned defence counsel, Mr. J.O. Magolo, while the State was represented by the Learned State Counsel, Mr. Onserio. The defence Counsel consolidated the eight grounds of appeal into three as follows:-

1. The charge and the conviction on it were defective, therefore null and void.

2. The evidence did not support the findings against the weight of the evidence.

3. The sentence was excessive and harsh.

In a nutshell, Mr. Magolo submitted that as regards the charge sheet the charges under the Immigration Act were not admitted and signed by the Magistrate. He submitted that the trial magistrate should have signed each count as per the provisions of Section 89 of the Criminal Procedure Code. He further submitted that, the charges under the said Immigration Act were poorly drafted and therefore incapable of informing the appellants clearly of the charges they were facing. That as regards the 1st count, the charge became defective at the close of the prosecution case because the charge was at variance with the evidence adduced. Yet the charges were not amended under section 214 of the Criminal Procedure Code. He relied on the case **Jason Akumu Yongo -Vs- R Criminal appeal no. 1 of 1993**.

He further submitted that, the trial magistrate acted illegally by reducing the charges from the charge of trafficking to a charge of possession. That the Narcotics and Psychotropic Substance Control Act of 1994 does not have express provisions to justify the reduction. That, Section 179 of the Criminal Procedure Code gives power to the Court to reduce a charge only where the evidence reveals a minor offence. He submitted section 3 of the Act is not a minor offence to section 4 of the Act in relation to sentence provided under it.

In relation to the evidence adduced, Mr. Magolo submitted that;

· That there was no evidence to prove the substance recovered was a narcotic drug.

· That though recovered in a khaki envelope, that envelope was not produced in court as an exhibit.

· That the exhibit was taken to Malindi but there is no evidence it returned. He argued that, caused why there was an amendment to indicate the weight from 10 gm to 4.94 grams.

He further submitted that the evidence of the arresting officer was contradictory in three areas.

§ Where the drug was found; that one alleges it was inside the car on a seat and the other at the petrol station.

§ The officers although they alleged the Ksh. 40,000 was to be used as an exhibit that was never to be.

On the issue of sentence the defence counsel submitted that:

It was excessive as the appellants were given maximum sentences. He prayed the Court to interfere with both the conviction and sentence and set the appellants free.

Mr. Onserio, the Learned State Counsel opposed the appeal both on conviction and sentence. He submitted in a nutshell that as regards the charge sheet, the trial Magistrate did not have to sign the charge sheet on counts 2, 3 and 4 as the police officers had signed the same. Therefore the charges were not defective. He relied on section 89 (4) of the Criminal Procedure Code.

On the issue of the evidence adduced, the Counsel submitted that, the trial Magistrate invoked the provisions of Section 179 of the criminal offence after the evidence disclosed the offence of possession of narcotic drugs. That, the appellants were arrested before the transaction was over, as it was interrupted. The State Counsel led the Court through the prosecution evidence and submitted that after the police officers laid a trap and recovered the whitish powder, the same was analysed and found to be cocaine, a narcotic drug. That, a report was produced in Court to that effect. That, upon the arrest of the appellants, they had no identification documents, and that, although, the 2nd appellant produced a passport during the trial, the visa therein was found to have expired, thus he was deemed to be in the country unlawfully. That, the witnesses were strangers to the appellants with no interest in the matter to fix or plant charges on them.

As regards the sentence, the Learned State Counsel submitted that, despite the trial Court noting the appellants were first offenders, she gave them maximum sentences on the 1st count. That, it was a harsh sentence. He invited the court to order for repatriation of the appellants upon completion of sentence on the 2, 3, and 4th count.

In final reply, Mr. Magolo maintained the Magistrate was supposed to sign the charge sheet. That, under the Immigration Act, the trial Magistrate cannot order repatriation of the appellant and lastly the case was not proved. The partes then rested their submissions.

I shall now deal with the grounds of appeal in the consolidated form as outlined by the appellant for they fall under three headings.

· Whether the charges or the charge sheet(s) are defective and therefore null and void.

· Whether the evidence of the appellants adduced was sufficient to sustain a conviction on all the four counts.

· Whether the sentences meted out, was excessive or harsh.

As I consider these issues I understand that the duty of the 1st appellant court is to re-evaluate and

reconsider the evidence adduced at the trial and draw it's own independent conclusion, warning itself that, it did not have the benefit of seeing or hearing the witnesses. This legal principles were laid down in the cases of;

· **Otenge Nyarombe and two others –Vs- R.**

Criminal Appeal No. 184 of 2002 and

· **Shantilah M. Ruwala -Vs- R (1975) EA Page 57**

In this later case, it was held:

"It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Thus, in this judgment, I have considered the evidence adduced at the trial afresh and re-evaluated it in the light of the grounds of appeal. I have considered the submissions by the parties.

As regards the issue of the charge sheet, I find that the law relating to drafting of the charge sheet is stipulated under section **137 of the Criminal Procedure Code.** That section requires inter alias, the charge commence with the statement of offence. In all counts herein, there is a statement of offence. That Section requires that statement shall explain the offence shortly in ordinary language avoiding the use of the technical words and without necessarily stating all the essentials of the offence. After the statement of the offence, the particulars of the offence are to be set out in ordinary language. Sample forms for drafting a charge are provided for under the second schedule to the code. The law equally requires, a charge containing more then one count, each count shall be numbered consecutively. I have looked at the charge sheet and I find the charges have been drafted properly in accordance with the provisions of section 137 of the Criminal Procedure Code and the forms under the second schedule. However, the issue raised by the defence was whether, the Magistrate was supposed to sign against all counts. I was referred to section 89 of the Criminal Procedure Code. Section 89 (3) states:

"a complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate."

It requires the complaint be signed by the complainant and the Magistrate. We all know in practice, that complainants do not usually sign the charge sheets. Under Section 89(4), where the Magistrate receives a formal charge sheet, the magistrate signs the same "**unless the charge is signed and presented by a police".** In this case, the charges in count 2, 3, and 4 are on a charge sheet stamped with a rubber stamped by **"OCS Central Police Station, dated and signed".** In my considered opinion that suffices. In any case a charge sheet can only be rejected under Section 89(5) of the Criminal Procedure Code, where the Magistrate is of the opinion that a complainant or formal charge made or presented does not **disclose any offence.** In this case I find the charges discloses offences known in law. The appellants were not prejudiced because they pleaded to the charges read to them and fully participated in the trial.

As to whether the charge on the 1st Count was defective due to the fact that evidence adduced was at variance with the evidence, I shall deal with that as I consider the second ground herein.

I now turn to the main ground of appeal, that is if the evidence adduced was adequate to sustain a conviction. In so doing, I shall not reproduce the evidence adduced nor the submissions by the parties. But, I find that, the evidence of the government analyst George Lawrence Oguda (PW5) is that, the whitish powder he examined was found to be cocaine, a narcotic drug. He produced a report dated 22nd December 2010 and signed to that effect. That evidence is not in dispute.

There is an issue as to whether the powder recovered was the same one examined by the government analyst. According to the evidence of the government analyst, the substance he received was marked **UCK 859/2010 GLO** and was received in an envelope **marked F containing 4.94 gm**, taken to their office by PC. Gabriel. I have looked at the Exhibit Memo Form produced (as prosecution exhibit 3) and it reveals No. 84183 PC Gabriel Jattani, took an envelope marked F containing white powder substance in white polythene (**marked F1**.) The contents of the exhibit Memo Form indicates the police officers were said to have recovered the same from two suspects arrested after the police officers acting on information, laid an ambush and arrested two suspect. The suspects are named as the appellants herein. The date and place of recovery of the exhibits is indicated as **30th October 2010** at **1700** hours and recovered by **Corporal Ngetich.** The exhibit memo is dated **31st October 2010.** Thus the details in that Exhibit Memo Form are in total agreement and conformity with the evidence adduced by the main prosecution witnesses. I am therefore satisfied that the recovered substance is the same one analysed by the government analyst. The reasons given for the variation in the weight of the drug from 10 gm to 4.94 gms was recorded by the trial Magistrate in the proceedings on the **21st January 2011**. The charges were then read out following the amendment of charges, to which, the appellants did not object. I, therefore, find no merit in that ground of appeal.

As regards, the rest of the evidence, I find that the 1st appellant admitted he was staying at Gulshan Hotel. He was arrested within that area. He admits he made several calls to the 2nd appellant who was traveling to Mombasa. In his evidence, PW1 PC Geoffrey Mathenge testified;

"**I saw him (1st appellant) come out of the motor-vehicle. I saw him come out and make a call as we watched him for a duration of 10 minutes."** and

PW3 PC Robert Mwavu testified

"They met (referring to the informer and the 1st appellant) chatted for sometime, we could see accused one make calls on his mobile phone. 30 minutes later the second accused appeared".

Thus, there is no dispute, the 1st appellant made several calls to the 2nd appellant as the police officers watched. This confirms the fact that, the officers had laid an ambush and of course they must have laid a trap following information received. It's not therefore believable that, they just approached the appellants, whom they did not know earlier and arrested them for no apparent reasons, then planted the drugs on them after "**robbing"** them of their money. Even if one was to give the appellants the benefit of doubt regarding their money, (because I am not satisfied with the explanation the police officers gave regarding the same,) I find that, that is a different kettle of fish which does not negate the recovery of the drugs from the appellants. All the arresting officers gave corroborative evidence, to the effect that they saw the informer call, and was joined by the 1st appellant, and then, the 1st appellant called and he was joined by the 2nd appellant, that, after that, the 2nd appellant passed something to the 1st appellant, and the officers moved in, arrested them and recovered the "**thing"**. I however find, there is a dispute as to where the substance was recovered PW1 said it was

"**on the front side of the vehicle and was recovered by Corporal Ngetich".**

PW2 Corporal Ngetich testified
"Accused 1 dropped something. I picked it from the ground."

And PW3 PC Robert Mwavu testified

"accused 1 who was seated (sic) on the front seat of the car threw a white substance ... He threw it next to him".

Is this material contradictions? I find the answer in the negative. The material fact is that the 1st appellant had the substance and threw it away as the officers approached. I can only imagine at the time of arrest,

the officers were divided in roles, some concentrating on the arrest of the suspects and others on the recovery of the substance.

All in all I agree with the finding of the trial Magistrate. He ruled that the offence of trafficking was not proved and substituted with the offence of possession of narcotic drugs. I have been invited to find that the substitution of the charges was improper. However I find that under Section 179(1) of the Criminal Procedure Code states-

"When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

and also section 179 (2) Criminal Procedure Code

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it"

Thus, a court can convict a person of an offence which he had not been charged with, if a minor offence is proved. Although the Counsel submitted that the offence of possession is not a minor offence, to trafficking in view of the sentence provided, I don't agree with him. This is because the penalty of trafficking attracts a custodial sentence of up to life imprisonment, and that of the possession, is custody sentence has a maximum sentence of 20 years. I therefore, concur with the findings of the trial Magistrate, that, both appellants were in possession of the cocaine recovered and are consequently guilty as convicted. I confirm the conviction on the 1st count in respect to both appellants.

I now turn to the 2nd, 3rd and 4th counts. I find that the 1st appellants allegation that he reported the loss of his passport at Kamukunji Police Station was found to be untrue upon the production of the OB from that police station. The 2nd appellant produced a passport during the trial and it showed the visa expired on 6th August 2010 and he exited on 18/8/2010, his return was unexplained. Thus both appellants as ruled by the trial court were in the country unlawfully. The findings on this count supports the evidence on the 3rd and 4th count, that they did not have documents to prove they reported their entry into the country nor registered as aliens. I, therefore, find as the trial court they are guilty as charged on all the other three counts. I must commend the trial magistrate for writing a well detailed and anaylsed judgment. I concur with her findings and confirm the conviction of each appellant as ordered by the trial Court.

Finally, I find that the sentence imposed herein was indeed lawful. The court has the discretion in sentencing so long as reasons thereof are given. However, the principles of sentencing do not require that a first offender be given the maximum sentence. This is the law as per the case of **Otieno –Vs. R KLR 295.** Similarly several factors ought to be taken into account when sentencing. These include the nature of the offence, the attitude of the accused, the prevalence of the type of offence and the effect of the sentence on the convict.

The appellants herein were first offenders. I, therefore, find it just to interfere with the sentence. I shall and do hereby order, the sentence on the 1st count be and is hereby set aside.

I substitute it with a sentence of **10 (ten) years imprisonment** for each appellant. The other sentences remain.

Orders accordingly.

Dated, signed and delivered at Mombasa on this 12th day of June 2012.

G.L.NZIOKA

JUDGE
12.6.2012.

In the presence of:

Magolo for the appellants

Tanui for the State

Matano – Court clerk

G.L. NZIOKA

JUDGE
12.6.2012