



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 85 OF 2010

(From original sentence and conviction in Criminal Case No. 705 of 2009 the Chief Magistrate's Court

at Malindi before Hon. L. W. Gitari - CM)

CAROLYNE AUMA MAJABU.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

Carolyn Auma Majabu (the appellant) was convicted on a charge of trafficking in narcotics contrary to section 4(a) of the Narcotic and Psychotropic Substances Act No. 4 of 1994.

The case against the appellant was that on 14th may 2009 at about 1735Hours at Serena Kisumu Ndogo area in Malindi location within Malindi District, was found trafficking seven sachets of HEROIN valued at kshs. 700/= by selling.

She denied the charge and after trial when prosecution called three witnesses and appellant was the only defence witnesses, she was convicted and sentenced to serve life imprisonment in addition to a fine of ksh. 1,000,000/=.

Pc John Keter (PW1) was on duty with Cpl. Wambua and members of Marufu, patrolling Majengo area on 14-05-09, when they got information that there was a woman at Serena area who was trafficking drugs. The informer showed them a semi-permanent house and the group met the owner of the house, standing at the door. Police introduced themselves and gave her the reason for their presence. The lady (now appellant) introduced herself as the owner of the house and police requested to conduct a search. Appellant was holding a small container of lotion, and when ordered to open the container, the officers recovered seven sachets of whitish powder which they suspected to be HEROIN.

Appellant also had a total of Kshs. 2100/- in her other hand, and which police suspected to be proceeds from sale of drugs. Appellant was then arrested and charged.

Pc Geoffrey Effayo (PW2) who accompanied PW1 to the scene gives evidence similar to what PW1 stated and that after the search, they prepared a search certificate. He then took the recovered substance to

the Government Analyst as per the exhibit memo form.

John Njenga (PW3) of Government Chemist Department examined the recovered substance and found that the powder was heroin. He produced the report dated 19-05-09 as exhibit 6.

Upon being put to her defence, the appellant in her sworn testimony, stated that Imams found her sitting outside, then a man came from a vehicle with drugs to her, she denied, the man insisted, then she was arrested. A search conducted inside her house yielded no significant recovery and she explained that only her money was recovered there. She insisted that she was arrested by Imams and not police though she also confirmed that those who testified in court, had indeed been to her house.

In her judgment, the trial magistrate took into account the evidence of PW1 and PW2 regarding the recovery of the drugs and the money, observing that their evidence was well corroborated and was not shaken during cross-examination.

Moreover, that appellant confirmed that she signed the search certificate and the claims by appellant that the Imams had the drugs was rejected since another person was arrested in connection with the drugs. The nature of the recovered substances was confirmed by the Government Chemist PW3 who examined and analysed them and compiled a report stating that the same was heroin. The trial magistrate also observed that since appellant had money in different denominations then this clearly demonstrated that she was engaged in selling the drugs.

Appellant now contests the findings of the trial court on grounds that:

- (1) Her arrest was circumstantial as she was made to carry a load which was not hers.
- (2) The lead man who was arrested with the alleged drugs and who brought the police officers and Imams to their rental block, misdirected them to her house to save her neighbour who was the dealer.
- (3) The said neighbour was the source of open malice and calculated misdirection leading to her arrest.
- (4) No independent witnesses was called by the prosecution
- (5) The drugs were not found in her possession
- (6) The sentence was unrealistic and detrimental to her life.

The appellant filed written submission in which she stated what the evidence did not meet the ingredients of what constitutes trafficking and that prosecution relied on the means of sale, which was not established in the absence of evidence that there was a buyer. It is her contention that the evidence simply discloses that she was in possession of the drugs, and recovering of some amount of money in her possession as not enough proof that there was a sale, arguing that it is not illegal to have money.

It is also her contention that there is discrepancy in the description of what was recovered, with PW1 referring to it as a whitish powder while PW2 says it was brown.

Also that whereas PW1 claimed she had a bottle of Zopen body Lotion. PW2 said it was Lux Body Lotion. On account of these “discrepancies” she urges this court to find that when two witnesses gave differing information in ordinary language so as to indicate with reasonable clarity the thing referred to, then both must be deemed to be liars. She relies on the Court of Appeal decision of **PETER KAMAU V R – CR APP. NO. 331 OF 2008 at Mombasa** which held that:

“Two witnesses cannot be at the same place, at the same time, and yet say two different things.”

She submits that from these discrepancies the only thing that can be implied is that the police officers had

an ulterior motive or ill will towards the appellant.

She also urges this court to disregard the fact of her signing the search certificate saying she was threatened to do so, and in any event, the same amounts to a confession which was irregularly obtained as the same must be done before a magistrate or a police officer of a rank of an inspector and above.

The reliance of information by an informer is also contested on grounds that the informer never testified and the Court of Appeal has been forthright in **PATRICK KIBUI MAINA AND OTHERS V R – CR. APP. NO. 10 AND 11 OF “year not given” NRB** which held that:

“Wherefore, if an accused was arrested on the strength of information and the informer was not put in as a witness to be examined in chief and cross examined, such evidence should be totally rejected”

The appeal is opposed, and Mr. Kemo, on behalf of the State submits that the evidence was overwhelming and direct.

The issues for determination are:

- a) Did the evidence prove trafficking, or did it prove being in possession
- b) Was the variance in relation to the colour description of the recovered substance, so material as to be considered fatal
- c) Was failure to call the police informer as a witness, fatal and demands that appellant therefore be released.

“Trafficking” under section 2 of the Act No. 4 of 1994 means:

“The importation, exportation, manufacture, buying, sale, giving, storing, administering, conveyance, delivery or distribution by any person of a narcotic or psychotropic substance”

The offence of being in possession of the drug is limited to situations where the court is satisfied that the substance was intended solely for the offender’s own consumption.

Trafficking encompasses being in possession, storing, conveyancing, distributing and even delivering. It is thus not limited to actual physical possession. In this instance the two police officers testified that appellant was not in actual physical possession of the substance, BUT circumstances surrounding her conduct persuaded them to conclude that she did not just have the substance for her own use, but was selling the same. PW1 described the substance as a whitish powdery substance, PW2 described it as brown-white powder and PW3 referred to it as powder. One consistent description was the texture of the substance as being powdery.

Whitish and brown-white (whitish connotes a dirty white, not pure snow white, while brown white suggests colour which is neither too white nor definitely brown) - I think that disparity in colour description is not fatal, it is a matter of individual appreciation of colour especially in instances where a colour range may fall from whitish, cream, beige, light yellow)

I find no reason to fault the evidence based on the colour description because all witnesses consistently referred to a powdery substance. Then there is the container in which the sachets were kept – PW1 referred to it as a small container of ZOPEN which he identified in court as a small white plastic body lotion container, PW2 referred to it as a small plastic bottle for body lux lotion while PW3 referred to as a

plastic bottle.

From the handwritten proceedings it reads as follows;

“The accused was holding a small container of lotion”

The reference to Zopen was a typing error by the typist when typing out the proceedings. That observation then takes care of the purported second error.

The issue then is whether the recovery demonstrated one involved in sale of the same, in the absence of a buyer, and whether failure to call the police informer as a witness was fatal.

There was nothing to suggest to the trial court that the appellant had the seven sachets for her own use. While there is nothing wrong in one having money, here the circumstances suggest that the money had a direct relation with the drugs – she had the same in one hand, while holding the drugs in the other hand, standing at the door.

The irresistible inference one can draw from that scenario is that she was selling the same and had either just concluded a deal or was waiting for more buyers.

The upshot is that the trial magistrate duly considered all the evidence available and arrived at a safe conclusion. It would have been different if police had relied on the informer, then failed to recover the drugs, but in this instance, the “story presents itself” in the police the presence or absence of the police informer notwithstanding. The appeal thus fails and is dismissed. As regards the sentence, section 4 (a) provides:

“A person who traffics in any narcotic drugs...shall be guilty of an offence and liable –

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

I will admit that I have had problems with the wording of this provision, why would one bother to pay a fine of kshs. 1000,000/= when it will not make a difference since there is no default sentence, and in any event whether the fine is paid or not, one will still serve life imprisonment. So what is the penalty if the offender fails to pay the fine? This issue remains unresolved in my mind, although the Court of Appeal made it clear in the decision of **KINGSLEY CHUKWU V R Cr. Appeal. No. 69 of 2010**, that the fine is in addition to the life sentence, so I am bound by that decision. I therefore make a finding that the sentence imposed by the trial magistrate was legal and proper and I have no reason to interfere with it. Consequently the appeal on sentence also fails.

The entire appeal is thus dismissed.

Delivered and dated this 10th day of **JUNE 2011** at Malindi.

H. A. Omondi
JUDGE