REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(*Coram: Ojwang J.)*

CRIMINAL APPEAL NO. 467 OF 2010

-BETWEEN-
EMMANUEL KWAKU ABABIO …….....……. APPELLANT

-AND-
REPUBLIC ……..…….....…….RESPONDENT

(Being an appeal from the Judgment of Chief Magistrate Mrs. R. Mutoka dated 22nd October, 2010 in Crim. Case No. 3630 of 2009 at Mombasa Law Courts)

JUDGMENT

Theappellant faced a charge in four counts, but was acquitted in respect of all but the first count, which is the basis of the instant appeal. The relevant charge was: trafficking in narcotic drugs contrary to s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No.4 of 1994). It was alleged that the appellant, on ***10th November, 2009*** in the Mikindani area of Mombasa, trafficked in narcotic drugs by storing five kilogrammes of heroin, with a market value of Kshs.10,000,000/=, in contravention of the said Act.

The learned Chief Magistrate, after reviewing the evidence, thus arrived at a finding of guilt, on the first count:

"I have no doubt whatsoever in my mind that Patricia's [PW3] relationship with the accused person was that of landlord/caretaker and tenant, and that, no doubt, Flat No.C5 in Mikindani belonged to the accused person as its tenant. Patricia then, was the one whose evidence [formed] the cog [in the] wheels [linking]… the arrest of the accused… at Nyali to the recovery of the narcotic drugs at Mikindani. Having found as above, then, [I] inevitably reach the conclusion that the [motor vehicle] KAZ 063W and the cash… recovered with the accused… [was] clearly related to the narcotic drugs recovered in [the] accused's possession. Given the quantity and the implements that were recovered together with the drugs, and given the circumstances of the recoveries, I am obliged to find, which I hereby do, that the accused person was involved in trafficking of the same. I therefore must dismiss the defence offered by the accused person… and [I] find that the prosecution has proved the charge in count 1 against the accused ….beyond all reasonable doubt."

The Court treated the appellant herein as a first offender, took his statement in mitigation, and dispensed sentence as follows:

"The penalty section under Section 4(a) [of the Act] is mandatory, and thus the accused is sentenced to serve life imprisonment. Further, the motor vehicle [Exh.1] and the cash…shall be forfeited to the State."

M/s. J.O. Magolo & Co. Advocates filed a petition of appeal, on behalf of the appellant, on ***28th October, 2010*** stating (in summary) as follows:

(i) the charge was defective;
(ii) there was no link between the appellant and the alleged narcotic drugs;
(iii) there were contradictions in the prosecution evidence;
(iv) the appellant's allegation that there was a frame-up, gave him the benefit of the doubt which was overlooked;
(v) doubts surrounded the material evidence used to draw a link between the appellant and the alleged narcotic drugs;
(vi) the trial Court shifted the burden of proof to the appellant by stating he should have called his wife as witness;
(vii) the trial Court failed to consider the appellant's defence;
(viii) the trial Court erred in drawing a link between the appellant's motor vehicle and the narcotic drugs, and in ordering forfeiture of his property;
(ix) the trial Court erred in finding that the only applicable sentence was life imprisonment;
(x) the trial Court erred in law and fact "in imposing a sentence that was manifestly excessive and harsh in the circumstances."

At the hearing of the appeal, on ***10th May, 2011***, learned counsel ***Mr. Magolo*** represented the appellant, while learned counsel, ***Mr. Onserio*** represented the respondent.

Mr. Magolo submitted that s.4 of the governing Act only imposed a maximum sentence of life imprisonment, but did not require the Court to dispense such a sentence; he urged that the Court had failed to take into account the fact that the appellant was a first offender, and had also not considered the "***long explanation***" which had accompanied the mitigation statement: such action by the Court, counsel urged "***was a misdirection***"; ***"there must be a special reason for maximum sentence, like a repeat-offence…"***

Counsel urged that the learned Magistrate had acted under the mistaken impression that life sentence was the only penalty provided for. Learned counsel urged that the statutory provision (s.4(a) of the Act) that any person who trafficks in the prohibited drugs ***shall be liable to life imprisonment*** implied that life imprisonment was not mandatory, but was only the maximum.

Mr. Magolo submitted that the trial Court had erred, both in respect of the term of imprisonment imposed, and in respect of the order for forfeiture; as regards forfeiture, counsel submitted that, by s.20 of the Act, this was reserved for implements and machinery used for the commission of the offence; yet the offence in this case was for "***trafficking by storing***" – and so the use of the motor vehicle did not arise. Counsel submitted that the appellant had been found inside his motor vehicle, with his money, at Nyali; but the alleged stored-drugs had been found elsewhere, at Mikindani; so there was no evidence to connect the Mikindani material with the money. Counsel submitted that even if this appeal were to fail, there would still have been no basis for ordering forfeiture of the appellant's property, as the trial Court had made no finding that that the motor vehicle or the money was involved in the storage of the prohibited drug in question.

Mr. Magolo submitted that the trial Court had also not complied with the terms of ss.21(1) and 41(1), which required that orders of forfeiture, be made only by the High Court. Counsel submitted that the order of forfeiture should be reversed.

Counsel submitted that the prosecution had not shown the ***locus in quo*** to be a place under the exclusive control of the appellant, nor shown the relevant house to be the appellant's residence; and that, consequently, stored drugs found at the said house could not be attributed to him.

Counsel submitted that the prosecution case was a frame-up: because it had emerged from the evidence of PW1 and PW2 that Police officers had come all the way from Nairobi, heading towards Nyali in Mombasa, and with the object of finding the appellant there and arresting him; he urged that the source of information should have been disclosed, and that the Police informers should have been called as witnesses.

Mr. Magolo submitted that the prosecution witnesses had not proved the offence of storing narcotic drugs; no evidence had been given that such drugs were found, examined and valued; no background had been laid to support the report on a drug by the Government analyst.

Counsel urged that the evidence of PW3 (***Patricia Wanjiru Kariuki***) should be treated with caution: because while she said she knew the appellant and had issued tenancy-receipts to him, her samples of the receipts were all original, and not copies; and also considering that she had asked to be allowed not to give evidence in open Court. Counsel urged that PW3 was an unreliable witness, and gave no evidence tending ***"to connect the appellant with that house."***

Mr. Onserio contested the appeal, urging that the offending narcotic drug had been recovered, same as money in the sum of Kshs.1.4 million from the appellant. Counsel urged that it was a relevant consideration that the appellant had no visible source of income. Counsel submitted that the appellant had occupied the house (the ***locus in quo***) all through since 2007, and had paid rent without default; and along with the narcotic drugs were found instruments for weighing and packaging. Counsel submitted that the appellant was the tenant; there was "***no suggestion of any co-tenancy"***; he had voluntarily led the Police officers to the ***locus in quo***; there was no mistaken identity as to the owner of the items recovered. Learned counsel submitted that the conviction was sound in every respect.

Mr. Onserio urged that it was not open to the appellant to contest the sentence imposed against him, for the reason that ***"it is too late."***

As regards forfeiture, however, counsel conceded that it was not effected according to law, and this Court should now determine the question.

PW1, ***Cpl. Jacob Kathurima*** of CID Headquarters, Special Crime Prevention Unit, was on ***9th November, 2009*** dispatched to lead a team to Mombasa, in search of motor vehicle Reg. No. KAZ 026W, Toyota Corona Saloon. This car was suspected to be "***associated with narcotic drugs and illegal ammunition."*** The Police team were to use detection technology to identify the location of the said car, which would then be searched. PW1 and his team spotted the said motor vehicle being driven along Links Road, Nyali, Mombasa. PW1 stopped the said motor vehicle, and a search was conducted, a driving licence and a passport, both in the name of the appellant, being recovered. PW1 and his colleagues found in the car a travelling bag, containing a large amount of money in Kenya currency: the appellant, a citizen of Ghana, could not say how much the money was, or how he obtained it. The money was later counted and found to be Kshs.1,410,150/=. Four keys were recovered from the car, and the appellant was ordered to lead the Police officers to his house. At the house, no drugs or ammunition or firearm was found; but the appellant indicated that the keys found in the car were for his (other) house at Mikindani. The Police officers, after securing reinforcement, proceeded with the appellant to a block of flats at Mikindani Kwa Shee; his flat was No. C5, on the 2nd floor. A lady (PW3) who introduced herself as the land-lady said she knew the appellant herein. One of the Police officers, ***Sgt. Phillip Kirui Langat*** (PW5) opened the door to the flat, using one of the keys recovered from the car. While the appellant and the Police officers were inside the flat, ***P.C. Samuel Muriithi*** (PW2) activated the detector- machine, and its antennae moved and signalled a wooden box. When PW5 opened the box, white polythene paper was found, and inside this, there was brown sugar-like substance. An inventory of all the items recovered from the flat were taken, duly signed; and a powder-like substance recovered was delivered to the Government analyst.

PW1's evidence is corroborated in all material respects by the evidence of PW2, ***P.C. Samuel Muriithi*** from the Nairobi CID Headquarters. The appellant, during the conduct of search at the Nyali Estate house, had informed PW2 that the keys recovered from the car were for the appellant's second house at Mikindani. After Police reinforcement had been obtained, the appellant led the officers to a

block of flats at Mikindani Kwa Shee, Flat No.5, the door to which was locked; and after the door was opened by PW5, PW2's detector signalled the storage of narcotic drugs in a wooden box in the flat.

PW3, ***Patricia Wanjiru Kariuki***, the manager of the Mikindani flats, testified that she had made a tenancy agreement with the appellant and a lady companion on ***1st September, 2007***, and thereafter the appellant had lived in flat No. C5; he did so from 2007 to 2009, and "***he duly paid the rent."***

Since learned counsel, ***Mr. Magolo*** submitted that PW3's evidence on the identity of the appellant could not be believed, I have paid attention not only to the unfolding of that witness's testimony, but also to the trial Court's record on demeanour. The learned Chief Magistrate thus recorded in her Judgment:

"…Patricia's (PW3) testimony against him…remains completely uncontroverted. Patricia, incidentally, struck me as a very confident, trustworthy witness who had no reasons, either direct or by implication, to blame the accused person…"

The evidence of PW1, PW2, PW4 and PW5 is, in my opinion, overwhelmingly consistent, and it links up so naturally with that of PW3, that I must come to the conclusion, on the facts, that the appellant ***was*** the special owner of the flat in Mikindani that was the ***locus in quo***, and that he was well aware of the things kept in that house – including the narcotic drugs in question.

From all the evidence, and in particular in the light of the evidence of PW3, this Court finds to have no merit the appellant's evidence that he was not the owner of the Mikindani flat, and knew nothing about it.

The real question before this Court is the interpretation to be given in respect of s.4(a) of the Narcotic Drugs and Psychotropic Substances

(Control) Act. The relevant provision may be set out here:

"4. 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 –
(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 or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life…"

Is it the case, as ***Mr. Magolo*** contends, that the foregoing provision of the law does not encumber the Court's sentencing discretion? ***Mr. Onserio,*** for the respondent, remained uncommitted, as to the possible validity, as a matter of law, of the appellant's position.

It is surprising that the appellant could only rely on one precedent, ***Fahim Salim Swaleh v. Republic,*** Mombasa H.C. Crim. App. No. 214 of 2001 whereas the respondent brought forth no authority; surprising because, as this Court takes judicial notice, there have been a number of cases decided both in the High Court and the Court of Appeal, in respect of the Narcotic Drugs and Psychotropic Substances (Control) Act – and from these decisions submissions could have been made on the question whether a sentence of life imprisonment was mandatory, as held by the learned Chief Magistrate.

Section 4(a) of the governing statute makes a person found guilty of trafficking in narcotic drugs "***liable…to a fine of one million Shillings or three times the market value of the narcotic drug… whichever is the greater, and in addition, to imprisonment for life."*** First of all, what was the value of the narcotic drugs in question? Secondly, must the fine relate to that value? Thirdly, has the Court a discretion for imposing ***any fine***, along the scale of the value of the drugs in question? Fourthly, has the Court any discretion, as regards the ***period of imprisonment?***

The crucial word is "***liable to***"; does this expression foreclose the Court's discretion? An analogy may be drawn; in respect of the offence of ***murder***, for which the conventional penalty is the death

sentence, s.204 of the Penal Code (Cap. 63, Laws of Kenya) thus provides:
"Any person convicted of murder shall be sentenced to death."

That contrasts markedly with the formulation of the penalty for ***manslaughter*** (s.205, Penal Code):

"Any person who commits the felony of manslaughter *is liable* ***to imprisonment for life."***

It is a fact, of which this Court takes ***judicial notice,*** that over the years, the Courts have regarded themselves as having an open discretion in imposing sentence for ***manslaughter.***

From the foregoing examples, it is, in my opinion, a logical inference that the expression "liable to", when used in respect of a prescribed sentence, reposes in the Court a ***discretion***, to be exercised judicially, in determining the exact penalty to be imposed.

Such an apprehension is confirmed by the ordinary definition of words. The ***Concise Oxford English Dictionary***, 11th ed Rev (2009) thus defines the word liable: ***"responsible by law; legally answerable***". Such is a loose-textured scenario of accountability; and, in my opinion, a Court ought not to be held to have been limited to one specific sentence, where the jurisdiction-granting provision makes the convicted person merely ***"liable to***" a particular sentence.

Black's Law Dictionary, 8th ed. (2004) defines ***mandatory sentence*** as follows (p.1394):
"A sentence set by law with no discretion for the judge to individualize punishment – Also termed *mandatory penalty****; mandatory punishment; fixed sentence.****"***

It is by no means apparent that the legislative intent was that s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act imposes a ***mandatory penalty***. In view of the wisdom and expediency of preserving the ***judicial discretion to apply the law in the context of the facts and circumstances of each case***, I would hold that s.4(a) of the said Act does ***not*** foreclose the judicial discretion.

It was the evidence of ***P.C. James Mbai*** (PW6) that he handed over the suspected narcotic substance which was recovered from the ***locus in quo,*** to the Government analyst, ***John Syengo***, who took samples, weighed and certified the quantities recovered. PW6 later received a report prepared by ***John K. Njenga***, a Government Analyst, confirming the white and brown powder recovered from the appellant's house, to contain ***chacotylinophine*** (heroin) (MFI 37).

Although there is evidence that the ***locus in quo*** was a place under the appellant's control, and that a powdery substance of a certain quantity found therein was analysed and found to be one of the drugs prohibited under s.4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act, 1994, the Prosecution called no witness of professional competence, to give evidence on the ***commercial value*** attached to these drugs. It is not, in my opinion, logical to conclude that the moneys which were found in the custody of the appellant, well away from the ***locus in quo,*** bore a relation to the ***pricing*** of the prohibited drugs recovered.

Yet the penal scheme prescribed under s.4(a) of the said Act is predicated on the ***value*** of the narcotic drug recovered. Without reliable evidence of the price-assessor for the drug recovered, a vital element in the prescribed penalty cannot be dispensed: for the criminal law, by its standard principle and procedure, lays the onus of proof on the prosecution, and does not require the accused to disprove anything.

The learned Magistrate did not address herself to the different ***elements in the penalty*** provided for under s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act; she dispensed a generic sanction, in the following terms:

"…it cannot be [gainsaid] that…drug use and addiction is a menace, particularly in the Coastal Region of this country, that has afflicted and ruined the lives of many, especially the youth. It would

therefore be a dereliction [of duty] on my part not to view this offence …with the seriousness it deserves… The penalty section [s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act] is mandatory and thus, [the] accused is sentenced to serve life imprisonment."

By handing down such an omnibus sentence, the trial Court failed to do justice in terms of the differentiated prescription of the statute; and on this account the said sentence must be declared null.

As counsel have not addressed this appeal case with the requisite assiduity, and no argument has been made that it is a fit case for retrial, I will grant the appellant the benefit of the doubt in that regard.

Already, it is quite evident that there is no logical connection between the prohibited drugs recovered, and the appellant's properties and effects which had been forfeited; and consequently the forfeiture decision must be set aside.

From ***22nd October, 2010*** the appellant has been serving sentence, on the basis of the penalty imposed by the trial Court. On the basis of the reasoning in this Judgment, especially in relation to the trial Court's jurisdiction under s. 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, I hold that the term served to-date is sufficient penalty for being found in custody of the offending drug.

I hereby allow the appeal, and specifically order as follows:

(1) The term of imprisonment imposed against the appellant is annulled, and vacated.
(2) The order of forfeiture of the appellant's properties and effects is set aside, and the same shall be restored to the appellant.
(3)*The appellant shall forthwith be set at liberty, unless otherwise lawfully held*.

Orders accordingly.

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 6th day of September, 2011.

M. ODERO
JUDGE