**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI**

**CRIMINAL APPEAL NO.460 OF 2007**

**ALLY ABDALLA UKINDO ……..APPELLANT**

**VERSUS**

**REPUBLIC …….…….RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 1797 of 2007 of the Chief Magistrate's Court at Kibera by Mr. Kiarie - Ag. Senior Principal Magistrate**

**JUDGEMENT**

The appellant was charged and convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs & Psychotropic substances Control Act No.4 of 1994. That on the 6th day of March 2007 at Jomo Kenyatta International Airport Nairobi jointly with another trafficked by conveying 1364 grammes of narcotic drugs namely heroine with an estimated market value of Kshs.1,364,000/= in contravention of the provisions of the said Act. After full trial he was convicted and sentenced to 35 years imprisonment and in addition ordered to pay a fine of Kshs.4092000 in default 5 years imprisonment. The appellant is aggrieved by the decision of the trial court hence this appeal against conviction and sentence.

It is the case of the appellant that the conviction is against the weight of the evidence tendered by the prosecution. It is also the case of the appellant that the prosecution did not prove its case beyond reasonable doubt as per law required. The appellant invited this court to allow his appeal against conviction and sentence since the prosecution did not prove its case to the required standard. On the other hand the State was of the view that the prosecution proved its case beyond reasonable doubt and that the evidence on record is watertight and places the accused as the one who committed the charge subject of this appeal.

It is clear that on 6th March 2007 Flight No. QR532 of Qatar Airways arrived at Jomo Kenyatta International Airport at around 2.30 p.m. The appellant was one of the passengers in that flight and was found in possession of Tanzanian passport with a visa indicating that he had initially travelled from Iran. The appellant was stopped for interrogation by PW1 PC Kenneth Kimeli, PW2 PC David Simiyu, PW3 PC Marcos Mbithi, and PW5 CI Aden Guyo. The said officers believed that the appellant was a drug trafficker since he had originated from a familiar drugs source.

After the initial interrogation, he was arrested and placed in cells at Jomo Kenyatta International Airport. The appellant was then taken to observation room and he requested to go to the toilet on several occasions. At the end he emitted 89 pellets from his bowels. The items were then taken to the Government Analyst (PW5) who upon analysis confirmed the white powder contained therein were heroine and was therefore a drug within the narcotic drugs and Psychotropic substances. PW5 produced the relevant report as exhibit No.1. The pellets were weighed by PW7 as weighing 1364 grammes. The exhibits were also valued by PW6 at Kshs.1,364,000/=.

The question is whether the prosecution proved its case to the required standard and whether the appellant was convicted in accordance with the law. The evidence against the appellant is that some officers who were on duty at Jomo Kenyatta International Airport suspected him to be a drug trafficker. He was then interrogated and held for observations in a special room which had a glass all round. The appellant requested to go for a long call of nature wherein he was taken to a special toilet to determine whether he

was carrying drugs in his stomach. The appellant was asked to confirm whether the toilet he was about to use was empty and clean. He did confirm before using it and in the first instance he emitted 12 pellets from his bowels. The evidence of PW1, PW2 and PW3 confirmed the said scenario.

It is also the evidence of PW3 that on the same day and on different occasions the appellant emitted 51 pellets. It is also the evidence of PW3 that on 7th March 2007 at about 6.10 a.m. the appellant emitted 6 pellets. It is also evidence of PW8 that on 7th March 2007 at 11.20 a.m. the appellant emitted 2 pellets. In total the appellant emitted 89 pellets. The evidence of PW1, PW2, PW3, PW4 and PW8 is that the appellant emitted 89 pellets from his bowels through his anal orifice on different times when he requested to answer a long call of nature. It is clear that on each occasion he was asked to confirm that the toilet was clean and empty before using it. The appellant thumb printed and signed a document to confirm that he indeed checked the toilet facility as clean and empty before he could use. From the set of facts adduced by the prosecution, it is clear that the prosecution proved its case beyond reasonable doubt. It is my decision that the appellant was convicted on cogent and credible evidence tendered by the 8 prosecution witnesses who gave evidence before the trial court. I am therefore satisfied the appellant was convicted in accordance with the law. The appeal against conviction therefore fails.

On sentence, the appellant was sentenced to 35 years imprisonment and to pay a further fine of Kshs.4092000/= or serve a further 5 years imprisonment. It is the position of the appellant that the trial court did not take into consideration the mitigating circumstances before meting out the sentence. It is also the case of the appellant that the sentence is manifestly excessive in the circumstances of this case. I appreciate that in giving out, a particular sentence, a court is required to do so in exercise of its judicial discretion. It is clear in my mind that, I cannot substitute my discretion to the one exercised by the trial court. However, where it is clear that the discretion was not exercised judicially, this court has the powers to interfere with the same. The appellant was found trafficking by conveying 1364 grammes of heroine with an estimated market value of Kshs.1364000/=. After conviction he was sentenced to serve 35 years imprisonment and in addition to pay a fine of Kshs.4,092,000/= or serve another 5 years imprisonment. In essence the appellant was sentenced to serve 40 years imprisonment.

Having taken into consideration the circumstances and facts in this case, I think the sentence of 35 years is manifestly excessive and harsh. The appellant was a first offender and the value of the drugs were about 1.4 million. I therefore think that the sentence of 35 years imprisonment is not commensurate to the offence committed by the appellant. In addition, the trial court ordered the appellant to serve 5 years in default of the fine imposed. The law is that the correct sentence in default of any fine imposed under Act No.4 of 1994 is 1 year imprisonment. The trial court did not have powers to impose 5 years imprisonment in default of the fine imposed. I therefore set aside the said sentence and substitute with 1 year imprisonment. All in all, I set aside the sentence of 35 years and substitute with an order that the appellant shall serve a sentence of 10 years imprisonment from the date of conviction. He shall also serve a further 1 year imprisonment in default of the fine imposed.

Dated, signed and delivered at Nairobi this 29th day of December 2010.

**M. WARSAME**
**JUDGE**