REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 300 of 2006

DAVID ANDOH…….…….....…...…….APPELLANT

-AND-

REPUBLIC ……
RESPONDENT

(An appeal from sentence imposed by Senior Principal Magistrate Ms. Mwangi on 9th June, 2006 at Kibera Law Courts)

JUDGMENT

The appellant was charged with trafficking in narcotic drugs contrary to s. 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994). The particulars were that the appellant, on 7th June, 2006 at Jomo Kenyatta International Airport in Nairobi, trafficked *2.593kg. of a narcotic drug* known as Cocaine, with a *market value* of Kshs.12,965,000, in contravention of the said Act.

After the substance of the charge and every element thereof had been stated by the Court to the appellant herein, "in a language that he understands", and he was asked whether he admitted or denied the truth of the charge, he replied: "True".

The facts of the offence, as then read out to the appellant, were as follows:

On 7th June, 2006, Jomo Kenyatta International Airport Police Officers, P.C. ***Bernard Lebo*** and P.C. ***Ouma*** were on normal patrol duties profiling passengers, when the appellant arrived in the country, via Flight No. KQ 501, from Ghana. The appellant, who had several suitcases, was stopped for checking; and the said Police officers noticed that his passport indicated he had travelled to reputed drug-source countries; so they decided to search him. In the suitcase, the Police officers recovered a heavy parcel wrapped with cellotape; they became suspicious, and cut out part of the parcel. The officers noticed that the cut parcel contained a whitish substance which they believed to be Cocaine; they took the same for analysis, and it was confirmed to be Cocaine; and when weighed, the weight of the substance was found to be 2.593 kg, which is worth *Ksh. 12,965,000.*

The appellant admitted the facts as read out to be correct; whereupon the learned Magistrate convicted him on *his own plea of guilty.*

As the appellant's past records were not available, he being a foreigner, the Court treated him as a first offender. The Court took the appellant's statement in mitigation, and sentenced him to serve "*10 years*

[in] jail and to pay a fine of Ksh. 38,895,000/= [and, in default,] 1 year [in] Jail."

In his grounds of appeal the appellant states: he is aged 53 years and is father to five children who are in school; he is a foreigner and does not know anyone in Kenya who can help him; he was lured into the criminal act by exigencies of poverty; he is very remorseful; he prays for pardon.

Learned Counsel ***Mr. Wandugi,*** who noted that the appellant had filed his appeal in person, said he would argue the appeal on basic *grounds of law*. And his essential point was that: "The conviction was unsafe, and wrong. The sentence was unjustified."

Mr. Wandugi contended that the charge-sheet was "defective from the beginning, and ought not to have been the basis for a conviction." Counsel submitted that the offence of trafficking drugs had several elements, by the relevant statute: importation; manufacture; sale; exportation; etc – and a charge sheet that does not show the nature of the trafficking which was in question, is "incurably defective". Counsel, in this regard, relied on a persuasive authority, ***Wanjiku Vs. Republic*** [2002] 1 KLR 825. In that case ***Mr. Justice Onyancha*** had stated (pp. 829 – 830):

"***It is therefore logical and indeed sensible that a charge of 'trafficking' should clearly specify the exact kind of trafficking to enable not only the prosecution to know what evidence to lead to prove the charge but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing. The purpose of this is both obvious and fundamental. It is that the accused has a full right to know the charge he is facing to enable him to fully prepare his defence. Failure to specify which one or more of the specific 'trafficking' is charged, is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. It is also possible that failure to specify the actual act as a foresaid may as well possibly lead or mislead the trial Court, to convict the accused on the more serious charge of 'trafficking' as defined under section 4 of the Act instead of rightly convicting on a lesser or cognate offence under section 5 or 6 of the Act, with the dire consequences in terms of the type of sentence that is like under Section 4 of the Act. It is my view therefore that the charge as drawn in the lower Court was erroneous in so far as it failed to specify the….activity or act (as defined under relevant Act) that the prosecution embarked [upon proving] and the accused purported to defend. It cannot be easily argued that the trial did not therefore embarrass and/or prejudice the appellant."***

Mr. Wandugi, relying on the foregoing authority, submitted that in the matter before this Court as well, the Charge Sheet had not indicated the *manner* of "trafficking" – and so the appellant would not know the nature of the offence with which he was charged.

Counsel next argued that the charge was defective for a different reason as well; that whereas it purported to be under s. 4 (a) of the relevant Act, that section by itself did not *constitute an offence* – and therefore no offence had been committed in the first place; in the words of counsel; "s.4 (a) only provides for the penalty; it does not set out the offence; my client was only charged under the provision for the offence. The matter was under s. 4(a), and nothing else." So, counsel urged, s. 4 as a whole was inapplicable, and there was *no offence* before the Court; and hence the sentence imposing a ten-year term of imprisonment was misplaced.

Thirdly, ***Mr. Wandugi*** contested *the value* which was attached to the drug which was the basis of the charge. He said the terms of the Act, relating to the *valuation of drugs* (s. 86(1) of the relevant Act), had not been complied with; for the prosecutor had not produced in Court a *valuation certificate signed by a proper officer* under the Act; and such valuation was the basis for the imposition of a fine.

To support this argument, Counsel cited the Court of Appeal decision, ***Hamayun Khan v. Republic,*** Crim. Appeal No. 159 of 2000, in which it had been thus held:

"…***there was no evidence adduced at the trial as to the value of the heroin and upon which the sentence of Kshs. 39 million or in default, one year imprisonment, could be based. The value of the heroin was given in the charge sheet is, by itself, no evidence as to the value of heroin. The sentence***

imposed in this respect is invalid. Unfortunately the learned Judge of the superior Court did not even notice this illegality."

Mr. Wandugi urged that the value stated in the charge sheet is not evidence of valuation; and the statement by the prosecutor as to value, could not replace the *valuation certificate* issued by a proper officer under the Act. Counsel urged that there could be no fine without evidence of valuation; for the alleged weight of a narcotic drug, for purposes of the Act, had to be a *fact,* and not just an allegation.

Still another challenge to the appellant's conviction was founded on the need for a *certificate of analysis*, issued by a professional appointed by the Minister by virtue of *s. 67* of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. ***Mr. Wandugi*** urged that "the purported admission by the appellant was not a certificate of analysis."

Counsel urged that there had been a substantial failure to comply with mandatory provisions of the governing Act, and that on this account, the conviction entered by the trial Court should be set aside.

In this regard, Counsel also raised the tenor and effect of *s. 77* of the Act, which provides for issuance of a *seizure notice* by the Police officer who seizes offending narcotic drugs. Counsel submitted that there was no evidence that those who recovered the drug in question, had complied with the terms of s. 77 of the enactment.

Mr. Wandugi submitted too that the Court record did not show the "language that the accused understands" , which had been used during plea-taking; and that the appellant had a right to be tried in a language that he understands: ***Swahibu Simbauni Simiyu & Another v. Republic***, Crim. Appeal No. 243 Of 2005.

Learned respondent's counsel conceded to this appeal on the grounds that: (i) the charge as drawn was erroneous; it did not specify the *mode of trafficking* in which the appellant was said to have been involved; (ii) the prosecution, in giving the applicable facts of the case, showed no *certificate of analysis* for the narcotic drug in question; (iii) the prosecution did not produce a *valuation report,* to enable the Court to properly guide itself on *sentence.* The facts stated by the prosecution, in the circumstances, were insufficient as a basis to sustain conviction and sentence.

Mr. Makura was not however, in agreement with counsel for the appellant, that s.4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 does not *create an offence* and cannot by itself be the basis of a criminal charge.

This is a remarkable appeal case, for the manner in which it has focused attention on aspects of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 which have been generally taken for granted, and which may well have been administered without a clear perception of legal requirements.

Just as the Court of Appeal had held in the ***Hamayun Khan*** case, it may not be possible to determine according to the law the *fine*, or *term of imprisonment* under the Act, unless there is a *certificate of valuation* which puts a value on the narcotic drug in question. On this point s. 86(1) of the Act thus provides:

"***Where in any prosecution under this act any fine is to be determined by the market value of a narcotic drug,*** **psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the Court as *prima facie* evidence of the value thereof."**

Secondly, even though many officials of Government may be able to recognize a narcotic drug, when it is seen being trafficked in one way or another, the proper person to identify and certify the same, for the purpose of criminal proceedings, is specified in *Section 67* of the Act, which stipulates:

"***(1) The Minister may, from time to time, by notice in the Gazette designate any duly qualified analyst***

for the purposes of this Act.

"***(2) In any prosecution or other proceedings under this Act a certificate signed or purported to be signed by an analyst, designated under subsection (1), stating that he has analysed or examined any substance and the result of his analysis or examination, shall be admissible in evidence and shall be prima facie evidence of the statements contained in the certificate and of the authority of the person giving or making the same, without any proof of appointment or designation or signature."***

Even though in the instant case, the appellant was *caught as he entered Jomo Kenyatta International Airport with his offending cargo* from abroad, and so, quite obviously, he could only have trafficked the narcotic drug by *conveying it in the aircraft across international boundaries,* still it remains true that this *detail* was not laid out in the charge sheet; and so the principles so well set out in the judgment of ***Mr. Justice Onyancha*** in ***Wanjiku v. Republic*** [2002] 1KLR 825 were not complied with. Those principles are an important element in the trial-rights of the accused; s.77(2) of the Constitution guarantees them in the following terms:

"***Every person who is charged with a criminal offence –***

(a) shall be presumed to be innocent until he is proved or had pleaded guilty;

(b) shall be informed as soon as reasonably practicable, in a language that he understands *and in detail*, of the nature of the offence with which he is charged."

Thus, even though the appellant in this case, indeed, *did* plead guilty to the charge, and to the prosecution statement of facts, and even in his grounds of appeal he was still affirming his guilt and seeking pardon, strictly in law his rights to *fair trial* would have been compromised by the *vague* manner in which the offence charged had been stated.

Learned counsel ***Mr. Wandugi*** rightly, in my opinion, urges that the *language* used in Court at plea-taking ought to have been *named*, in place of the general statement that the charge had been read out "in a language that the accused understands." This is a relevant point in this case, because the appellant is Ghanaian, and it cannot rightly be assumed that he is necessarily able to speak and understand English. The proceedings, thus, in my opinion, did *not* pass the test of the language requirement contained in the Court of Appeal's decision in ***Swahibu Simbauni Simiyu & Another.***

Is it the case, as ***Mr. Wandugi*** submitted, that a charge brought under s.4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 is improperly framed? I do not think so; for s. 4 of the Act is to be seen *as a whole*, and it has a general stem, followed by specifications, (a) and (b); it is the stem that creates the offence:

"***Any person who trafficks in any narcotic drug or psychotropic substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence….";***

and this stem is then followed by paragraphs (a) and (b) which specify the applicable *penalties,* depending on the relevant element of the stem.

I find that the charge-sheet was erroneously framed; but as the appellant pleaded guilty, and as he had no assistance of counsel, the defects in the charge *did not* come out; but still, he was convicted, and subjected to severe consequences. Even though the appellant did not raise such critical issues in his grounds of appeal, this Court will always deal with *legal questions* that touch on its exercise of jurisdiction. I hold the charge and the plea-taking to have been a nullity in law.

Learned counsel ***Mr. Makura***, while conceding to the appeal, urged that this Court do order the appellant, a national of Ghana, to be *repatriated* immediately. Learned counsel ***Mr. Wandugi*** objected to this submission, on the ground that the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 does not concern itself with matters of repatriation, which is a subject of the *Immigration Act* (Cap. 172, Laws

of Kenya).

In the light of the holding that must be made in this case, it does not fall within the terms of *s. 26A of the Penal Code* (Cap. 63, Laws of Kenya), whereunder the Court may "order that the person be removed from and remain out of Kenya." It is, however, clear from the text of this judgment that the appellant had been arrested *with prohibited drugs in his possession*, at Jomo Kenyatta International Airport. On the basis of that fact, it will be in order for this matter to be placed before the Minister in charge of Immigration, to deal with the appellant as he deems fit, by virtue of the Immigration Act.

This Court makes orders as follows:-

(1) The proceedings, the plea and the sentence recorded on 9th June, 2006 are hereby quashed.

(2) The appellant shall be set at liberty, unless he is held for some other lawful cause.

(3) The Deputy Registrar, by due protocol, shall place before the Minister in charge of Immigration a certified copy of this Judgment.

DATED and **DELIVERED** at Nairobi this 26th day of January, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Appellant : Mr. Wandugi

For the Respondent: Mr. Makura