**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 693 of 2006**

**(From Original Conviction and Sentence in Criminal Case no 1958 of 2006 of the Senior Principal Magistrate's court at Kibera)**

**ABDALLAH MOHAMED IDDI CHAUREMBO……..APPELLANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

**JUDGMENT**

The appellant, Abdallah Mohammed Iddi Chaurembo, was charged in the Chief Magistrate's Court, Kibera, with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994. After a full trial during which the prosecution called 8 witnesses, and the appellant made an unsworn statement in defence, the appellant was found guilty as charged and was sentenced to imprisonment for 10 years, and to pay a fine of KShs. 6,265,800/= and in default, 1 year jail. He appealed to this court against sentence.

The appellant's grounds of appeal are as follows –

1. **THAT the learned trial magistrate in passing sentence ought to have considered that:**

**(a) The appellant was a first offender and a foreigner.**

**(b) The appellant was a young person and imprisonment was likely to ruin his life.**

2. **THAT the sentence passed upon the appellant was harsh, excessive, and lacked "humane"(sic).**

**3. THAT the appellant was the sole breadwinner in the family and an imprisonment term which is harsh and excessive like one against him will make some other innocent members of his family to suffer.**

He therefore prays that his appeal be allowed and the sentence imposed be reduced to such terms as are commensurate with his circumstances and those of the case.

During the hearing of the appeal, the appellant appeared in person while Mrs Gakobo appeared for the Republic. The appellant begged the court to forgive him or reduce the sentence as he was a first offender

and has a family, two brothers and a sister who rely on him for maintenance. He has a chest problem and therefore asks for forgiveness and he undertakes never to be involved in drugs again. Responding for the Republic, Mrs Gakobo submitted that the sentence was legal and not harsh. There was nothing on record to show that the trial court did not exercise its discretion judicially. She further submitted that the value of the drugs was

quite high and that this called for a deterrent sentence. She therefore urged the court not to interfere with the sentence but to dismiss the appeal.

I have considered the grounds of appeal and the submissions by both parties. The particulars of the charge with which the appellant was charged were that –

"**(the appellant) on the 3rd day of April 2006 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, was found trafficking by conveying 2,088.6 grammes of Narcotic drugs namely diacetylmorphine commonly known as heroin with a market value of KShs. 2,088,600/= in contravention of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994."**

The penalty for trafficking in narcotic drugs is provided for in Section 4(a) of the Act which prescribes as follows –

"**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.**

The old case of **REX** v. **MOHAMEDALI JAMAL** (1948) 15 EACA sets out the approach which an appellate court should adopt towards a sentence. The court said –

"**It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge or magistrate has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."**

Similar sentiments were expressed in **WANJEMA** v. **REPUBLIC** [1971] EA 493 in which Trevelyan J. said at page 494 –

"… **An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case …."**

Applying the above principles to this case, I note that the appellant was sentenced to imprisonment for 10 years, and to pay a fine of KShs. 6,265,800/= and in default 1 year jail. Section 4(a) of the Act is worded in such a way that any person found guilty of trafficking in narcotic drugs or psychotropic substances is liable to a mandatory fine of KSh one million, or three times the market value of the drug or psychotropic substance, whichever is the greater. In this case, three times the market value of the drug or psychotropic substance was KSh. 6,265,800/= which was greater than KShs. 1 million. Therefore, the trial magistrate's hands were tied and she had no discretion in the matter but to impose a fine in the sum of KSh. 6,265,800/=.

In addition to the fine, the section also requires that the offender be liable to imprisonment for life. This limb gives the trial court some discretion, but the maximum that may be meted out to an accused person is a life sentence. In the exercise of its discretion, the trial court noted that the appellant was a first

offender, and that he had nothing to say in mitigation, and sentenced him to serve ten years. This was within the jurisdiction conferred by the Act. The appellant blundered when he declined to mitigate before the trial court. The factors he introduced at the appellate stage as mitigating circumstances ought to have been brought up before the trial court, otherwise an appellate court might well call them an afterthought.

For these reasons, I find that in meting out the sentence, it is not evident that the trial court either acted upon some wrong principle, or imposed a sentence which was either patently inadequate or manifestly excessive. The appeal has no merit and it is accordingly dismissed.

Dated and delivered at Nairobi this 16th day of November 2009.

**L. NJAGI**

**JUDGE**