



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

**Criminal Appeal 455 of 2006**

**GABRIEL RALPH ROLAND ..... APPELLANT**

**-AND-**

**REPUBLIC ..... RESPONDENT**

***(An appeal from sentence imposed by Principal Magistrate Mrs. Wasilwa on 19<sup>th</sup> July, 2006 in Criminal Case No. 4445 of 2005 at Kibera Law Courts)***

**JUDGMENT**

The charge brought against the appellant herein was, trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act (Act No. 4 of 1994). The particulars were that the appellant, on 5<sup>th</sup> June, 2005 at Jomo Kenyatta International Airport in Nairobi, trafficked in 816 grammes of Narcotic Drugs, namely Diacetylmorphine, commonly known as Heroin, with a street value of Kshs.81,600/-, in contravention of the said Act.

On 15<sup>th</sup> June, 2005 the substance of the charge and every element thereof was stated by the Court to the appellant, in a language that he understands, and he pleaded not guilty. Trial began on that basis before Senior Resident Magistrate **Ms. Muchira**, but before Principal Magistrate **Mrs. Wasilwa** on 19<sup>th</sup> July, 2006 the appellant applied to be allowed to change plea. The charge was then read over and explained to him, and he pleaded guilty.

The prosecutor gave the facts relating to the commission of the offence charged. On 5<sup>th</sup> June, 2005 Anti-narcotics officers manning the departure gate at Jomo Kenyatta International Airport intercepted the appellant who was checking in, in readiness for a flight to Seychelles. When the appellant produced his passport and Kenya Airways ticket, the Anti-narcotics officers suspected him of drug-trafficking, because of the airline route he had chosen. These officers escorted the appellant with his luggage into their offices, for the purpose of interrogation. They found nothing suspect in the baggage, but suspected that the applicant had swallowed narcotic drugs, to conceal them. The Police officers placed him under observation; and on 6<sup>th</sup> June, 2005 at 3.30 p.m. the appellant emitted ten pellets of substances which were suspected to be narcotic drugs. Later at 11.20 p.m., the appellant emitted five pellets of substances suspected to be drugs. The appellant remained under observation until 13<sup>th</sup> June, 2005 when the substances he had emitted, a total of 15 pellets, were weighed and found to be 81.6 grammes. These

pellets were then conveyed to the Government chemist for analysis; and a report from the Government analyst confirmed the substances to be Heroin, worth KShs.81,600/-. The appellant was subsequently charged in Court. The pellets and the analysis report were produced as exhibits.

Upon the appellant admitting the foregoing fact-statement to be correct, the learned Principal Magistrate entered a plea of guilty. After the prosecutor asked that the appellant herein be treated as a first offender, and after hearing the appellant's statement in mitigation, the learned Magistrate sentenced him to a ten-year term of imprisonment.

In the appellant's petition of appeal, he contended that the trial Court had erred in imposing upon him a long prison term without the option of fine. He stated that he was in ill-health, and a ten-year term of imprisonment was, in the circumstances, harsh and excessive. He stated that he was remorseful and would not in future, be involved in drug-trafficking.

The appellant subsequently instructed counsel, who filed supplementary grounds of appeal. In the new grounds it was asserted as follows:

- (i) that the trial court had not complied with the provisions of Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994;
- (ii) that the plea had been equivocal, and so a conviction should not have been entered;
- (iii) that the appellant's trial rights under the Constitution, Section 72(3) (b), 74(1) and 77(1), (2) (a), (b), (c), (d), (e) and (f) had been violated.
- (iv) that the sentence imposed was harsh and excessive;
- (v) that the trial Court did not consider the appellant's mitigation statement;
- (vi) that the trial Court erred in law by convicting the appellant on the basis of a defective charge sheet;
- (vii) that the prosecutor had been incompetent, and his participation was contrary to Section 85(2) as read with Section 88(1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

In his submissions, learned counsel **Mr. Ondieki** urged that the appeal ought to succeed, because the appellant had been arrested on **5<sup>th</sup> June, 2005**, but only brought before the court on **14<sup>th</sup> June, 2005**; this, it was urged, violated the terms of Section 72 (3) (b) of the Constitution which required that, ordinarily, a suspect such as the appellant herein, is to be brought before a court within 24 hours of being arrested and detained; in this case, the appellant had been held for about one week. On this ground, it was contended, the trial process itself was rendered unconstitutional, and was a nullity.

**Mr. Ondieki** also challenged the trial proceedings on the basis that presiding Magistrates had changed after P.W. 3 was heard, but the rights of the accused in those circumstances, founded on Section 200 of the Criminal Procedure Code (Cap. 75), had not been explained to him. It was contended that the appellant had been caused to change plea on account of the change of presiding Magistrates.

It was urged that Section 77(2) (f) of the Constitution, which relates to the recording of languages used in Court, had been violated, because the appellant came from Seychelles where the main language was French, but it was not on record that there was any interpretation into French during the trial process.

Counsel also challenged the sentence imposed as having been illegal, since the relevant section of the governing Act provided first for **fine** and only afterwards, for imprisonment; and hence, it was urged the appellant ought not to have been imprisoned without the option of fine.

**Mr. Ondieki** contended that the charge sheet was defective, for not having specified the manner in which

the appellant had trafficked in narcotic drugs.

Learned State Counsel **Mr. Makura**, in response, submitted that the trial Court record showed certain irregularities; the language of the Court was not indicated, and the “*guilty*” plea was not unequivocal. **Mr. Makura** agreed with counsel for the appellant, that Section 200 of the Criminal Procedure Code had not been complied with when the matter passed on from one presiding Magistrate to another: the appellant’s right to re-summon witnesses was not explained.

Mr. Makura was in agreement with Counsel for the appellant, that the mode of trafficking in narcotic drugs by a suspect, ought to be shown. It had been so held in a persuasive authority, **Wanjiku v. Republic** [2002] 1 KLR 825, where **Onyancha J** had held (p.826):

***“The definition of ‘trafficking’ in the Act embraced several kinds of acts including importation, exportation, manufacture, buying, sale, supplying, storing, administering, conveying or distributing. It is logical and 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”***

Although **Mr. Makura** did not agree with the appellant’s contention regarding the status of the prosecutor, he submitted that the case made for the appellant had certain merits. From the record, the prosecutor upto the time of the appellant’s change of plea was **I.P. Oyoo**; and hence, there is nothing to show lack of qualification on the part of the prosecutor.

**Mr. Makura** urged that the appellant be repatriated to his home country and, as the narcotic drugs which were the basis of the charge had been destroyed, he did not favour retrial.

I have carefully considered the facts relating to this case and in particular, the fact that the appellant changed his plea and pleaded guilty, to the charge, and admitted the facts as rendered by the prosecution in Court. I am not in agreement with counsel for the appellant that the change of plea arose out of any constraint on the part of the prosecution. I also have serious doubts about the contention that the trial court did anything improper, at the time of change from one presiding officer to another, within the terms of Section 200 of the Criminal Procedure Code. That change of presiding officers coincided with a personal decision by the appellant herein, to change his plea. The new plea of guilty, was not part of the ongoing trial, and thus did not have to be taken before the first presiding officer, nor would it have been proper to explain to the appellant his right to recall witnesses who had testified while his case was being tried normally.

As an industrious advocate, counsel for the appellant has brought several claims of breaches of the Constitution before this court; on possible use of French in the trial court; on period of detention before commencement of trial.

I consider that vital rights–claims which are believed to rest on the Constitution should always be placed before the Court with sufficiently detailed background information, and with indications of any representations that may have already been made in apprehension of possible breach; they should not, in principle, be tossed onto other claims, as ordinary add-ons. Unless the foregoing principle is observed, then notwithstanding the reference made to the Constitution (in the manner in which counsel for the appellant did it herein), the Court would be entitled to consider whether anything prejudicial to the trial process has taken place which would tend to compromise the performance of the obligation of the Court to ensure that justice is done, or tend to qualify the Court’s discharge of its obligation to administer the criminal process in the public interest.

The appellant has not convinced me that the proceedings which took place before the learned Principal Magistrate were anything but diligently and judiciously conducted, nor that any trial-rights of his were so compromised that the proceedings in the trial Court should be treated as a nullity.

It is on this basis that I shall now determine the outcome of the instant appeal.

Section 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act thus provides:

**“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 greater, and, in addition, to imprisonment for life.....”**

The charge brought against the appellant herein, fell squarely within the ambit of the foregoing provision; and therefore, just as learned counsel **Mr. Ondieki** hinted, it was necessary to reconcile the scope for imposing a jail term with that for requiring a fine to be paid.

This is not, before this Court, a matter of first impression; as it had arisen earlier in **Kingsley Chukwu V. Republic**, High Court Criminal Appeal No. 599 of 2004, and in that case I had thus held:

**“On the basis of the foregoing provisions, [respondent’s counsel] submitted that the lawful sentence would have been, in the first place, a fine.....; and in addition, a term of imprisonment. Learned counsel submitted – I believe, correctly – that the first recourse of the learned Magistrate should have been a fine, and only secondly should he have considered imprisonment, in the order set out in the statute”**

Fine, as contemplated under the said provision, is KShs.1,000,000/-, or a figure much more than that. So a fine in the instant case would be in that sum, at the least.

I will allow the appeal on sentence, set aside the term of imprisonment imposed by the trial court, and substitute it with (a) a fine of one million Kenya Shillings (KShs.1,000,000/-) or, in default, a two year term of imprisonment; **and** (b) a **five-year** term of imprisonment running as from the original date of sentence by the trial court; ( c ) the appellant shall be repatriated to his home country upon serving sentence as imposed herein.

**Orders accordingly.**

**DATED and DELIVERED** at Nairobi this 18<sup>th</sup> day of February, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court clerk: Huka**

**For the Appellant: Mr. Ondieki**

**For the Respondent: Mr. Makura**