REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*Coram: Ojwang, J.*)

CRIMINAL APPEAL NO. 403 OF 2006

BETWEEN

SHEM MONG'ARE NYABERI……..…….….APPELLANT

-AND-

REPUBLIC…….…..……..RESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. Wasilwa dated 21st July, 2006 in Criminal Case No. 7931 of 2005 at Kibera Law Courts)

JUDGEMENT

The appellant was charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act (Act No. 4 of 1994). It was charged that the appellant had, on 17th November, 2005 at Jomo Kenyatta International Airport in Nairobi, trafficked in 344.8 grammes of a narcotic drug namely Heroin, valued at Kshs. 344,880/= in contravention of the said Act.

PW1, Police Force No. 77328 ***P.C. Rosemary Mong'are,*** who works at the Jomo Kenyatta International Airport Police station testified that she had reported for duty at 6.30 a.m on 17th November, 2005 and was profiling passengers travelling to Seychelles, and was checking if any was possessed of drugs. When the appellant came through the screening machine, PW1 asked him to open his bag which she searched, and found in it nine pellets, wrapped in a white polythene bag, which she suspected were narcotic drugs. When PW1 inquired what the pellets were, the appellant asked for forgiveness; but PW1 would not hear of it, and handed him over to ***P.C. Nyaga*** together with the pellets.

PW2, Police Force No. 73339 ***P.C. James Mbui*** was on duty at the Anti-Narcotics Unit of Jomo Kenyatta International Airport on 17th November, 2005, when he was asked by one ***CIP Ondego*** to guard the appellant herein who had been arrested with narcotic drugs but had swallowed the same. PW2 kept the appellant under observation until he discharged the drugs which he had swallowed, and PW2 took possession of the same. The appellant signed an observation sheet confirming he was the one who discharged the eight drug pellets. These pellets were passed on to ***CIP Ondego***, while the appellant was still kept under observation. On the following day the appellant was again placed under PW2's observation, and he stayed with the appellant until the morning of 19th November, 2005. At 5.20 am on that date, the appellant again emitted eight drug pellets; and he signed an observation sheet

acknowledging having emitted the same. PW2 took possession of these pellets, and left the appellant at 6.00 am still under observation. PW2 returned to take charge of the task of observation at 6.00 am on 20th November, 2005; and at 7.50 am on that day the appellant emitted one drug pellet, which he cleaned, handed over to PW2, and signed an observation sheet acknowledging he is the one who emitted the pellet.

PW3 Police Force No. 77508 ***P.C. Bernard Nyamosi,*** of the Anti-Narcotic Unit at Jomo Kenyatta International Airport, was on 17th November, 2005 at 14.00 hrs, assigned the task of guarding the appellant herein who was suspected to be concealing narcotic drugs in his rectum. PW3, while performing the assigned task, was in the company of PW2. At 2.37 pm the appellant emitted eight drug pellets, which PW3 took and handed over to his superior officer for custody. The appellant signed the observation sheet acknowledging he was the one who had emitted the said drug pellets. On 18th November, 2005 at 3.08 pm the appellant again emitted four drug pellets, which PW3 took possession of after the appellant signed an observation sheet acknowledging he was the one who emitted the said pellets.

PW4, Police Force No. 55603 ***Corporal Julius Musonga*** who does investigation duties at the Anti-Narcotic Unit of Jomo Kenyatta International Airport was, on 17th November, 2005 instructed by ***C.I.P Ondego*** to take over the case of the appellant herein and conduct investigations. PW4 confirmed from passport and ticket, that the appellant herein was of Kenyan nationality and was set to travel to Seychelles. The appellant had been found with nine drug pellets, and it was suspected he had swallowed some more; so the appellant was subjected to observation between 17th and 20th November, 2005; and in that period of time he emitted a total of 21 pellets at intervals. The appellant was kept under observation, and it was noticed that on 23rd November, 2005 he had emitted no further substance. PW4 then invited the Government Analyst to confirm the nature of the pellets, which was dispatched with a duly signed exhibit memo form. After the chemical analysis was conducted, and the pellets confirmed to be a narcotic drug, PW4 on 24th November, 2005 charged the accused in Court. PW4 found that the pellets weighed 344.8 grammes and the monetary value attributed to them was Kshs.344.800/=.

PW5, ***Habel Aketch Omondi***, a Government Analyst testified that he had, on 24th November, 2005 received from PW4 a polythene bag with 30 sachets marked A1 up to A30, and each contained a brownish powdery substance. He conducted analysis and found that the brownish substance in the sachets was Heroin, a narcotic drug.

PW6, Police Force No. 219196 ***C.I.P Harris Ondego*** testified that he was an authorised officer to value narcotic drugs, deployed at the Anti-Narcotic Unit of Jomo Kenyatta International Airport. He certified that the market value of 344.8 grammes of Heroin recovered from the appellant herein, was Kshs. 344,800/=.

The appellant elected to give a cursory unsworn statement and to call no witness. He said he was travelling to Seychelles and had no narcotic drugs on him. Referring to the drug pellets which PW1 found in his bag, the appellant said: *"I was surprised to see them in my bag. I did not know how they got there. That is all."*

After summarizing the prosecution evidence, the learned Principal Magistrate made her conclusion and pronounced her verdict as follows:

> ***"I have examined all evidence on record…….***
>
> ***"Accused was in possession of the bag, and his contention that he does not know how the drugs got into his bag is not...believable.***
>
> ***"Accused was put under observation and he emitted a further 21 pellets, and he signed the observation sheets as proof that he was the one who emitted them.***
>
> ***"The pellets were sampled and analysed by a Government Analyst who certifies that the pellets contain Heroin, a narcotic drug. The weighing and valuing was done, and the value given as***

Kshs.344,800/=.

"The prosecution evidence is consistent and [corroborated]. I find [that the] prosecution [has] established their case against [the] accused beyond reasonable doubt. I find the accused guilty as charged, and convict him under section 215 of [the] CPC".

After the prosecution represented that the appellant herein be treated as a first offender, he made a mitigation address in which he said he had a family, and asked for leniency. The trial Court sentenced the appellant to a ten-year term of imprisonment.

In the petition of appeal, the appellant thus states:

i. the sentence imposed is harsh and excessive;

ii. the trial Court failed to take the mitigation statement into account;

iii.he is repentant and remorseful and undertakes not to infringe the law in future.

The effect of the foregoing grounds of appeal is, as learned counsel ***Ms. Gateru*** noted, that the gravamen is limited to sentence, and the merits of the conviction are not at all questioned. Conviction, in my assessment from evidence, was correctly arrived at, and a challenge to the same, I think, would have been unlikely to succeed.

Ms. Gateru submitted that the sentence imposed by the Court below was lawful, and was neither harsh nor excessive. As s.4 of the Narcotic Drugs and Psychotropic Substances (Control) Act provides for a maximum of life imprisonment, the ten-year term of imprisonment awarded, counsel urged, was lenient in every sense. Counsel submitted that the appellant's mitigation statement had been duly taken into account; and therefore, this Court should maintain the punishment dispensed by the trial Court.

S.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 the greater, and, in addition to imprisonment for life……"

In the canvassing of this appeal, the Court was not urged to take any position with regard to the selection and/or apportioning of penalties that may be dispensed under the law. But I have to address this question since it has come before me before, and I hold that right and judicious decision-making ought to be guided by such lines of principle as may have, in the past, been considered and adopted.

In the case of ***Kingsley Chukwu v. Republic*** High Court Criminal Appeal No. 599 of 2004 I heard counsel's representations regarding s.4 of the governing Act (excerpted above), and I there, set out the emerging construction-picture as follows:

"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."

If the foregoing principle is applied, then the minimum fine in the instant case would be Kshs.1,000,000/=. In the ***Kingsley Chukwu*** case I had introduced the fine element into the verdict, and

duly substituted the singular term of imprisonment which had been imposed by the trial Court. I had in that case directed my finding as follows:

> "As regards sentence it is clear to me that, taking into account the express provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, s.4 (a), the learned Magistrate should have dispensed penalty ***beginning*** with the option of ***fine,*** and he should not have imposed a fifteen-year term of imprisonment without the option of a fine"

Before applying the foregoing considerations to the appellant's case, I will lodge my decision within certain principles of sentencing which I have deliberated upon in the past, and which are partly to be found in ***Yussuf Dahar Arog V. Republic,*** High Court Criminal Appeal No. 110 of 2006:

"Such is, of course, a maximum sentence and, within that constraint, the Court has a wide discretion which it exercises on judicial principles. Such principles would, I believe, take into account the ***ordinary span of life*** of a human being; the general ***circumstances*** surrounding the commission of the offence; the possibility that the culprit may ***reform*** and become a law-abiding member of the community; the goals of ***peace and mutual tolerance*** and accommodation among people ? those who are injured, and those who have occasioned injury".

Being guided by such principles, I find the sentence imposed by the trial Court to be not on all fours with the law; and consequently I hereby allow the appeal on sentence, set aside the sentence imposed, 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.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 13th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person