REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL REVISION CASE NO. 62 OF 2008

REPUBLIC……………………………………...APPLICANT

-VERSUS-

LINA MKUNDE DAVID KIRITTA *alias*

LENAH MUSYOKA MWENDE.…...……...RESPONDENT

RULING ON REVISION

The respondent was charged with the offence of 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 of the charge were that the respondent, on 10th February, 2007 at Jomo Kenyatta International Airport in Nairobi, trafficked by conveying two kilogrammes of narcotic drugs, namely Heroin, with an estimated market value of Kshs.2,000,000/=, in contravention of the provision of the Act.

There were four other charges brought against the respondent, but, of these, she was acquitted by the learned Ag. Senior Resident Magistrate, ***Mrs. J. Wanjala***, on 14th July, 2008.

As regards the charge set out above, the trial Court found the respondent guilty, convicted her, and imposed a suspended sentence of ten years' [imprisonment?]

It is the correctness, legality and propriety of the said suspended sentence, that lies at the centre of this request for revision by the applicant. On 17th July, 2008 the Director of Public Prosecutions wrote a letter to the Registrar, the relevant paragraph of which thus reads:

"In Count one, Trafficking in 2 kgs. of narcotics, [the learned Magistrate] found the accused guilty, convicted her and sentenced the accused to ten years suspended sentence. The sentence and order by the Magistrate is illegal and offends...s.4(a) of the [Narcotic Drugs and Psychotropic Substances (Control) Act] which provides the punishment for Trafficking in Narcotic or Psychotropic Substances [as] 'a fine of one million shillings or three times the market value of the Narcotic Drug or Psychotropic Substances, whichever is the greater, in addition to imprisonment for life.'"

This matter came up before me on 30th July, 2008 when learned counsel ***Mrs. Oduor*** made a case for a revision of the sentence awarded by the trial Court. She drew the Court's attention to the terms of s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, which thus stipulates:

> ***"any person who trafficks in any 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....."***

Counsel urged that under the foregoing provision there was no discretion in sentencing for an offence based on s.4(a) of the Act; and it was thus an illegal sentence, which the trial Court had imposed.

Counsel's argument, in my opinion, has merit so far as the prescribed *fine* is concerned; but for the term of imprisonment, it is well known that, generally, statutes do prescribe only the *maximum term,* leaving the Court with room for discretion.

Learned counsel drew the Court's attention to the provisions of law relating to the revision jurisdiction, in a situation, such as the instant one, in which the respondent had not come to Court, and had not made any submissions.

By s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya),

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

In such situations, the High Court may, where a conviction has been entered by the Subordinate Court, enhance sentence, where the sentence imposed is found *not to be in accordance with the law* (s.364(a)). The High Court may also *reverse* "any other order [of the Subordinate Court] other than an order of acquittal," where such other order is found not to be in accordance with the law (s.364(b)).

S. 364(2) thus provides:

> ***"No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence..."***

But there is a *proviso* to the foregoing:

> ***"Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."***

It is clear then, on the basis of s.362 of the Criminal Procedure Code, that *if* the sentence imposed by the trial Court was illegal or improper, then the High Court has the jurisdiction to re-examine it; and the High Court, by virtue of the provision in s.364(a) of the same statute, may *enhance* the sentence if need be. It is equally clear that if the Subordinate Court failed to pass a sentence which it was required by statute law to pass, then the High Court, by virtue of s.364(2) of the statute *may impose the correct sentence*, even where the accused *"has not had an opportunity of being heard either personally or by an advocate in his own defence."*

In that case, the only limitation to the sentencing discretion of the High Court is as stated in s.364(3) of the statute:

> ***"Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence."***

It is this Court's understanding that, where a sentence imposed by the Subordinate Court was an illegal one, orders can be made imposing such minimum statutory sentence as may have been prescribed by law.

S.364(4) provides that –

> *"Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction."*

It is this Court's understanding that there was *no acquittal* by the Subordinate Court, in the instant case; and therefore, by virtue of the detailed provisions of s.364 of the Criminal Procedure Code, it is open to this Court to impose the minimum statutory sentence, if the Subordinate Court failed to comply with this requirement.

Did the Subordinate Court impose sentence in accordance with the law? No, according to the State. I am inclined to agree with the State's position, for the following reasons.

(a) The learned Magistrate's last words in her 39-page hand-written judgement are as follows:

> **"Mitigation considered. She is 1st offender. She is given 10 years suspended sentence. Right of appeal, 14 days"**

The foregoing passage bears ***no*** legal meaning; it is not clear whether "10 years suspended sentence" denotes a suspended term of *imprisonment*. So the sentence is *vague,* and does not meet the requirements of the law.

(b) If it is assumed that the learned Magistrate imposed a suspended imprisonment sentence of *ten* years, then this would be contrary to law.

The law relating to suspended sentences is found in *s.15 of the Criminal Procedure Code*, and the sentence imposed by the learned Magistrate in the instant case runs directly counter to that section – and is therefore illegal. That section of the statute thus provides:

> ***"15 (1) Any court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless during the period specified by the court (hereinafter called the 'operational period') the offender commits another offence, whether that offence is punishable by imprisonment, or by fine.***
>
> ***(2) Where the offender is convicted of an offence during the operational period the sentence for the first offence in respect of which the offender was convicted under subsection (1) shall thereupon take effect.***
>
> ***(3) Where under subsection (2) the sentence passed for the first offence under subsection (1) takes effect the sentence passed for the subsequent offence shall run consecutively to the sentence passed for the first offence."***

It is quite evident that the provisions for suspended sentences relate only to relatively *minor offences,* or *misdemeanours,* and not to serious offences or felonies punishable by a substantial number of years of imprisonment. On this principle, I find and hold that an offence under s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 falls in the category of *serious offences*, which, thus, cannot be the subject of a suspended sentence. In this regard, the sentence imposed by the learned Magistrate was an *illegal* sentence.

(c) *Illegality* in the sentence imposed by the trial Court is still more apparent, considering the specific terms of s.4(a) of the governing statute aforesaid. The minimum punishment, by that statute, is, firstly, a *fine of Kshs.1 million or three times the value of the illicit drugs described in the charge sheet, whichever is the greater*. This is to be *followed, next, by a term of imprisonment*, which is specified as life-

imprisonment: and that, by the principles of statutory interpretation, and by established judicial practice, means that life-imprisonment is a maximum term.

The sentence in question is, thus, *illegal* in every respect, and it is the obligation of this Court, upon revision, to *quash* it, and to impose the *minimum lawful sentence*. On that basis, I will order as follows:

The sentence imposed by the trial Court is hereby vacated, and in its place, a different sentence is imposed, in these terms:

> (1) the accused, ***Lina Mkunde David Kiritta*** *alias* ***Lenah Musyoka Mwende*** shall pay a fine of Kshs. Six Million (6,000,000/=), or in default, serve an eight-year term of imprisonment; and *in addition* –
>
> (2) three-and-a-half (3 ½) years of imprisonment as from the date when she is apprehended and held in custody.
>
> (3) The subject, if not already in custody, shall be forthwith apprehended and held in prison custody, on the terms set out in these orders, to serve sentence as hereby imposed.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 31st day of July, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mrs. D. Oduor

Respondent Absent