REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 590 & 601 of 2005

DANIEL KADURENGE MONDI……….………..…….1ST APPELLANT

CHAUSIKU BOKE MWITA…………………………….2ND APPELLANT

-AND-

REPUBLIC…………………………………………….....RESPONDENT

(An appeal from the judgement of Chief Magistrate Mr. Muiruri, dated 14th December, 2005 in Criminal Case No. 1907 of 2004 in the Chief Magistrate's Court at Nairobi)

JUDGEMENT

The 1st accused, *Daniel Kadurenge Mondi* (1st appellant) and 2nd accused, *Chausiku Mwita* (2nd appellant) had been jointly charged with three others, with the offence of trafficking in a narcotic drug contrary to s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994).

The particulars were that on 27th July, 2004 at about 11 a.m., at a bus station in Nairobi, the accused persons had jointly trafficked a narcotic drug, namely *cannabis sativa*, in the amount of 41 kg, with a street value of Kshs.410,000/=. The trial Court found the appellants herein to have a case to answer, after which both of them elected to make unsworn statements.

The essence of the prosecution case is that, sometime on 22nd July, 2004 a consignment of two cartons, each one filled with greenish plant-material, were booked for transportation by Kenya Bus Services, from Migori to Nairobi. Although Police suspicions of the conveyance of illicit goods led to the impounding of the said bus, at Sotik, the two cartons were somehow transferred to another bus, and reached the Kenya Bus Services base in Nairobi. Both cartons showed the name of the sender as *Chausiku Boke* (2nd

appellant herein); the intended recipient was shown as *Daniel Kadurenge Mondi* (1st appellant herein). By the time the bus reached Nairobi *P.C. Nashon Simiyu* (PW5) had alerted the bus station officials to detain the suspect parcels, for inspection. PW1 and PW2 detained the said parcels, while PW5, accompanied by PW3 (P*.C. George Omondi*) and PW4 (*P.C. Gideon Nzomo*), laid an ambush, until 7.00 pm on 27th July, 2004, when 1st appellant went to ask for the two parcels. PW1 took the identification details of 1st appellant, and ascertained that the consignment notes were in the name of 1st appellant as consignee – the consignor being 2nd appellant. PW2 then released the parcels to 1st appellant, but as soon as he left the bus-station office with the goods, the Police officers stopped him and arrested him (1st appellant), while he was in possession of the suspect parcels.

When interrogated, 1st appellant said the parcels belonged to 2nd appellant. The Police officers traced 2nd appellant at Kibera Estate in Nairobi, and she was identified by 1st appellant.

The appellants were handed over to the Anti-Narcotics Unit of the Police; an exhibit memo was prepared, and samples sent to the Government Chemist for analysis. The result was that the greenish plant material in the parcels was found to be *cannabis sativa,* and it fell within the restrictions in the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.

The 1st appellant said he did not know the content of the two parcels and was merely carrying out 2nd appellant's instructions. The 2nd appellant denied all knowledge about the illicit drugs.

It was the finding of the learned Chief Magistrate that the 1st appellant had been caught red-handed, while collecting the two parcels containing *cannabis sativa*, and he was the person named as the consignee of the two items. He did not believe either of the appellants in their unsworn defences. He found that the 1st appellant could not have been a mere messenger, as the goods were addressed to him by name: "He must be taken to have been the owner of this illicit consignment that contained bhang...and he definitely knew its contents."

The trial Court also found that 2nd appellant had borne false witness: "[The] 1st [appellant] led the Police to the house of 2nd [appellant] whom he said was the owner of the parcel. And he rightly did so because the name of 2nd [appellant] was already ...on the consignment note...." The learned Magistrate had "no doubt that she was involved in [the] dispatch of this consignment and was to be a beneficiary of the proceeds of the sale of the same."

The learned Magistrate found the prosecution case proved beyond any reasonable doubt, and dismissed the defence statements as falsehood. He convicted appellants herein, and, after taking their statements in mitigation, regarded them as first offenders, and sentenced each to life imprisonment and, in addition, each to pay a fine of Kshs.1 million.

In the grounds of appeal the appellants contended that the drugs which formed the subject of the charge did not belong to them; that the prosecution had not discharged the onus of proof resting upon it; that the sentences imposed were harsh and excessive.

Learned respondent's counsel, *Mrs. Kagiri,* contested the challenge to conviction, but conceded on sentence. She submitted that the prosecution had demonstrated that 2nd appellant had conveyed by bus two cartons of *cannabis sativa*, which had been received by 1st appellant, and that the prosecution had proved all the ingredients of the offence. Counsel urged that the conviction of both appellants was entirely safe.

As to sentence, counsel urged that even though the sentences awarded were legal, the trial Court should have considered certain circumstances before imposing sentence: in particular, the appellants were first offenders, and the sentences imposed had all the characteristics of being harsh and excessive, especially in view of the mitigation made by the appellants. Counsel urged it to have been a misdirection, when the learned Magistrate said he was bound to impose the sentences he did impose. The relevant words of the

Magistrate are as follows:

"I have considered the fact that the accused [persons] are ... first offenders. I have considered [those dependant upon them] but I find myself bound by the penalty prescribed for this offence."

Learned counsel urged that the Court should impose a more considerate sentence in respect of each of the appellants.

From the earlier review of the evidence, I have no doubts in my mind that the trial Court rightly found the appellants guilty, on the basis of the evidence adduced by the prosecution witnesses.

However, as to sentence, I am in agreement with learned counsel, that the trial Court was in error: firstly by considering itself "bound" to hand down the maximum penalty; and secondly, by failing to pay any regard to the mitigating circumstances, and to the fact that on the record, the appellants were first offenders. I would, thirdly, hold that the learned Magistrate did not take into account what may be regarded as best practices in the sentencing of offenders.

Humane considerations, which should run through the process of criminal justice, would call for a sensitivity to certain situations attending the commission of crime. In an earlier decision, in *Yussuf Dahar Arog v. Republic*, Nbi High Court Crim. Appeal No. 110 of 2006, I had attempted to set out some of the relevant principles, as contained in the following passage:

"*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.*

"Such principles would not, in my opinion, and taking into account the circumstances of this case, accord with an extremely harsh sentence such as the one in question herein. I would consider a forty-year term of imprisonment, in the circumstances of this case, to be manifestly harsh and excessive...."

My holding in the *Yussuf Dahar Arog* case, in my opinion, perfectly well represents the kind of situation brought before the Court, in the instant appeal.

The instant appeal should in principle be treated in the same way as earlier appeals entailing the same issues. A similar matter was *Kingsley Chukwu v. Republic*, Nbi High Court Crim. Appeal No. 599 of 2004, in which the appellant had been charged with the offence of trafficking in narcotic drugs contrary to s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act; and I had held that a place of sequential priority in sentencing, belonged to *fines.* The relevant passage in that appeal thus reads:

"*As regards sentence it is clear to me that, taking into account the express provisions of [the] Act..., 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."*

Against this background, I will make orders as follows:

(1) The appeal of each of the two appellants against conviction is dismissed, and the conviction entered against each is upheld.

(2) Each appellant shall pay a fine of Kshs. One Million (Kshs.1,000,000/=), and in default, the appellant so failing shall serve a term of six years in jail.

(3) *In addition, each appellant shall serve a prison term of two-and-a-half (2 ½) years – this period to be counted from the date of the judgement of the trial Court*.

DATED and DELIVERED at Nairobi this 30th day of July, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Kagiri

Appellants in person