REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 196 OF 2007

-BETWEEN-

ABDUL MUNIALO SADIK.....APPELLANT

-AND-

REPUBLIC…….....RESPONDENT

(An appeal from sentence imposed by Principal Magistrate Mrs. J. Wanjala on 19th October, 2006 in Criminal Case No. 905 of 2006 at the Nairobi Law Courts

JUDGEMENT

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, 1994 (Act No. 4 of 1994). The particulars were that on 23rd May, 2006, at Marikiti Market in Nairobi, he trafficked in narcotic drugs, in the form of 60 sachets of Heroin, with an estimated value of Kshs.6000/=, in contravention of the said Act.

Before Senior Principal Magistrate, ***Mrs. R. A. Mutoka*** on 25th May, 2006 the appellant pleaded not guilty; he pleaded not guilty again before Principal Magistrate ***Mrs. J. Wanjala*** on 22nd September, 2006 after an amendment to the charge was effected. Then, at a mention on 16th October, 2006 before Senior Resident Magistrate ***Ms. L. Nyambura***, the appellant indicated that he wished to change his plea, and to plead guilty. At the next mention, before the learned Principal Magistrate, ***Mrs. Wanjala***, the appellant pleaded guilty, and the facts were then read out by the prosecutor.

The facts were that, on 23rd May, 2006, Police officers from the Anti-Narcotics Unit at the Railways Police Station received information that the accused was peddling *bhang*, within Wakulima Market. The Police officers visited the *locus in quo*, and laid an ambush; and they were able, after half an hour, to locate the appellant herein who was identified to them by an informer. When the officers stopped the appellant and conducted a search on him, they recovered 60 sachets of a white powdered substance which was suspected to be a narcotic drug; the substance was stuffed in the appellant's right-leg sock. The officers also recovered the sum of Kshs.4,789/05 which was contained in a black wallet; this money was suspected to be proceeds from the sale of narcotics. The appellant was thereupon arrested and taken to Railways Police Station, where he was charged with the offence.

The sachet-exhibits were forwarded to the Government Chemist with an exhibit memo, for ascertainment

whether the sachets contained prohibited drugs; and the same was examined and analysed by ***Mr. Habil Omondi***, a Government Analyst, and confirmed in a report dated 21st June, 2006 to contain Heroin.

After the appellant admitted the facts as true, he was convicted on his own plea of guilty. As there were no records on the appellant's antecedents, the learned Magistrate treated him as a first offender, took into account the mitigation statement, and sentenced him to serve ten years' imprisonment, and to pay a fine of Kshs.18,000/=, or, in default, to serve a further six months in jail.

In the grounds of appeal against sentence, the appellant states as follows:

i. he is "most remorseful and deeply regrets" the damage occasioned by the drugs he was selling;

ii. he was a first offender, and this should be taken into account;

iii. he will be unable to care for his dependant family, if he remains in jail;

iv. the sentence imposed on him was "harsh and severe";

v. he has now learnt his lesson, and so the sentence imposed by the Magistrate's Court be reviewed, and a lesser sentence imposed.

The appellant came before the Court armed with written submissions, which elaborated on the grounds of appeal already set out. He made a short oral presentation, in which he said he was in ill-health, and asked the Court to lessen the penal burden weighing upon him.

Learned counsel ***Ms. Gateru***, however, urged that the sentence imposed was not harsh or excessive, as the law provided for a maximum of life imprisonment. Counsel urged that the trial Court had taken into account the mitigation statement, and had factored into the sentence the fact that the appellant was a first offender. ***Ms. Gateru*** urged that there was nothing to show that the trial Court had not acted judiciously in imposing sentence; and so the appeal should be dismissed, and the sentence affirmed.

In the trial from which this appeal arises, there was no specific reference to the terms of s.4(a) of the Narcotic Drugs and Psychotropic Substances Control Act, 1994. This was unfortunate, as that Act, in a certain particular respect (that relating to *fines*) prescribes the minimum terms of a valid sentence. That section reads as follows:

> ***"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....."***

I have no doubts that the learned Magistrate in the trial Court, when she passed sentence, had not adverted to the implications of the foregoing provision. It is not, for this Court, an issue of first impression. In several cases, notably ***Kingsley Chukwu v. Republic***, Nbi High Ct. Crim App. No. 599 of 2004, I have had to deal with this question; and in that case I had thus stated;

> ***"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."***

I find the very same error in the sentence imposed by the trial Court herein, which is thus expressed:

"Accused person is sentenced to serve ten years' imprisonment and a fine of Kshs.18,000/= or six months in jail."

It was mandatory to start with a *fine*: of either Kshs.1 million, or three times the value of the illicit drug, whichever was the greater. And failing due payment of that fine, then a *default prison term* would be imposed. Then, at a *second level*, a separate term of imprisonment would have been imposed, the length of this, by normal judicial practice, being determined on the basis of *discretion.*

If I determined this appeal on the foregoing principles, then it follows that the penalty already imposed against the appellant would be considerably enhanced. But he was *not warned* of that possibility before the appeal was heard. Had the respondent addressed itself to the requirements of the law, it would have *given notice that enhancement of sentence would be sought*, so that this Court in its appellate capacity, would be able to exercise its jurisdiction fully, by rectifying such errors of law as would be found. If such a warning were given, the appellant would then have been at liberty to elect whether to still pursue the appeal, or withdraw the same. If the appellant would have, in the circumstances, elected withdrawal of the appeal, then, without any doubt, the outcome of an appeal would be *prejudicial* to him, and indeed, would be *oppressive.* It is not the principle of the criminal law that, where there are two options open to an appellant, the appellant must be subjected to the *harsher* of the two.

On the foregoing principles, the appeal proceedings herein must be declared a mistrial; and specifically I will make orders as follows:

1. The appeal proceedings are declared a mistrial, and are hereby vacated.

2. This matter shall be listed for mention, on the basis of priority, before a single Judge, other than the Judge who heard it before.

3. The respondent's counsel shall give notice to the appellant that the trial proceedings had errors which the High Court would be asked to consider rectifying, and that such rectification could result in enhancement of sentence.

4. If the appellant shall elect to withdraw the appeal, then the same shall be terminated, and the file closed.

5. If the appellant shall elect to still be heard on appeal, then there shall be a fresh hearing of the appeal against sentence.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 24th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person