REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 599 OF 2004

BETWEEN

KINGSLEY CHUKWU……...……..……. APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An appeal from the Judgement of Chief Magistrate Mr. A. Muchelule dated 1st December, 2004 in Criminal Case No.2667 of 2003 at the Nairobi Law Courts)

JUDGEMENT

The appellant, ***Kingsley Chukwu***, 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). The particulars of the charge were that the appellant, on *24th October, 2003* at Jomo Kenyatta International Airport in Nairobi, trafficked in 9.605 kg. of narcotic drugs, namely D*iacetylmorphine*, commonly known as heroin, valued at Kshs.9,605,000/=, in contravention of the provisions of the said Act.

The appellant, who is a national of Nigeria, had travelled on the Kenya Airways Flight No. KQ 311 which landed at the Jomo Kenyatta International Airport from Dubai on the morning of *24th October, 2003*. This flight was scheduled to proceed to Lagos, now as No. KQ 432, on the material day. The Anti-Narcotics Police officers at the Jomo Kenyatta International Airport did not allow the appellant to proceed to Lagos; they arrested him, as they had information that he had narcotic drugs in the luggage compartment of the aircraft. In the meantime, the three items of luggage identified as belonging to the appellant had already been loaded into the luggage compartment of Kenya Airways Flight KQ 432 which was about to depart for Lagos. PW1, Police Force No. 20230742 ***Inspector Emmanuel Mwasi*** of Jomo Kenyatta International Airport, at this moment, and in the presence of senior Police officers, had requested to see the pilot of flight No. KQ 432 and had asked him to have the said three pieces of luggage return with the return flight from Lagos (which would be Flight KQ 433); and indeed the aircraft took off for Lagos, and returned with the said luggage while the appellant was still held in custody at the Jomo Kenyatta International Airport. The three items of luggage were taken out and run on the conveyor belt, and the appellant is said to have identified them in the presence of Police officers including PW4. The pieces of luggage, which were black in colour, were taken to the Airport security offices where they were opened up, and drugs found in them. They were locked with padlocks, and the appellant denied having the keys; and so it became necessary to force open the zip-locks. The pieces of luggage contained 59 motor vehicle coils,

and electrical spare parts. So heavy were the coils, they caused suspicion; and so PW1 and his colleagues broke them open. Inside each of the 59 coils, was found a ball; and each ball contained a whitish-to-brownish powder which was suspected to be a narcotic drug. A Government analyst (PW2) was summoned who took samples from each of the 59 balls; and after analysis the content of the balls was found to be heroin. The 59 balls weighed 9.6 kg, and their street value was estimated to be Kshs.9,605,000/=.

After PW1 produced the drug-exhibits on 5th November, 2003 they were destroyed at the Nairobi Law Courts in the presence of the trial Magistrate and the appellant, and a certificate of destruction was duly made.

PW2, ***Habil Oketch Omondi*** testified that he is a Government Analyst at the Government Chemist Department, and he had sampled and analysed the 59 ball-like pellets of substance which are the basis of the charge, in the presence of the appellant. PW2 had examined the content of the pellets, and found them to be heroin – a narcotic drug. He prepared and signed a report containing his findings – and the same was exhibited in the trial Court.

PW3, Police Force No. 48783 ***Police Constable Sadira Ole Roime***, of the Anti-Narcotic Unit at the Jomo Kenyatta International Airport, was on duty at the Airport on 24th October, 2003. The witness had already received intelligence tip-off, and was profiling passengers disembarking from flight KQ 311 from Dubai. He was seeking to identify a passenger by the name ***Kingsley Chukwu*** who was travelling on KQ311, from Chennai in India, through Dubai. At about 6.30 a.m. PW3 was able to pick out ***Kingsley Chukwu***, and he inquired of the passenger whether he had any baggage. While acknowledging that he had items of luggage transiting to Lagos, he had no documentary record for this; his luggage-tags affixed to the ticket apparently had been removed, so it was impossible to see indications of luggage passing through Jomo Kenyatta International Airport to Lagos. PW4, therefore, rushed to the Kenya Airways Office to obtain a computer print-out on the relevant flight; and this showed that ***Kingsley Chukwu*** had three items of luggage transiting through the airport: 0176-EK-656-302; 0176-EK-656-303; and 0176-EK-656-304 – and these bore the name ***Kingsley Chukwu.*** The name as set out on the computer print-out, coincided with the name shown on the name-tags on the three items of luggage, though on the tags, the name ***Kingsley*** was shortened to ***King.*** The number of items of luggage shown on the computer print-out, agreed with the appellant's acknowledgement, that he had three such items. It was not possible to retrieve the three items of luggage at the time of the aircraft's departure to Lagos; in PW3's words: "I did not lose sight of the accused all along. He was under arrest, and in my charge. When we went to the air site, all luggage [was] tied together and [could] not be retrieved. It was a huge bulk of bags securely tied with tags." To the same effect PW4, Police Force No. 48218 ***Sgt. Momo Shamallah*** testified: "We went to the apron to see if we could get the bags. It was not possible as all the bags were heaped together. I talked to ***Flight Captain Kiniti*** and requested he bring back the three bags from Lagos."

PW4 testified that the appellant's ticket had shown Madras in India as the place of origin; and he changed flights at Dubai to come through Nairobi by KQ 311. On flight KQ 311 there was only one passenger by the name ***Chukwu Kingsley***, namely the appellant, and while in Nairobi, he did not have access to his three items of luggage until the time they were opened up by the Jomo Kenyatta International Airport Anti-Narcotics Police. PW4 testified that on flight KQ 311 there were two passengers by the name ***Chukwu,*** namely ***Chukwu Edwin*** and ***Chukwu Kingsley***. The appellant's passport showed his name as ***Kingsley Chukwu***, and it bore his photograph which was also shown on the computer print-out.

PW5, ***Flight Captain John Kiniti*** who flew flight KQ 432 from Nairobi to Lagos testified that, due to delay in the departure of his flight from Nairobi on 24th October, 2003 he had been requested by ground staff to have certain items of luggage returned from Lagos, with the return flight because the Anti-Narcotics Police had arrested a passenger who came on KQ 311 flight from Dubai in connection with the content of the said luggage. The Nairobi Airport staff, in the words of PW5, "informed me they would alert ground staff in Lagos to retrieve the luggage, to come back on return flight…I accepted, and we left at 8.00 a.m. I did not see the luggage. I did not see the arrested person. In Lagos I handed [over] the flight to the return crew." On cross-examination, PW5 clarified that: "As Captain, I don't handle luggage." And on re-examination, the witness further said: "Loss of baggage is reported to staff of the airline, not to the

Captain. Baggage is [shown] on the computer, and loss may be discovered at destination."

The appellant gave sworn evidence in which he said he had been on Kenya Airways Flight No. KQ 311 from Dubai to Nairobi on 24th October, 2003, and that he had on him only his passport, as well as three pieces of luggage – a suitcase and two polythene bags. The appellant testified that he had carried all his luggage as hand luggage, and had no item in the craft's luggage container. He denied that he had shown the Police officers any baggage of his at the conveyor-belt, or anywhere else. He denied that the three black bags which had been found to contain narcotic drugs, were at all his. The appellant said his air ticket did not show any luggage-record tags, because he had checked-in no luggage. He said he had not been asked to identify any luggage at all, by the Airport Police officers. He said his name is ***Kingsley Chukwu***, as distinct from "King", which was shown on the name tags attached to the three pieces of luggage found to contain narcotic drugs. The appellant said it was the Police who told him that drugs had been found in the said three bags; he did not see those drugs. He said the three bags were not opened in his presence; he had refused to sign the search certificate. The appellant said he had never dealt in drugs at any time in his life.

On cross-examination, the appellant said he saw the Flight KQ 311 computer printout for the first time in Court, and that it did not show that the three items of luggage in question belonged to him. He acknowledged that luggage cannot be taken on board an aircraft without a tag showing the owner thereof.

The learned Chief Magistrate, after hearing submissions, directed himself as follows:

> **"The Kenya Airways passenger manifest…shows that on the flight was passenger *Chukwu Kingsley*. The other passengers with names [close to this] were *Chukwu Edwin* and *Chukwuka Anthony*. The accused's passport shows he is *Chukwu Kingsley*. He agrees in sworn evidence that he was on this flight but denies he had any checked-in luggage. He told the Court that all….he had was hand luggage. It is for the prosecution to establish beyond doubt that the accused *Chukwu Kingsley* is the same as *Chukwu Kingsley* on exhibits 15 [KQ 311 computer print-out] and 22 [passenger manifest] and that the name *CHUKWU/KING* on the tags refers to him and therefore, that he was the owner of the luggage. It is quite clear to me that exhibits 12, 15, 16, 17, 18 and 22 all taken together confirm that these [pieces of luggage] were checked in by the accused**."

The learned Chief Magistrate considered it material that the three pieces of luggage had to be broken open, as the appellant did not have the keys, just as it was also material that neither the boarding pass nor the air ticket held by the appellant, was found with luggage-tags. From this fact, the trial Court observed that: "If someone is carrying illicit drugs on an aircraft, he would not at all want to be identified with them."

The learned Magistrate relied on the evidence of two boarding- passes used by the appellant, to discount any possible significance to the indication of names on luggage tags as ***CHUKWU/KINGSLEY,*** or ***CHUKWU/KING,*** or ***CHUKWU/K.*** The boarding-pass used by the appellant between Chennai and Dubai read: ***CHUKWU/KINGSLEY***; but the one he used between Dubai and Nairobi read: ***CHUKWU/K.***

The learned Chief Magistrate noted that, from the testimonies of PW3, PW4 and PW6, the three pieces of luggage found to contain narcotic drugs had been forced open in the presence of the appellant, even though this is denied by the appellant. What was more important, as the Court held, was the fact that the three pieces of luggage were found to contain a substance which was tested by PW2 and found to be a narcotic drug. This led to the conclusion, the trial Court held, that "the luggage that [the appellant] was conveying from Dubai to Nairobi and to Lagos contained heroin."

The learned Chief Magistrate noted that the charge against the appellant as formulated, had omitted to state in what manner the appellant had been trafficking the heroin; but he treated that omission as immaterial; in his words: *"However, the evidence clearly showed [that] the accused was conveying the drugs through the aircraft. I find that the failure to indicate 'conveying' as the mode of trafficking…did not prejudice the accused…"*

The learned Chief Magistrate found the charge proved beyond all reasonable doubt, convicted the appellant, and sentenced him to a *fifteen-year term* of imprisonment.

In his petition of appeal filed on 9th December, 2003 the appellant contended that the trial Court erred in fact and in law, in connecting the flight KQ 311 passenger-manifest entry to the name-tag denoting the appellant, without ascertaining the origin of the offending luggage; by placing upon him burdens to prove that ***CHUKWU/KING*** and ***CHUKWU/KINGSLEY*** were different persons; by assuming the appellant had voluntarily signed the Police inventory as recorded during luggage-search; by not recognising that the prosecution case was marred by material contradictions, especially in the evidence given by PW1, PW2, PW4 and PW6; by not construing the testimony of PW5 (***Flight Captain Kiniti***) in the appellant's favour; by giving an improbable interpretation to the fact that during the airport search, no luggage-tag was found on the appellant; that it was not proved that the offending baggage was the appellant's property; that the destruction of the narcotic drugs before the conclusion of the case, constituted a miscarriage of justice.

The appellant later filed supplementary grounds of appeal, which learned counsel ***Mr. Ondieki*** took up, in addition to the ones filed earlier.

Mr. Ondieki submitted that the prosecution case had rested wholly on *circumstantial* evidence, but that this evidence fell short of the required legal standards, as a condition to a finding of guilt. He relied on the Court of Appeal for Eastern Africa decision in ***Rex v. Kipkering arap Koske & Another*** (1949) EACA 135: "***in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."***

On the foregoing principle, ***Mr. Ondieki*** questioned the testimonies of PW1 and PW5: although the three pieces of luggage mentioned in the charge went by Kenya Airways Flight KQ 432 from Nairobi to Lagos and back, those who handled the luggage in Lagos had not been called to come and testify; and those who handled the baggage at the Jomo Kenyatta International Airport also did not come to give evidence; so learned counsel contended that there were gaps in the chain that would link the luggage to the appellant herein, in particular as the crucial individual who had tipped-off the JKIA Anti-Narcotic Police about the drugs the subject of the charge, too, had not been called as a witness. ***Mr. Ondieki*** urged: "Where there are gaps, they create doubt; and any such gaps are to be construed in favour of the appellant."

Learned counsel also contested the appellant's conviction, on the basis of ss.59 and 60 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. Those sections are concerned with *international assistance* in drug-investigation and drug-related proceedings. The tenor and effect of those provisions is, however, as it appears to me, only *directory* (*and not mandatory*). S.59(1) of the Act provides that, for the purposes of an investigation or of proceedings under the Act, the Attorney-General *may request* an appropriate authority of another country to arrange for –

> ***"(a) evidence to be taken, or information, documents or articles to be produced or obtained in that country; or***
>
> ***(b) a warrant or other instrument authorizing search and seizure to be obtained and executed in that country; or***
>
> ***(c) a person from that country to come to Kenya to assist in the investigation or proceedings; or***
>
> ***(d) a restraint order or forfeiture order made under this Act to be enforced in that country, or a similar order to be obtained and executed in that country; or***
>
> ***(e) an order or notice under this Act to be served on a person in that country; or***
>
> ***(f) other assistance to be provided, whether pursuant to a treaty or arrangement between Kenya***

and that country or otherwise."

Learned counsel also contended that the Anti-Narcotic Police had acted in breach of s.72 of the same Act, by *not immediately stopping* the three pieces of luggage in question once they entered Kenyan territory. The said section, however, is also expressed in *directory terms,* and reads as follows:

> "(1) Any police officer, or any other person authorized in writing by the Commissioner of Police for the purposes of this section, who has reasonable cause to suspect that any person is in possession of, or is removing, any narcotic drug or psychotropic substance in contravention of this Act may –
>
> ***a) stop and search that person and any conveyance in which he is and any package in his possession or under his control;***
>
> ***b) seize and detain for the purposes of proceedings under this Act any narcotic drug or psychotropic substance or any other thing (including any conveyance) which appears to be evidence of the commission of any offence under this Act, found in the course of the search; and***
>
> ***c) arrest and detain the person until he can be brought before a Magistrate as soon as is reasonably practicable, and dealt with according to law."***

It was ***Mr. Ondieki's*** contention that the Anti-Narcotic authorities had failed to comply with the law when they allegedly learned that three bags in the aircraft's cargo-hold contained narcotic drugs, and yet they still *allowed* the craft to take off to Lagos.

Such a contention, however, would not – I think – be consistent with the directory mode in which the whole of s.72 of the Narcotic Drugs and Psychotropic Substances (Control) Act, is cast. A substantial *discretion* is still left with the police authorities, as regards the manner in which they will take action in any particular case, to give fulfilment to the intent of the Act which is clearly stated in the long title thereto.

Mr. Ondieki submitted that, mere suspicion was the basis of the conviction entered against the appellant by the trial Court. To justify this contention, learned counsel laid his client's case around the trial Court's remarks following conviction, but before sentence. The learned Chief Magistrate remarked:

> ***"For quite some time Kenya, and its Jomo Kenyatta International Airport have been considered as destinations and transit points…for drug trafficking. Yet the people responsible for the bad name and image are foreigners, especially Nigerians…"***

This, counsel urged, was a gross misdirection and it suggested that conviction was based not on evidence, but on personal background and suspicion.

Mr. Ondieki argued that the several factors taken by the trial Court to establish guilt, were compatible with the appellant's innocence: that he had not been linked to the bags containing narcotic drugs; and that there was more than one person on Flight KQ 311 going by the name ***Chukwu***, and the Police did not interview any of the passengers except ***Kingsley Chukwu***.

Counsel also contended that the bags containing the narcotic drugs, since they were not found on the appellant, and they were flown to Lagos while the appellant remained in Nairobi, could not be said to have been under the *control* of the appellant and he would therefore, know what they contained *at all times.* He cited in support of this argument the Court of Appeal decision in ***Hussein Salim v. Republic*** [1980] KLR 139 in which it had been held:

> ***"To establish possession for the purpose of the Dangerous Drugs Act, Section 10(e), the accused must be shown to have such access to and physical control over the thing (or substance) that he is in a position to deal with it as an owner could, to the exclusion of***

> ***strangers; but it is not necessary to prove that the accused had title nor that he has access to it to the complete exclusion of all other persons***…"

On the basis of the principle in the ***Hussein Salim*** case, ***Mr. Ondieki*** urged that the appellant in the instant case should have been shown to have had such *access* to the items of luggage containing the narcotic drugs, "as to *be able to deal with it to the exclusion of others*." He urged: "The prosecution never showed that the appellant was in exclusive control [of the three pieces of luggage]."

Learned counsel contended that conviction of the appellant had not been based on proof-beyond-reasonable-doubt. He urged that somebody other than the appellant could have owned the three pieces of luggage in which the narcotic drug was found; the ground staff at Jomo Kenyatta International Airport handled the three bags, just as did also the ground staff at Lagos Airport – so they might know more about them than did the appellant. Such ground staff, ***Mr. Ondieki*** urged, ought to have been called as witnesses. And in support of that contention, learned counsel cited the East African Court of Appeal case, ***Bukenya & Others v. Uganda*** [1972] E.A. 549, in which a principle was stated as regards the calling of witnesses to prove a particular point, in a criminal matter. In that case, if some particular evidence had been called, this would have resolved the question whether conviction should be in respect of ***murder***, or ***manslaughter;*** but such evidence was not called, and the trial Court proceeded to convict for murder. It was held (pp.550 – 551):

> ***"It is well established that the Director [of Public Prosecutions] has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case… Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success."***

Mr. Ondieki urged the Court, in the instant appeal, to draw the inference that the testimonies of ground staff at Jomo Kenyatta International Airport and at Lagos Airport if they had been called, would be adverse to the prosecution case. Learned counsel contended that the design of witness-testimony in the trial, had been orchestrated such as to exclude important witnesses, and that this had been prejudicial to the appellant. Counsel contended that so long as the person who gave the Anti-Narcotic Police the tip-off regarding illicit drugs on Flight KQ 311 was not called as a witness, there was "no basis for convicting the appellant."

Learned counsel also urged that the destruction of the impugned narcotic drugs before most of the witnesses had testified, compromised the quality of testimony by the remaining witnesses, as there were no longer any narcotic drugs that they could make reference to. The hurry in destroying the drug-exhibits, learned counsel urged, had no justification, and was a demonstration of wrong principles being applied by the trial Court. In aid of this contention, learned counsel cited a passage in the East African Court of Appeal decision, ***Okethi Okale & Others v. Republic*** [1965] E.A. 555, at p.557:

> ***"…in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches***."

Counsel perceived as a dangerous theory in the trial-Court decision, the reference to the role of persons of Nigerian nationality, in connection with drug-crime at the Jomo Kenyatta International Airport; and he contended that it was precisely such a theory that "obscured the Magistrate's eyes against evidence and

justice."

Mr. Ondieki urged that there had been a contradiction between the testimony of PW1 and PW5: PW1 had said he requested the Lagos-bound pilot (PW5) to return to Nairobi with the suspect luggage which carried narcotic drugs, while PW5 testified that the said request was made to him by ground staff. Counsel urged that the said contradiction should have been resolved in favour of the appellant.

Mr. Ondieki urged that the charge-sheet was defective, insofar as it did not state the mode of drug trafficking that was the subject of the charge against the appellant. He submitted that such a shortcoming in the charge, rendered the trial contrary to the appellant's rights to fair trial, in the terms of s.77(2)(b) of the Constitution.

Learned State Counsel, ***Mr. Makura*** contested the appeal, and urged that conviction be upheld. He submitted that the prosecution, through their six witnesses, had proved the case against the appellant beyond reasonable doubt. Contrary to learned counsel ***Mr. Ondieki's*** contention, ***Mr. Makura*** urged that the prosecution case had been made on the basis of *direct,* rather than circumstantial evidence.

Learned counsel ***Mr. Makura*** urged that the appellant had been properly identified as the owner of the three bags which contained the illicit drugs, the basis of the charge in the trial Court. PW4 had used a computer print-out from the Dubai-to-Nairobi Kenya Airways flight KQ 311, to identify the luggage belonging to the appellant, ***Kingsley Chukwu***; and the said luggage bore the numbers on the computer print-out, as well as the particulars of the appellant written in brief form, CHUKWU/KING. In this way, it was urged, PW4 was able to connect the three pieces of luggage to the appellant herein. And a search in the said luggage revealed the illicit drugs which led to the charge brought against the appellant.

Mr. Makura submitted that the more general testimony of PW5, ***Flight Captain Kiniti*** who flew the Kenya Airways Flight KQ 432 to Lagos, neither contradicted other prosecution testimonies, nor inured in favour of the appellant's case. PW5 had indicated that he had received information in Nairobi that the three pieces of luggage in the cargo section of Flight KQ 432 should return to Nairobi with the aircraft, and he had passed on that information to those taking over from him on the return flight.

Mr. Makura noted that PW6, Police Force No. 51700 ***Cpl. Jestimorte Malit*** of C.I.D. Headquarters, Scenes of Crime Section, had taken detailed photographs of the said three pieces of luggage which had arrived from Dubai on Flight No. KQ 311, on 24th October, 2003 and he had made a report which was exhibited in the trial Court, along with the said luggage and its contents. Such evidence, ***Mr. Makura*** urged, was not circumstantial but direct.

Mr. Makura submitted, and quite meritoriously, with respect, that allowing the three pieces of luggage to be flown to Lagos, on Flight KQ 432 before being returned to Nairobi was not contrary to the requirements of ss.59, 60 and 72 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 as contended for the appellant. He urged that, as the appellant himself was already apprehended and was in custody in Nairobi, there was nothing improper in the luggage alone being flown to Lagos and then returned to Nairobi.

Learned State Counsel submitted that, contrary to the argument made on behalf of the appellant, suspicion alone was not the basis of the conviction recorded by the trial Court. Reliance on a mention of *Nigerian nationality*, in connection with drug-crime at the Jomo Kenyatta International Airport, as a basis for impugning the conviction, ***Mr. Makura*** urged, was a misapprehension of the learned Chief Magistrate's judgement, which had an entirely different *ratio decidend*i founded on reliable testimony. ***Mr. Makura*** urged, and, I think, quite meritoriously, that the reference to past history of drug incidents at the airport, involving Nigerian nationals, was only *obiter dictum*. As already noted, the reference to Nigerian nationals was made after *conviction* had already been recorded – and hence the said reference might conceivably be associated with *sentence*, rather than with conviction. Counsel considered, moreover, that s.60(1)(o) of the Evidence Act (Cap.80) which empowered the Courts to take judicial notice, *inter alia*, of "all maters of general or local notoriety," perfectly entitled the learned Chief Magistrate, as a matter of law, to make the observations in question.

Mr. Makura sought to distinguish the Court of Appeal decision, ***Mary Wanjiku Gichira v. Republic,*** Crim. App. No. 17 of 1998 which related to the cautions to be taken when relying on circumstantial evidence to convict, and which case the appellant had invoked. In the ***Wanjiku Gichira*** case the relevant charge was murder; and the Court made the following remarks:

> ***"We are satisfied upon a careful analysis of the evidence that the circumstances relied upon in the instant case do not irresistibly point to the appellant as the one who had started the fire inside the house of her deceased husband. We have come to the conclusion that though there were circumstances of suspicion, the circumstantial evidence properly considered did not establish a case against the appellant with the degree of certainty which would justify a finding that the charge was proved beyond reasonable doubt or that the conviction was safe. Suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence."***

Mr. Makura submitted that the instant case, unlike the ***Wanjiku Gichira*** case, is a case of *direct*, and not circumstantial evidence; and hence the cautions which in the other case the Court associated with the admission of circumstantial evidence, were not applicable in the same way in the instant case.

Learned counsel contested the contention made for the appellant, that in the same aircraft in which the appellant had flown from Dubai to Nairobi, he was not the only one by the ***Chukwu,*** and so there were doubts in identification, the benefit of which should have been taken in favour of the appellant. Apart from ***Kingsley Chukwu*** there had been ***Anthony Chukwu***, and also one ***Chukwuka***; and these were different identifies, quite apart from the fact that the luggage containing the prohibited drugs had been accurately shown to have belonged only to ***Kingsley Chukwu.***

Mr. Makura also contested the claim that the prohibited drug was actually not in the *possession* of the appellant when he was apprehended. The charge, counsel urged, was not possession, in the terms of a section of the decision relied on by the appellant, ***Mohamed Ghani Taib v. Republic,*** Criminal Appeal No. 183 of 2002 (***Makhandia, J***) (at p.40 – which refers to the Dangerous Drugs Act (Cap.245)). The charge in the instant case was trafficking in the illicit drug; and in this regard it was not necessary to prove that the appellant had *title* or *exclusive access* to the drug in question. Counsel relied on the definition of "possession" in the Penal Code (Cap.63), to denote the level of proprietorship over the drug in question, which would be sufficient to sustain a charge of *trafficking*. By s.4 of the *Penal Code*, "possession" is thus defined:

> ***'(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them****….'*

The foregoing definition, ***Mr. Makura*** urged, would be the applicable one in relation to the charge of trafficking in drugs, such as had been brought against the appellant.

Learned counsel submitted that the appellant could not very well make the claim that he should be set free, merely because certain particular witnesses were not called by the prosecution. He urged that the principle in ***Bukenya & Others v. Uganda*** [1972] E.A. 549 would not apply in this instance, because that case carried the principle that, only when the prosecution has presented a *threadbare case*, in terms of evidence, can the inference be made that witnesses not called, had they been called, would have given testimony adverse to the prosecution. In the instant case, counsel urged, the evidence adduced by the prosecution was overwhelming; and besides, it was a provision of statue law (s.143 of the Evidence Act (Cap.80)) that *no particular number of witnesses* was, in general, required to prove a case. Counsel urged further that the appellant himself, had had the liberty to call any particular witnesses, if he wanted them. Counsel urged that the due process of trial was followed in every respect, as required under s.77 of the

Constitution.

Mr. Makura contested the submission made for the appellant, that the drug-exhibit should not have been destroyed after its production in Court. He urged that it was the operative policy and practice of the Courts to destroy drug-exhibits once they had been produced in Court.

Learned counsel submitted that while the charge as drawn, had not specified the mode of trafficking of the prohibited drug, this by itself did not contravene s.137 of the Criminal Procedure Code (Cap.75) which relates to rules of framing charges and informations. In any case, counsel urged, if there was found to be a defect, then this Court could cure it by virtue of s.382 of the Criminal Procedure Code which stipulates that "*no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial…"* Counsel noted that the learned trial Magistrate had already considered the same question, and held that the appellant had suffered no prejudice on that score.

Mr. Makura, however, considered that the prison term of 15 years imposed on the appellant was excessive, in the light of the provisions of s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. That section 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; or***
>
> ***b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years."***

On the basis of the foregoing provisions, ***Mr. Makura*** submitted that the lawful sentence would have been, in the first place, a fine of Kshs.28,815,000/=; 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.

The role of a first appellate Court has been repeatedly stated in authoritative judicial decisions. This role is thus stated in the Court of Appeal's recent decision in ***James Otengo Nyarombe & Two Others v. Republic,*** Criminal Appeal No. 184 of 2002:

> ***"It is trite that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and to draw [conclusions] only based on the evidence before it. In the same way a court hearing a first appeal (i.e., a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so, the first appellate court would give allowance for the same."***

In this judgement I have reviewed all the evidence taken before the trial Court; I have given due attention to the submissions of learned counsel on both sides; I have considered the authorities placed before me; and I have keenly followed milestones in the Judgement rendered by the learned Chief Magistrate on 1st December, 2004.

I find myself more in agreement with the line of submissions presented by learned State Counsel ***Mr.***

Makura, on the question whether this is a typical case of direct or of indirect evidence – more so than with the submission on that point, made for the appellant.

Kenya Airways Flight KQ 311 flew into the Jomo Kenyatta International Airport from Dubai on 24th October, 2003 carrying in its cargo-hold three pieces of luggage, among others. The three pieces of luggage, among others. The same details were entered on computer, and so an accurate print-out could be generated showing the identities of the three pieces of luggage; and on the three items themselves, tags were attached showing that the passenger who checked them in was ***CHUKWU/KING***. The same three items of luggage were more fully accounted for in the computer record as being the property of ***CHUKWU/KINGSLEY.***

By s.60(1)(o) of the Evidence Act (Cap.60), this Court is enjoined to take *judicial notice* of "all matters of general or local notoriety." I would take judicial notice that the computer process that generated the tag-names and numbers to be inscribed on the three items of luggage, is the same one that generated the Kenya Airways print-out in respect of the Dubai-Nairobi Flight, No. KQ 311; and therefore, the names appearing on the print-out, which themselves would have come from the passenger's passport, would perfectly match the name-indications on the tags attached to the pieces of luggage themselves. Therefore, it would follow that the tag-names ***CHUKUW/KING*** on the three pieces of luggage, did refer to the fuller name, ***CHUKWU/KINGSLEY*** on the computer print-out. This is, I believe, a mechanically accurate record, in respect of which *direct evidence* was provided by witnesses, in particular, PW4, Police Force No. 48218 ***Sgt. Momo Shamallah***.

I hold, therefore, that the three pieces of luggage, 0176-EK-656-302, 0176-EK-656-303 and 0176-EK-656-304 which arrived on Flight KQ 311 from Dubai on 24th October, 2003 *were* the property of ***Kingsley Chukwu***, the appellant herein.

Although by the definition of "possession" in s.4 of the Penal Code (Cap.63) there would be no doubt that the three pieces of luggage were indeed *possessed* by ***Kingsley Chukwu,*** as they came aboard Flight KQ 311 from Dubai – and so he was clearly, then, responsible for their narcotic-drug content – learned counsel ***Mr. Ondieki*** has raised doubts regarding such *interventions* as might have touched the luggage as it was flown from Nairobi to Lagos and back, before being produced in Court as exhibits.

As is already clear from earlier findings in this Judgement, there would have been no breach of the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, merely on account of the fact that the Anti-Narcotic Police in Nairobi did not search and seize the three bags at the beginning, but allowed them to be flown to Lagos and back, before they were seized and inspected. For all the relevant provisions of the statute (ss.59, 60, and 72) are *directory* and not *mandatory*; they confer *power and discretion* upon the Police, and create some leeway for the Police, to discharge their mandate in the context of responsible exercise of *discretion*. So it was perfectly in order, for the Anti-Narcotic Police to seize and inspect the luggage later rather than sooner.

But, inherent in the scope of discretion for the Police, is the loophole which learned counsel ***Mr. Ondieki*** is raising as a ground of appeal: that the three pieces of luggage were then touched by airport staff, in Nairobi and in Lagos, and what did such staff do to the luggage? Why are such staff not called as witnesses? ***Mr. Ondieki*** indeed urges the scenario that, the failure to call such witnesses, should be taken by this Court as a signal that they would give testimony adverse to the prosecution.

State counsel ***Mr. Makura***, on the foregoing point, urged that overwhelming evidence implicating the appellant had already been produced; and so there could be no inference that evidence not produced would have in any way weakened the prosecution case: ***Bukenya & Others v. Uganda*** [1972] E.A. 549.

As already noted, the documentation of Kenya Airways luggage movements and identifications, at least as regards Flight KQ 311, was computerised, and managed in an automated mode. There is, I think, no basis for supposing that a different luggage-management mode would have been adopted for the Kenya Airways Flight KQ 432 to Lagos, or for the return flight from Lagos to Nairobi, KQ 433. In such an automated process of luggage management, what was the role of ground staff, whether at the Jomo

Kenyatta International Airport or at Lagos Airport? Ought such ground staff to have been called as witnesses, to show that when the three pieces of luggage were flown to Lagos from Nairobi, nobody interfered with them?

I do not think so. Firstly, this Court will take *judicial notice* that the computerised tracking of the three pieces of luggage as they moved between Nairobi and Lagos and back, would have allowed no room for ordinary intervention by ground staff, especially if it was clear, as it was in this case, that the bags when they returned from Lagos to Nairobi, were *still locked*. Such judicial notice may be taken by virtue of s.60(1)(o), on a matter of general notoriety; besides, I believe such a position, taking into account the current sophistications in air-travel, and in the adoption of standard procedures by airlines, merits the cover of a recognised presumption of law: *omnia praesumuntur rite et solemniter esse acta* – all acts are presumed to have been done rightly and regularly.

It follows, as this Court finds, that the three pieces of luggage which came to Nairobi on Kenya Airways Flight KQ 311, then were flown to Lagos on Kenya Airways Flight KQ 432 and back to Nairobi on Kenya Airways Flight KQ 433, and which were found to contain narcotic drugs, *were* in the possession of the *appellant*, and he was responsible for the content of those pieces of luggage.

I have considered the several other objections to the appellant's conviction made on his behalf by learned counsel: that the conviction was based on unreliable circumstantial evidence; that conviction was based on sheer suspicion; that there were doubts in the evidence which should have been resolved in favour of the appellant; that proof-beyond-reasonable doubt had not been achieved; that the narcotic drugs the subject of the charge should have been preserved; that the testimonies of certain witnesses had not been consistent; and that the charge-sheet was defective.

The point about the charge-sheet being defective was adequately dealt with by the learned Chief Magistrate, who found the alleged shortfall to be not only marginal, but one which had occasioned no prejudice to the appellant. I hold the trial Court's decision on the question to be one of merit.

As regards the other objections, I have considered them anxiously, but found them not to negative the substantive finding of the trial Court, founded upon cogent evidence. I must, in the circumstances, *dismiss* the appeal against conviction.

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 will, therefore, set aside the sentence imposed by the trial Court.

I will make ***orders*** as follows:

(1) The appellant's appeal against conviction is dismissed, and the conviction is upheld.

(2) The appellant shall pay a fine of Kenya Shillings Twenty-Eight Million Eight Hundred Thousand (Kshs.28,800,000/=), and in default, he shall serve a term of *Twelve* (12) years in jail.

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

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerks: Tabitha Wanjiku

Huka

For the Appellant: Mr. Ondieki

For the Respondent: Mr. Makura