



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(Coram: Ojwang, J)
CRIMINAL APPEAL NO. 74 OF 2006

BETWEEN

ROBERT LUBOWA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Mrs. Kasera dated 16th February, 2006 in Criminal Case No. 935 of 2005 at the Kibera Law Courts)

JUDGMENT

The appellant was charged with the offence of trafficking in narcotic drugs, contrary to s. 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act (Act No. 4 of 1994).

The particulars were that on 30th January, 2005, at Jomo Kenyatta International Airport within Nairobi, the appellant had trafficked 79 pellets containing 974 grammes of a narcotic drug, namely diacetylmorphine (commonly known as heroine), with a street value of Kshs.974,000/=, in contravention of the said Act.

The prosecution called eight witnesses. PW1, No. 67887 **Police Constable Viscon Nyaga** testified that, on 30th January, 2005 at the Jomo Kenyatta International Airport, he was on duty, doing a check on passengers who had just arrived on Flight No. KQ 201 from Mumbai. The witness noticed that the appellant looked weak, and showed peculiar characteristics which tend to mark those affected by drugs. He asked for the appellant's ticket, passport and boarding pass, and took him to the anti-narcotics office for further investigation. The appellant was taken to a special investigation room, where he was later found to have emitted pellets of a substance suspected to be a drug.

After the testimony of PW1 was confirmed, in various respects, by seven other witnesses, the learned trial Magistrate ruled that the appellant had a case to answer; and the appellant thereafter made an unsworn statement, and called no witnesses. The trial Court carefully assessed all the evidence, found the appellant guilty, and convicted him accordingly. After hearing the appellant's statement in mitigation, the trial Magistrate sentenced him to pay a fine, in the sum of Kshs.1,000,000/=, and in default, to serve a term of six years in prison.

The appellant's appeal is only on sentence, and he states as follows: he is remorseful, and undertakes to desist from drug offences, in the future; he is a Ugandan national, and is badly missing his relatives, who do not know where he is; he is the sole bread-winner in his family, and there will be much suffering in the family, in his absence.

Learned counsel, **Ms. Gateru** opposed this appeal against sentence. She submitted that contrary to the claim of the appellant that the sentence was oppressive, it had been a lenient sentence. For s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act thus stipulates:

“Any person who traffics in any narcotic drug or psychotropic substance represented or held out by him to be a narcotic drug or psychotropic substances 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 ...”

After considering the facts and circumstances of this case, and taking into account the mandatory provisions of the law, I have found myself unable to differ from the position of the trial Court. Indeed, I would very well have agreed with learned State Counsel, that the mark of the sentence which is the subject of appeal, is **leniency** and not oppressiveness.

Consequently, I dismiss the appeal herein, and reaffirm the sentence imposed by the learned trial Magistrate.

Orders accordingly.

DATED and DELIVERED at Nairobi this 11th day of July, 2007

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms. Gateru

Appellant in person