REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 331 of 2005

ANNE BARON……..……..……. APPELLANT

-AND-

REPUBLIC……..……..……...RESPONDENT

(An appeal from sentence imposed by Senior Principal Magistrate Mrs. Mwangi, dated 16th June, 2006 in Criminal Case No. 3325 of 2006 at the Kibera Law Courts)

JUDGEMENT

The appellant had appeared with a co-accused before the trial Court, 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 the accused persons, on 11th June, 2006, at Jomo Kenyatta International Airport in Nairobi, were jointly found trafficking by conveying, 375 grammes of a narcotic drug, namely Diacetylmorphine, commonly known as Heroin, with a market value of Kshs.375,000/=, in contravention of the Act.

On 16th June, 2006, the substance of the charge and every element thereof was stated to the appellant herein by the Court, in a language that she understands; and she said it was true. The prosecution, thereupon, gave the pertinent facts, which were as follows.

On 11th June, 2006, officers from the Anti-Narcotics Police Unit at Jomo Kenyatta International Airport, acting on information, arrested the two accused, in connection with drug trafficking. It was suspected that the accused persons had concealed the drugs in their abdomen. Both of them were detained, and kept under observation, between 11th June, 2006 and 12th June, 2006; and they admitted having drug pellets weighing 375 grammes, bearing a value of U.S.$375,000. Further investigation showed that the two accused had travelled by air from Seychelles, on the same day they were detained. It was believed that the drugs were being carried by the 1st accused on behalf of the 2nd accused; and the two were arrested after the Government Chemist confirmed the drug to be Heroin.

The accused persons admitted the above facts to be true, whereupon a plea of guilty was entered for the first accused (appellant herein), whereas the second accused pleaded not guilty. The appellant herein was treated as a first offender, and was convicted on her own plea of guilty. She was sentenced to imprisonment for a period of four years, and a fine of Kshs.1,000,000/= or, in default, a further year in jail.

In her petition of appeal filed on 30th June, 2006 the appellant acknowledges that she had pleaded guilty to the charge brought against her; therefore her gravamen centres on ***sentence.*** She pleads that she had committed the offence purely out of temptations which moved her, as she needed money. She prays for forgiveness, and vows that she will not repeat the offence in future. She asks to be set free.

Prosecuting her appeal, the appellant repeated the theme of forgiveness. She said she had committed the offence in order to raise money, to sustain her children.

Learned State Counsel ***Ms. Gakobo*** opposed the appeal, on the ground that the governing statute provided for a maximum penalty of life imprisonment, and a mandatory fine of Kshs.1,000,000/= at least. Counsel urged that the total prison term of five years, which the appellant may have to complete, was a very lenient sentence; and she urged the Court not to interfere with the sentence, as there was no evidence that the trial Court had erred. Counsel urged that the appeal lacked merit, and should be dismissed.

The appellant's contention, unlike that of the respondent, is grounded on compassion and empathy; she pleads that it was the moral imperatives of family-care, that drove her to commit the offence of drug trafficking, and that the Court should sense her deep plight, and order her release.

The State's case, by contrast, is a cast-iron statement of legal principle; the learned Magistrate imposed a fine as required, and gave a prison term which was quite lenient, in the light of the maximum of life-imprisonment, which could lawfully have been awarded.

Since it is clear from the statements on record, that the appellant would have difficulty raising the one-million-shilling fine, it follows that, for all practical purposes, the operative term of imprisonment in this case is five years; and still, that would be lenient, as counsel urged.

This Court, like any other Court exercising an appellate jurisdiction, is governed by certain principles which are well established in case law. These principles emerge from the following passage, in the Court of Appeal for Eastern Africa decision in ***Ogalo s/o Owoura v. Reg***. (1954) 21 EACA 270:

"***The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial Judge unless, as was said in James v. R (1950) 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case….***"

I am in agreement with learned counsel that, the sentence appealed against was in every respect lenient. I have found no special circumstance which speaks in favour of an interference with the sentence imposed by the learned Senior Principal Magistrate.

Consequently, I dismiss the appeal herein, uphold the conviction, and affirm the sentence.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 31st day of October, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms Gakobo

Appellant in person