



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 213 of 2005

From original conviction and sentence in Criminal Case No. 3108 of 2005 of the Chief Magistrate’s Court at Kibera- Ms. Muchira, SRM)

PAUL OJUKWU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

This is an appeal against sentence only. The appellant, **PAUL OJUKWU** was convicted on his own plea of guilty for the offence of Trafficking in Narcotic drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act. The particulars of the charge were that on the 20th April, 2005 at Jomo Kenyatta International Airport in Nairobi area, the appellant trafficked in 78 pellets weighing 1.328 Kgs of Narcotic drugs namely Diacetylmorphine commonly known as Heroin with a street value of Kshs.1,328,000/=. Upon entering a plea of guilty, he was sentenced as follows:

“.....A fine of Kshs 3 million in default 20 years in prison and in addition and after considering his mitigation to imprisonment for 15 years.....”

The appellant was aggrieved by the sentence and hence lodged the instant appeal. In his petition of appeal the appellant stated that the learned Magistrate failed to take into account his mitigation, that the sentence imposed was manifestly harsh and excessive, that the fact that he was a first offender was not taken into account by the learned Magistrate, that the learned Magistrate failed to take into account the fact that quantity of the drugs with which the appellant was charged with was small and did not warrant such extremely harsh sentence and finally that the learned Magistrate erred in law and misdirected herself in imposing a default sentence of 20 years.

When the appeal came up for hearing the appellant in support of the above grounds submitted orally that he was pushed to commit the offence because of family problems. That the sentence imposed was harsh and excessive. That being a Nigerian, he had no relative in Kenya. He was ailing and finally he submitted that he was remorseful and would not commit the same offence again. He also with the permission of the Court tendered what he called written “mitigation” and which I have carefully read and considered.

Mr. Ndege, learned state counsel opposed the appeal. Counsel submitted that the sentence imposed was neither excessive nor illegal. Counsel pointed out that under the Section of the law that the appellant was charged, a convicted person is liable to imprisonment for life in addition to a fine which should be

three times the market value of the Narcotic drugs. In the instant case the market value of the drugs was Kshs.1,328,000/=. Accordingly, counsel submitted the fine which ought to have been imposed should have been Kshs.3,984,000/= and not Kshs.3,000,000/=. That part of the sentence according to the learned state counsel was illegal. Otherwise the sentence of 15 years imprisonment was legal. Finally learned state counsel pointed out that the learned trial Magistrate had committed an error in imposing a default sentence on the fine of Kshs.3,000,000/=.

Sentencing is a matter for the discretion of the trial court. The discretion must, however, be exercised judicially. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and exclude all extraneous factors. The appellate court may interfere with the discretion of the sentencing court if it is shown that the sentence imposed is illegal, harsh and excessive, that the trial court acted upon wrong principle, took into account immaterial factors and overlooked some material factors.

See generally WANJEMA VS REPUBLIC (1971) E.A. 993.

The offence for which the appellant was convicted carries a maximum sentence of life imprisonment as well as a fine, three times the market value of the Narcotic drugs involved. In the instant case, the appellant was sentenced to 15 years imprisonment and to a fine of Kshs.3,000,000/= and in default to serve a further 20 years imprisonment. Save for the 15 years imprisonment, it would appear that the other sentences are illegal.

However, the sentence of 15 years for an offence which carries a maximum life sentence cannot be said to be harsh and excessive in the circumstances. In my view and considering the seriousness of the offence, that sentence was in the circumstances well deserved and I will not interfere with it. The trial court's notes on sentence are detailed and shows what the learned Magistrate took into account in arriving at the said sentence. She did not take into account extraneous matters or failed to take into account material factors.

However for other aspects of the sentence which are illegal, I will have to interfere with the same. First, the Narcotic drugs and Psychotropic substances control Act of 1994 is very clear as regards the fine to be imposed upon conviction. It provides

***“..... 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 of the grater, and, in addition, to imprisonment for life*”**

From the charge sheet, it is indicated that the market value of the drugs was Kshs.1,328,000/=. This is in excess of one million. Accordingly, the fine imposed ought to have been three times the market value of the drugs. The Magistrate should therefore have imposed a fine of Kshs.3,984,000/= as correctly submitted by the learned state counsel. I will therefore interfere with that aspect of the sentence to the extent that I will substitute the fine of Kshs.3,000,000/= with that of Kshs.3,984,000/=.

The learned Magistrate also erred in imposing a default sentence of 20 years in the event that the appellant was unable to pay the fine. Under Section 28 of the Penal Code, the maximum default sentence that can be imposed is 12 months. The default sentence of 20 years was therefore clearly illegal. I will therefore substitute that default sentence with one of 12 months imprisonment.

Save for the corrections aforesaid the appeal otherwise stands dismissed. In the event then the orders of this court on this appeal are as follows: -

- (a) The appellant shall serve 15 years imprisonment.
- (b) The appellant shall further pay a fine of Kshs.3,984,000/= in default to serve a further 12 months imprisonment.

Orders accordingly.

Dated at Nairobi this 2nd day of October, 2006

.....

MAKHANDIA

JUDGE