

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.941 OF 2002

[from Original Conviction and Sentence in Criminal Case No.272 of 2000 of the
Senior Principal Magistrate's Court at Kibera]

PHILLIP UCHE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant herein initially filed a petition of appeal himself against both conviction and sentence for drug trafficking. However, at the hearing of the appeal he was represented by counsel, Mr. Kang'ahi.

Learned counsel for the appellant informed this court at the hearing of the appeal that he was abandoning the appeal against conviction and wished to proceed only with the appeal against sentence. In his view the sentence of ten years imprisonment is excessive having regard to the mitigation laid down by the appellant at the time of his conviction, i.e. that he was a first offender, sickly and a family man. Counsel added that the fine of Kshs.800,000/=, in default 12 months imprisonment, is manifestly excessive. He drew attention to the particulars in the charge sheet indicating the street value of the drugs the appellant was found in possession of to be Kshs.215,000/=. He argued that the legal maximum fine is three times the street value which in the present case works out at Kshs.645,000/=. In the premise, the fine of Kshs.800,000/= is manifestly excessive. While appreciating that Kenya is struggling to fight drug trafficking., counsel nevertheless submitted that the court should not be guided by morality. He urged that justice should be tempered with mercy and prayed for a lenient sentence, even if it is custodial.

Learned counsel for the respondent, Miss Amulele reiterated the seriousness of the offence and pointed out that it carried a sentence of life imprisonment. She noted that the magistrate took into account the mitigating circumstances of the appellant, including his state of ill-health despite the fact that no medical evidence was given of the appellant's sickness. She noted that Kenya is increasingly becoming a drug conduit and urged that the court has a duty to discourage drug trafficking at all costs. In respondent's counsel's view, the sentence imposed on the appellant is very lenient and there is no reason to tamper with it.

The appellant was charged with trafficking of narcotic drugs, contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (control) Act, No.4 of 1994. Section 4 (a) of the Act provides as follows:

“4. 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”.

The learned trial magistrate took into account all the mitigation of the appellant. As to the appellant's alleged ill-health, the magistrate correctly noted that he can be availed proper medical attention while in prison. The magistrate was of the view that the charge the appellant faced was very serious, bearing in mind that the airport where the appellant was transiting through is increasingly being used as a drug conduit and that the court has a duty to discourage drug trafficking. In the magistrate's view, the offence for which the appellant was convicted did not merit a non-custodial sentence and she awarded the sentence complained of. The trial magistrate took into account relevant principles and factors in sentencing the appellant.

Part of the complaint against sentence was that the fine of Kshs.800,000/= was excessive and should be reduced to Kshs.645,000/=, being three times the street value of the drugs as shown in the charge sheet. It should be noted from the provisions of section 4 (a) of the Act cited above that the authorized fine for the trafficking of narcotic drugs or psychotropic substances is Kshs.1million or three times of the street value, whichever is the greater, plus imprisonment for life. As the given street value of the drugs in question is less than Kshs.1 million, the authorized fine is Kshs.1 million. The learned trial magistrate, therefore, erred in awarding a fine of Kshs.800,000/= which is illegal in the circumstances of this case. The prison sentence of ten years is not excessive.

There is no merit in the appellants appeal against severity of sentence.

The appeal against the prison sentence of ten years is hereby dismissed. The appeal against severity of the fine of Kshs.800,000/= is also hereby dismissed and the said fine is enhanced to Kshs.1 million in compliance with section 4 (a) of the Narcotic Drugs and Psychotropic Substances (control) Act, 1994.

The sentence of twelve months imprisonment in default remains.

Delivered at Nairobi this 2nd day of July 2003.

B.P. KUBO

JUDGE