REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 139 OF 2002

SOPHIA WANJIKU…….....…..APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

(Appeal from Conviction and Sentence of the Chief Magistrate's Court at Mombasa, JS Kaburu, SPM in Criminal Case No 3613 of 1998)

JUDGMENT

The appellant Sophia Wanjiku, was jointly charged with another with the offence of Trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No 4 of 1994. They both were tried and convicted and sentenced to 12 years imprisonment. The appellant who was the 2nd accused appeals against both the conviction and sentence. It is not clear whether or not the 1st accused in the lower court appealed.

The facts of the case as I understand them are as follows:-

That on 21.10.1998 at about 6 p.m. four anti-narcotic Police Officers on a tip-off, went to Likoni where they had gotten information drugs were being sold. They noticed some people coming to and going from a certain house. Soon after they confronted the two accused in the lower court. A search netted nothing. They then threatened to take them to the Police Station where they declared, the appellant would be searched by female Police Officers. At this juncture, the appellant, who apparently became afraid of being subjected to a search into her private parts, got alarmed, whereupon the said Juma Mohamed, told the appellant to produce the drugs hidden in her body. Wanjiku is said to have moved a few yards away and yielded two bundles of items wrapped in polythene paper bags. The Police Officers suspected the stuff to be heroine. They then arrested the appellant and one Juma Mohamed and took them to the Central Police Station. It would appear that Juma Mohamed then claimed that the drugs were his and not appellant's. The Police Officers who were in the above expedition were Inspector Samwel Nyabengi, Sgt Abdalla, Pc Wambua and Pc Kipchumba. Inspector Samwel Nyabengi claims to have organized for the drugs to be taken to the Government Chemist who according to him, confirmed the stuff to be heroin. PW 2, Pc Wambua also claims in evidence that from the Police Station he prepared a memo form and took the recovered 29 sachets to the Government Chemist and claim to have received the Analyst's Report which confirmed that the stuff was heroin together with the samples. Sgt Abdalla Chitupa, PW.1 also claims that he took the samples of the 26 sachets of the stuff to the Government Chemist and also, like PW 2 and PW 3, claims that he received the chemist's Report.

It is also in evidence that during the process of investigations PW 4 Inspector Peter Ngure obtained a charge and caution statement from the 1st accused, Juma Mohamed Mwaisa. The statement which contains what may be said to be confessions was admitted in evidence after a trial within a trial and it was

clearly taken into account by the trial Magistrate to convict.

The appellant and her colleague in the lower court gave sworn statement in their defence and they were cross-examined. In it the appellant denied that she was found in possession of the drugs produced in court. She said that she was arrested and came to see the drugs as they approached the Police Station at Pandya Hospital. The other accused said he was arrested at his house which was searched without finding any drugs. He said that they took the appellant to her house where they conducted a search also but without success. He claimed he was not there when the police recovered the drugs if they recovered them from 1st accused at all. He admitted he wrote an extra-judicial statement but that he did so only after being threatened or influenced. He denied that the statement was voluntary and thus repudiated or retracted the said statement.

The trial Magistrate's judgment was short. He accepted the evidence adduced by the prosecution witnesses in full. He repeated the statements made by the appellant and her lower court colleague but failed to determine whether or not their statements which were made under oath were true or even possibly true. He then referred to the appellant's lower court's colleague's confession statement and proceeded to fully rely on it and convict the two accused one of whom is the appellant.

The appellant raises several issues on appeal. I will now examine them one by one.

The first ground is that the charge was fatally defective in that it was amorphous and that its effect was to embarrass and prejudice the appellant and that the evidence failed to and could not prove it. It read thus:-

> "1. Juma Mohamed (2) Sophia Wanjiku: On the 21st day of October, 1998 at about 11.30 p.m. in Likoni area of Mombasa District within the Coast Province, Jointly trafficked in 29 sachets of heroin in contravention to the said Act."

The main element of the charge as drawn above is the phrase "jointly trafficked". The Act under which the charge was drawn defines "trafficking" as follows, to wit:-

> "importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person, of a narcotic drug..... Or making any offer in respect thereof."

It will be noticed that the word has a much wider meaning than its ordinary dictionary meaning which in *Collins English Dictionary* is: "to carry on trade or business, especially of illicit kind" with a few other exceptions which we are not concerned with here. It is therefore logical and indeed sensible that a charge of "trafficking" should clearly specify the exact kind of trafficking to enable not only the prosecution to know what evidence to lead to prove the charge but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing. The purpose of this is both obvious and fundamental. It is that the accused has a full right to know the charge he is facing to enable him to fully prepare his defence. Failure to specify which one or more of the specific "trafficking" is charged, is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. It is also possible that failure to specify the actual act as aforesaid may as well possibly lead or mislead the trial court, as the case may be, to convict the accused on the more serious charge of 'trafficking' as defined under section 4 of the Act instead of rightly convicting on a lesser or cognate offences under section 5 or 6 of the Act, with the dire consequences in terms of the type of sentence that is due under section 4 of the Act. It is my view therefore that the charge as drawn in the lower court was erroneous in so far as it failed to specify the specific activity or act (as defined under the relevant Act) that the prosecution embarked to prove and the accused purported to defend. It cannot be easily argued that the trial did not therefore embarrass and or prejudice the appellant. Nor can it be argued that the evidence that was tendered and eventually accepted to have proven the offence, actually and really could prove the charge, if it had been properly drawn as stated above. I, on my part, hold a doubt and I would hold any such possible doubt in favour of the appellant.

The second ground of appeal is that the trial Magistrate failed to comply with the imperative requirements

of section 210 and 211 of Criminal Procedure Act and that such failure is incurably fatal. Section 210 and 211 aforementioned state:-

> "S.210. If at the close of evidence in support of the charge, and after hearing such summing up, submissions or arguments as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

> "S.211.(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that if he does so, he will be liable to crossexamination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence if (any)."

Perusal of the trial records confirms that after the prosecution closed its case (on page 14) the appellant's advocate Mr Saidi left it to the court to make a ruling as to whether or not there was a case made out sufficiently for the accused to answer. The court appears to have adjourned the proceedings to 12.2.99. The presumption was that on the latter date the court would first rule whether there was such a case for the accused to answer or not before proceeding further. If there was no sufficient case to require him to answer, the court would at that stage acquit him under s 210 of the Criminal Procedure Code aforequoted . If on the other hand there was case, then the court would comply with the requirements of section 211 of the Criminal Procedure Code, making sure that such compliance is fairly recorded in the case record and proceed to give the accused an opportunity to carry out the method of defence chosen by him. In this case the record is silent. The best assumption to adopt in the circumstances in my view is that the court failed to comply with both section 210 and 211 of the Criminal Procedure Code. It is my opinion that had the court complied with s 210 aforesaid, it may without making a finding, possibly have found that there was no sufficient case which would require the appellant to be put on her defence. The fact that there are chances also that the court would conclude that there would be a case to answer, do not in my view deprive the appellant of the favourable chance, aforementioned. Failure of the court to comply with section 210 of Criminal Procedure Code aforementioned may therefore certainly be said to have prejudiced the appellant. The failure in my view is not curable where eventually the appellant was convicted.

Hotly following behind the above conclusion is the issue of the trial Magistrate, also, failing to comply with the requirements of s 211 of the Criminal Procedure Code. There is no dispute that the trial Magistrate failed to do so. Such failure in my further view deprived the appellant of the benefit of being explained to, by the court, the substance of the charge and of being informed what her rights were before she decided the method she would adopt in making her defence. It also deprived her of the right to call witnesses to support her defence since no such a right was explained or could have been explained as no such opportunity was granted her. Once more, it cannot be easily argued that the trial court's failure did not prejudice her. It is my view and I so hold, that it prejudiced her and that such failure is not curable. The fact that the appellant was represented by an advocate did not discharge the trial Magistrate from his statutory duty to the appellant.

I have considered what could be the best course in the circumstances arising from the failure to comply with sections 210 and 211 of the Criminal Procedure Code. I am of the view that a retrial would not be fair or just to the prisoner who has since served about four years of her sentence and such a course would therefore be prejudicial to the prisoner. I would under the circumstances of this particular case, dismiss the charge and acquit the appellant on the ground that the proceedings after failure to comply with said sections would be a nullity. This remains the same whether or not the appellant was represented by an advocate who also failed to point the failures out to the court.

The third issue to be considered by this court touches on whether or not the trial Magistrate made a finding as to whether the stuff allegedly found in the possession of the appellant was the narcotic drug, heroin, within the definition given in the Act under which the charge was raised. It is in evidence that PW 1 and PW 2 each claimed that after recovering the stuff each sent it to the Government Chemist for analysis and later recovered the Analyst Report and the samples which were produced in evidence. PW 2 No 58868 Pc Francis Wambua stated at page 7 of the proceedings:-

> "Later I prepared an exhibit memo form and took 29 samples ..... To the Government Chemist..... Later I received a report, which confirmed that this was heroin….. I wish to produce the drug and the report as Exhibit 1-4 ....."

PW.1 at page 5 stated:-

> "There was second bundle in a blue polythene bag which had 19 sachets MFI 2 ..... I took samples of all the 26 sachets to the Government Chemist. I received a report which confirmed these to be heroin. I have the report MFI 3 ..... These are the samples. MFI.4."

And under cross examination at page 6:

> "The sachets were wrapped in cigarette foil. We took samples of each sachet to the Government Chemist for examination ....."

Clearly the two witnesses each claims to have taken the stuff identified as heroin to the Government Chemist and to have received the analyst's report which was put in evidence. This cannot be true in respect of each or both witness(es). One of them is talking a lie and we do not know who it is. It is also possible that both may be lying. But what is of greater importance is that the chain of events from the moment the stuff, later said to be heroin was recovered from the appellant to the time it was produced in court as exhibit, together with a Chemist's report, is not clear. Who took the stuff to the Government Chemist; was it PW 1 or APW 2? Who received it at the Government Chemist? Who analyzed it there?

Who released it to who to bring it back to the Police Station to keep it safely in the exhibits store until it was released at the time it was to be produced in court? Several witnesses were skipped from giving evidence which would maintain the said continuous link. This is not only logical and circumstantially necessary but would also lay the foundation required to have the report sensibly produced under section 77 of the Evidence Act as it would finally turn out. The result of failure to call such witnesses created a possible doubt as whether or not the report produced in court was reliable and could be a basis of a proper conclusion that the stuff recovered from the appellant was the one that reached the Government Chemist and whether it was the one that was finally produced in court and finally whether it was indeed heroin.

Furthermore, it turned out that the court finally relied on the Government Analyst's report to convict, relying on the finding that the stuff was heroin. The report was presumably produced in evidence by PW 2, Francis Wambua. Mr Said, Advocate for the appellant did not object, thus having it sail into evidence unopposed. The trial Magistrate does not indicate under which provisions of the law the report was produced. This court has therefore to assume in favour of the prosecution that it was so produced under section 77 of the Evidence Act. But as I said in answer to a similar issue in Mombasa HCCR.A. No.214 of 2001, in respect of the production of such documents under the said section 77, the court has to be satisfied that certain basic conditions have been fulfilled. As stated therein, the section presupposes that the maker of the report cannot be called to prove that he made the report and that he signed it. The legislature wanted to surmount the problem of lack of authentication of the signature on the report by giving the trial court authority to presume that the signature on the report by giving the trial court authority to presume that the signature on the report is the genuine signature of the maker. To do so, the trial court is given overriding discretion to admit or reject the report. It is supposed to reject it if it is satisfied that the circumstances surrounding the recovery of the matter for analysis, the method of sending it to the analyst, the sequence of events at the Government Chemist and the method or manner of bringing it back, who signed the report or why he is not available in court to give evidence of the report and all other necessary related information, has not been established before the same is sought to be produced

under section 77 of the Act. The court on the other hand will admit the report if the information above is positively established. The court will in deciding this issue, need to read s.77 together with s.33 of the Evidence Act. The reasons for the maker's failure to attend court and authenticate his signature on the report must be established by recorded evidence, usually from the witness producing the report. They may inclusively or exclusively include the reason that his attendance could not be procured at all or cannot be procured without an amount of delay or prohibitive or unreasonable expense. The producer will need to identify the maker's signature. That is why it would require the witness producing it to one from the Government Chemists or Analyst's office to produce the report instead of a Police Officer.

In the case under appeal, no such foundation was laid on the record before the trial court decided to admit the report. Although the use of the word "may" in subsection (3) of section 77 gives the trial Magistrate full discretion to admit or reject the report, the discretion has to be exercised judicially. That is to say, it has to be based on reasonable grounds. Perusal of the proceedings at page 7 confirms that the court based its decision on no reasons. Indeed exercise of the discretion is not shown to have arisen at all. I accordingly find that the trial Magistrate should under the above circumstances have rejected the report from being admitted into evidence. The admission of it was improper and since the court ended up relying on it, I hold that this prejudiced the appellant's case and resulted into an injustice against her.

The final issue raised by the appellant is that the court admitted an extrajudicial statement wrongly and without giving reasons. The record confirms that the trial Magistrate admitted the said statement upon reasons or grounds she would give later in the judgment. In the judgment no such reasons or grounds were given. The effect of this was that she admitted the extra-judicial statement without giving reasons. Was she entitled to do so?

We note that the extra-judicial statement made by the first accused in the lower court who was co-accused to the appellant was retracted or repudiated. Its admission was accordingly disputed. Its voluntariness became an issue. The trial Magistrate as is necessary in such situations conducted a trial within a trial to determine the issue. The accused person who made it argued that he made it because he was promised release if he admitted possession. He denied that he gave the statement voluntarily. It was therefore imperative for the trial magistrate to make a finding over the issue of "voluntariness" of the statement. The Magistrate admitted the statement with the following words at Page 14 of the proceedings:-

> "After considering the evidence I do find that it is admissible in evidence for reasons to be given in the final judgment if need be."

Clearly, the trial Magistrate was satisfied that the statement was admissible in evidence. However, it was not necessary for the court to undergo the lengthy process of the trial-within-a trial if at the end of it all reasons to allowing or refusing admission are not clearly indicated on the case record. Indeed the trial Magistrate realized this and that is why he decided to give reasons in the judgment most probably for convenience and to avoid giving lengthy ruling during the trial which might interfere with the smooth progress of the trial.

It is now trite law that no statement by an accused person is admissible in evidence against him unless it is shown by the prosecution to have been voluntary. This means that the same will not have been obtained from the accused either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The trial court has a discretion to decide whether or not the statement was voluntary or not, taking into account all the circumstances prevailing before, and at the time of recording it. These would include the question as to whether or not a caution was administered before the statement was obtained. The failure to administer such a caution would not automatically render the statement inadmissible but would most likely stand to influence the exercise of the court's discretion in favour of the accused, to reject admission of the statement. On the other hand, the issue being a discretionary one, where the court has to consider various circumstances, the court may nevertheless admit in evidence a statement which was obtained in contravention of the Judges Rules provided that it is satisfied that it was voluntarily obtained. That is to say, that it was not obtained using violence or threats. What will be the difference in such cases where the statement is recorded against Judges Rules but voluntarily is that the probative value of such statements will be low.

Applying the above principles in the facts of this case, it is my view that the trial Magistrate considered the evidence adduced in the trial within a trial. He was satisfied that the statement in question was admissible and he declared so in his ruling above quoted. Although it would be a better practice to explain the grounds for his decision, he was in my view entitled to state merely that he was satisfied that it was admissible and proceed on with the trial. It is unfortunate and irregular for the trial Magistrate to fail to give reasons for his decision to admit the extra-judicial statement of the accused person but the failure was not fatal. It is clearly in the maker's evidence in the lower court that he gave the statement voluntarily. Indeed, he drew the statement himself in his own hand. It may be that he did so because he was promised release soon thereafter. However, that is another issue in the discretion of the trial court. The upshot is that the admission of the extra-judicial statement was within the court's power and discretion which was properly exercised. This court does not see grounds to interfere with it.

Before making final remarks this court notes that the appellant's conviction arose *inter alia*, directly from the extra judicial statement made by her co-accused, one Mohamed Juma, as well as what the said Mohamed Juma said in court during the trial-within-a trial and during his defence statement given on oath. Some of the contents in the statements were clearly adverse to the appellant's position and would end up prejudicing her. Indeed, the conviction of the appellant cannot have been arrived at as it was, if what Mohamed Juma had said at various times during the investigations of the case and the trial were not taken into account. It was therefore imperative that the appellant should have been given an opportunity to cross-examine her co-accused both during the trial within a trial and during the defence case. We stated in Mombasa HCCRA No561 of 200 at Page 11, consolidating Cr Appeals Nos 560, 566 and 559 of 2000, as follows:-

> "With this conclusion, the correct legal position would be that where two or more prisoners are jointly indicted and evidence is called on behalf of one prisoner which tends to incriminate the other(s), the latter is entitled to cross-examine on the incriminating evidence. The basis of this principle is that such evidence though given for the defence of one prisoner, becomes, in fact, the evidence for the prosecution against the other(s). The position remains the same where as in this case, the incriminating evidence is given not by a called witness, but by a co-accused."

We had then quoted the case of *Edward s/o Msenga v Reginam*, in Criminal Appeal No. 123 of 1956, reported in Her Majesty Court of Appeal for Eastern Africa at page 554, and we then added:-

> "We apply the above doctrine fully and would therefore think that the failure to give all the accused in this case an opportunity to cross-examine the 4th co-accused was no less prejudicial and was indeed a denial of fundamental rights of all the appellants ....."

It is my view therefore that the above principle also applied to this case. The appellant should have been allowed an opportunity to cross-examine her co-accused. She was not. The failure prejudiced her and amounted to a denial of her fundamental right. This alone is a ground to allow this appeal.

The upshot of all the above canvassing is that this appeal has several legal grounds upon which it should be allowed as shown above jointly and severally. The appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is ordered released from prison forthwith unless lawfully detained. It is so ordered.

Dated and delivered at Mombasa this 9th day of November, 2002

D.A ONYANCHA

JUDGE