REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 97 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 99 OF 2019

AND

CRIMINAL APPEAL NO. 113 OF 2019

BETWEEN

GEOFFREY KANYINGI KAHUKI…….....1ST APPELLANT

JOSEPH GATHUNGA MBUGUA……...…….2ND APPELLANT

MARTIN MURIITHI NJUGUNA…….…….…….....3RD APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the judgment of Hon. Kagoni E.M, Principal Magistrate, delivered on 8th August, 2019 in Mombasa Chief Magistrate's Court Criminal Case No. 1606 of 2015).

J U D G M E N T

1. Martin Muriithi Njuguna and Geoffrey Kanyingi Kariuki were sentenced to serve fifteen years in custody, in addition, each was fined Kshs. 1,000,000/= in default to serve a further five years in custody in Count 2 while Joseph Gathunga Mbugua was sentenced to serve 10 years in addition, to pay a fine of Kshs. 1,000,000/= in default to serve a further five years in custody in Count 1 for which they were found guilty and convicted in Mombasa Chief Magistrate's Court Criminal Case No. 1606 of 2015.

2. The Appellants were charged 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 in Count 1. Particulars to Count 1 were that Martin Muriithi Njuguna, Geoffrey Kanyingi Kariuki and Joseph Gathunga Mbugua on the 12th day of August, 2015, at Witu Police road block within the Lamu County in a motor vehicle registration number KBY 986Z, Mitsubishi FH Lorry jointly trafficked in Narcotic drugs by conveying 24 sachets weighing a total of 26.9 grams of Heroin with market value of Kshs. 80,700/= in contravention of the said Act.

3. In Count II, the Appellants were charged 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. The particulars were that Martin Muriithi Njuguna, Geoffrey Kanyingi Kariuki and Joseph Gathunga Mbugua on the 12th day of August, 2015, at Witu Police road block within the Lamu County in a motor vehicle registration number KBY 986Z, Mitsubishi FH Lorry jointly trafficked in Narcotic drugs by conveying 390 rolls weighing a total of 18 Kilograms of Cannabis with a market value of Kshs. 360,000/= in contravention of the said Act.

4. The 3rd Appellant was aggrieved by the conviction and sentence and he lodged petition of appeal dated 18th November 2019 on the following grounds: -

a) The Trial Court erred in Law and Fact in convicting the appellant with the offence of trafficking in narcotic drugs when the

prosecution had not proved the said offence against the appellant beyond reasonable doubt.

b) The Trial Court put forward a theory not based on the evidence and erred in Law and fact in convicting the Appellant with the offence of trafficking in narcotic drugs based on the said theory rather than the weight of the evidence

c) That the Trial Court misdirected itself on the burden and standard of proof in a criminal case and erred in Law and in fact in: -

(i) Shifting the burden of proof from the prosecution to the appellant when in law the burden of proof is throughout on the prosecution.

(ii) Requiring the appellant to adduce evidence to dispute, contradict and discredit the evidence of the prosecution when in law the Appellant has no duty at all to tender evidence to contradict or discredit the prosecution's case; and

(iii) Convicting the appellant on a standard other than that of beyond reasonable doubt.

d) The Trial magistrate did not evaluate and analyze the evidence on record with circumspection and as a result erred in law and fact in convicting the appellant with the offence of trafficking in narcotic drugs in the absence of evidence proving the said offence against the appellant beyond reasonable doubt.

e) The Trial magistrate committed a fundamental error of law in rejecting the defence of the Appellant which clearly showed that it was Joseph Gathunga Mbugua who put the sack in the motor vehicle and lied to the appellant that the said sack contained potatoes.

f) The Trial Court erred in principle in the exercise of its discretion in sentencing the Appellant to a harsh and excessive sentence of; -

(i) Imprisonment for a period of twenty years; and

(ii) A fine of Kshs. 1,000,000.00.

5. The 3rd Appellant prayed that the conviction and sentence by the Trial Court be set aside and reversed and the 1st Appellant be acquitted and set at liberty.

6. The 2nd Appellant was also aggrieved by the conviction and sentence and he lodged petition of appeal on 22nd August, 2019 on the following grounds: -

a) That the learned magistrate erred in law and fact by convicting me to 15 years' imprisonment without considering that the said drugs were not recovered in my possession.

b) That the learned magistrate erred in law and fact by convicting me to 15 years' imprisonment without considering that the same narcotic were not examined and proved that they narcotic drugs as alleged.

c) That the learned magistrate erred in law and fact by convicting me to 15 years' imprisonment without considering that the source of arrest had no connection with the said drugs.

d) That the learned magistrate erred in law and fact by convicting me to 15 years' imprisonment without considering that the case at hand was not proved to the required standard of law.

e) That the learned magistrate erred in law and fact by convicting me to 15 years' imprisonment without

7. The 1st Appellant was also aggrieved by the conviction and sentence and he lodged petition of appeal on 22nd August, 2019 on the following grounds: -

a) That the learned magistrate erred in law and fact by convicting me to 10 years' imprisonment without considering that the said drugs were not recovered in my possession.

b) That the learned magistrate erred in law and fact by convicting me to 10 years' imprisonment without considering that the same narcotic were not examined and proved that they narcotic drugs as alleged.

c) That the learned magistrate erred in law and fact by convicting me to 10 years' imprisonment without considering that the source of arrest had no connection with the said drugs.

d) That the learned magistrate erred in law and fact by convicting me to 10 years' imprisonment without considering that the case at hand was not proved to the required standard of law.

f) That the learned magistrate erred in law and fact by convicting me to 10 years' imprisonment without

8. The prosecution case in the lower court was that on 12th August, 2015, the Appellants were transporting 24 sachets weighing a total of 26.9 grams of Heroin with market value of Kshs. 80,700/= and 390 rolls weighing a total of 18 Kilograms of Cannabis with a market value of Kshs. 360,000/= in contravention of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

9. PW 1 testified that together with Sergent Medi, PC Nafula, PC Adam, PC Oduor and APC Titus, they were manning a police road block along Witu Mukope road and at around 9:50 am a lorry registration No. KBY 986 Z approached from Witu direction, they stopped the said vehicle and on inspecting it, found bags of cement and a green sack which the driver who is also the 3rd appellant herein told them had potatoes. On opening the said sack, he found that it had 390 rolls of what he suspected to be cannabis. The occupants of the lorry were restrained in the driver's cabin and the lorry escorted to Witu police station.

10. PW 1 stated that at the station, they searched the lorry again and asked the driver, conductor and passenger to each hold their luggage. The 1st Appellant had a blue/black rack sack and in it they found a short, t-shirt and a white substance wrapped in a black polythene bag which they suspected to be heroine. The bag, short, shirt, black polythene containing 24 pellets of white powder and the 24 pellets were marked as PMFI 1,2,3,4 & 5 respectively. He further testified that he was later informed by the O.C.S that the case shall be handled by the CID Mpeketoni.

11. It was stated by PW1 that the inventory and search certificate both dated 12th August, 2015 which were produced as Prosecution Exhibit 1 and 2 respectively, the 390 rolls, green sack, two white polythene bags, all marked as PMFI 6,7,8(a) & (b) respectively, the lorry and the three suspects were all escorted to Mpeketoni police station, thereafter CPL Wambua of scenes of crime took photographs of the lorry which were presented to Court and marked as PMFI 7. PW1 testified that on 18th March, 2015, he accompanied the appellants plus the exhibits to the government analyst Mombasa. The exhibits were weighed by the analyst Francis Mjomba. The sachets were found to be weighing 26.9 grams and a certificate of weighing for 24 sachets dated 18th August, 2015 was issued, the same was marked as PMFI 10. The 390 rolls were also weighed and found to be 18kgs, a certificate of weighing for the 390 rolls was issued and the same was marked as PMFI 11.

12. A certificate of sampling for the brownish substance dated 18th August, 2016 was marked as PMFI 12 while the one for 390 rolls was marked as PMFI 13, PW1 stated that the weighing and sampling was done in his presence and in the presence of the Appellants. He later on prepared an exhibit memo which was marked as PMFI 14. The exhibits were handed to the anti-narcotics police unit in Mombasa. During cross examination by the 3rd Appellant's counsel, PW1 stated that all the three Appellants denied ownership of the sack and that the 2nd and 3rd Appellants had told him that they had given a lift to the 1st Appellant.

13. PW 2 testified that on 18th August, 2015 he was in Mombasa on official duty when he got information that drugs had been seized in Lamu and that the suspects and the exhibits were on their way to the government chemist, Mombasa. He proceeded to the government chemist and weighed the drugs however the weighing certificate was done by CPL Francis Mjomba under his instructions. He stated that the 24 sachets which were weighed and found to be heroin weighed 26.9 grams while the sack which had 390 rolls was weighed and found to be cannabis weighed 18kgs. He directed CPL Mjomba to prepare a notice of seizure for the drugs and the lorry. PW 2 produced the Certificate of weighing for 390 rolls and for 24 pellets as Prosecution Exhibit 3 & 4 respectively.

14. It was stated by PW 2 that the weighing was done in the presence of the government analyst, Mr. Njenga, a scenes of crime personnel CI Mwangi, the Appellants and the officers. Scenes of crime photos of each exhibit which was being weighed was produced as PMFI 15. During cross examination, PW 2 stated that the seizure office in Kenya is the Attorney General therefore the seizure notice is issued under the NPSC Act and copied to the Attorney General, there are authorized seizure officers and Francis Mjomba is one of them.

15. PW3 testified that indeed he was on a road block where he was assigned the duty of recording all motor vehicles coming to and leaving Lamu, at about 9;00 am, a yellow lorry registration No. KBY 986Z was stopped at the road block, the driver was asked to alight and go to where he was and register, which he did. That as he registered the motor vehicle, he heard one of his colleague's PC Muchai asking for help and at the same time he was holding a green sack, in the sack were rolls wrapped in brown Khaki papers which they suspected to be cannabis. He further stated that at this point they arrested the three persons on board of the lorry and escorted them to the police station where the sack was unwrapped and the rolls counted and found to be 390. The evidence of PW 3 largely corroborated the evidence of PW 1 with regards to the recovery of the 390 rolls found in the green sack that was at the back of the lorry

16. PW 4 DPC Jospehat Situma attached to Witu police station testified that on 12th August, 2015, they were on road block duty near NYS Camp along Garsen. He left briefly back to the station to pick his cellphone and on his way back, he met a lorry KBY 986Z Mitsubishi FH being escorted to the police station by a police land cruiser. He went back to the station as the lorry packed. Once it packed, one of the officers and a civilian opened the canvas and inside there were bags of cement, a spare tyre and a green sack. The said sack was offloaded and opened, inside, there were 390 rolls of what they suspected to be cannabis, they were counted in the presence of the accused persons and an inventory made and signed.

17. He further testified that accused 3 had a bag containing a trouser, a t-shirt and a polythene bag containing 24 sachets of what they suspected to be heroine. After the search, the three suspects were escorted to Mpeketoni DCI. Assistant SP Mwangi Jilon Gitau testified as PW 5, in his testimony he averred that he is in the forensic department and they process exhibits which require forensic analysis. He stated that on 24th August, 2015 he received photographic films from CPL Francis Mjomba of the ANU through an exhibit memo requesting that the form be processed. He processed the photos and prepared a certificate of prints. In total, he processed 92 photographs taken at the government chemist Mombasa which show how the sampling of exhibits in the case before the trial Court was done, the weighing and the repackaging.

18. It was PW 5's testimony that he prepared a certificate of print dated 7th October, 2015. He went ahead and produced the photos as prosecution exhibit 5, the exhibit memo as prosecution exhibit 6 and the certificate of photographic print as prosecution exhibit 7. PW 5 also produced a report dated 7th October, 2015 as plaintiff exhibit 8. The said report was prepared by CPL John Wambua, he testified that the said John Wambua was unable to attend Court however, he was in the same department with him and was familiar with his handwriting and

signature. The said report contained photos of a Mitsubishi Lorry KBY 986Z which had been detained at Lamu Police Station. CPL John Wambua took photos of the lorry together with its contents.

19. PW 6 Assistant SP George Mutiso attached to Cheptais police station at the DCIO testified that he was requested to value narcotic drugs on 19th August, 2015 by CPL Francis Mjomba. He was shown a report from the government analyst that confirmed what they had was cannabis and heroine. He was also shown the weighing certificate which showed that there was 26.99gms of heroin and 18000 gms of cannabis. He then proceeded to value the said narcotic drugs. The 26.9 gms of heroine were worth Kshs. 80,700/= each gram going for Kshs. 3,000/= while the 18000gms of cannabis was worth Kshs, 360,000/= at Kshs. 20 per gram based on the regular briefs on drugs and local prices in the black market. Thereafter, he prepared two valuation reports and signed them. The reports were produced as prosecution exhibit No. 14.

20. The government chemist Mr. George Ogutu testified as PW 7 produced a report dated 18th August, 2015 a prosecution exhibit 16 which was prepared by Mr. John Njenga who retired. He testified that from the report, Mr. Njenga was presented with a marked manila bag containing 390 rolls of dry plant material and 24 sachets of brown powder for analysis. After examination, he concluded that the dry plant material was cannabis and the brown powder was heroine. It was his testimony that there was also grey powder which was found to be cement. He averred that he had worked with Mr. Njenga for thirty years and was familiar with his signature.

21. The investigating officer testified as PW 8. He testified that on 18th August, 2015, he was on duty in Mombasa with his colleagues when they were informed by the head of ANU Dr. Hamisi that three suspects had been arrested in Witu at a police road block and had been brought to Mombasa by officers from Lamu. He proceeded to the regional police headquarters where the suspects were and accompanied them together with the exhibits to the government chemist. The said exhibits consisted of 390 rolls of dry plant material and 24 sachets of brownish powder. The exhibits were then sampled in the suspects presence and photos taken. He stated that the 390 rolls were weighed and found to be 18kgs while the sachets were found to be 29.9 grams. Thereafter, they were tested and all the 24 sachets tested positive for heroine. The 390 rolls were sampled and 41 rolls randomly picked and tested. The said 41 rolls were found to be cannabis.

22. PW 8 further testified that he prepared a certificate of sampling, weighing which was signed by the suspects and the officers present. He stated that the motor vehicle was found not to belong to them and was returned to the owner. At this juncture the prosecution closed its case. the trial Court found that the prosecution had established a prima facie case against the appellants and put them on their defence.

23. The 3rd appellant gave an unsworn testimony in his defence. He testified that the 2nd appellant called him requesting for a lift while he was in Mombasa preparing to transport cement to Lamu. The motor vehicle had been loaded at night at Bamburi cement by the 1st appellant. He further stated that when the vehicle was handed to him, he confirmed that it only had cement, the 2nd appellant came with a black bag and they proceeded with the journey. It was the 3rd appellant's testimony that when they got to Witu road block, they were stopped by police officers, after the car was registered, they were asked to open the tent for inspection. The 1st appellant alighted to go open the canvas, he was shocked to hear that other than the cement there was also a sack inside the car. He averred that the 2nd appellant told them that the luggage was his. Once it was opened, it was found to contain cannabis. The black bag was also searched and heroine was recovered.

24. The 1st appellant also gave an unsworn testimony, he testified that while they were in Mombasa, the 2nd appellant called the 3rd appellant requesting for a lift. The following day, they were to transport cement to Mkowe in Lamu together with the 3rd appellant. He stated that they loaded the truck at night and as they were leaving Bamburi cement, the 2nd appellant came with his luggage, they left and were stopped at Witu road block where the police asked to search the motor vehicle, on searching it they found a bag which belonged to the 2nd appellant. A further search in the bag revealed that he had rolled cocaine. The 1st appellant denied knowledge of the contents in the bags.

25. The 1st appellant on the other hand gave a sworn testimony. He testified that he had come to Mombasa for eye treatment, his brother in Lamu connected him to the 3rd appellant who offered him a lift to Lamu. They linked at 10 pm. He stated that when the truck left Bamburi factory, he was outside, he got in and they left. When they reached Witu, the truck was stopped, he was seated between the 2nd and third appellant. The police asked the driver to open the truck. He testified that he was left in the driver's cabin thereafter, he heard 2nd and 3rd appellant argue with the police it is then that he learnt that cannabis had been found in the truck. He further testified that all the appellants denied owning the contents of the said bag in fact, it was for the driver to know what goods he was transporting.

SUBMISSIONS

26. This appeal was canvassed by way of written submissions. The 1st appellant's submissions were filed on 16th December, 2020 by the firm of Were Geoffrey & Company Advocates, the 2nd appellant's submissions were filed on 11th February, 2021 by the 2nd appellant in person, the 3rd appellant's submissions were filed on 2nd March, 2021 by the firm of K'Bahati & Co. Advocates while the respondent's submissions were filed on 10th March, 2021 by the director of public prosecutions.

27. The 1st appellant submitted that the prosecution evidence the commission of the offence by him beyond reasonable doubt. He submitted that he was represented by Counsel up to a certain point in the proceedings when Counsel did not show up and from that point until judgment he proceeded without counsel. He argued that the trial Court failed in its duty to inquire why the appellant elected to proceed without an advocate when he was previously represented. He relied on Article 50 of the Constitution of Kenya, 2010 which provides for the right to a fair trial and one of the essential requirements therein is the right to be informed that he is entitled to chooses and be represented by an advocate. That for the trial Court to be seen to have complied with this legal requirement, it should have recorded in the proceedings that it had informed the appellant of this right and also recorded the accused person's response.

28. Reliance was placed on the case of **Ramaite v The State (1948/13)** [2014] ZASCA 144 where the Supreme Court of Appeal of South Africa held that the accused's rights were explained to him must appear from the record in such a manner as and with sufficient particularity to enable a judgment to be made as to the adequacy of the explanation. He cited section 43 (1A) (b) of the Legal Aid Act, 2016 and

submitted that the trial Court failed to inform him of his rights as provided for thereunder.

29. The 1st appellant also relied on the case of **Republic v Karisa Chengo & 2 others** [2017] eKLR where the Supreme Court agreed with the proposition that if an accused is an indigent, to have him secure the services of counsel from the state to state expense, an immediate right which is triggered the moment an accused is arraigned in Court and before the charge is read to him or her by the trial Court. reliance was also placed on the case of A**lbanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004** where the Court held that an unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.

30. The 1st appellant argued that he should have been informed of this right the moment he became unrepresented therefore, failure by the trial Court to do so violated the 1st appellant's right to a fair trial. He further argued that he did not have knowledge of the right to representation, he was not informed of the seriousness of the offence and penalty, he was not informed of the complexity of the case and the consequences of not having representation at the stage the proceedings had reached therefore, he could not validly waive the right. He contended that there was a miscarriage of justice which was occasioned by the trial Court's failure to comply with its duties which failure went to the root of a fair trial. He urged the Court to find that the 1st appellant's trial was unconstitutional and unfair and quash his conviction and set aside the sentence.

31. The 2nd appellant submitted that the sentence of 15 years' imprisonment for trafficking in 24 sachets of heroine with a street value of Kshs. 80,700/= was harsh and excessive. He relied on the case of **Gaston January Steven vs Rep** [2017] eKLR where the Court while considering the principles of sentencing held that an appellate Court will only alter sentence imposed by the trial Court if it is evident it acted on a wrong principle or overlooked some material factor or the sentence is manifestly excessive in view of the circumstances of the case.

32. The 2nd appellant also relied on the case of **Juma Rashid Mwawanga vs Republic** H.C.C.R App No. 47 of 2019 where the appellate Court reduced a sentence to seven years' imprisonment where the appellant had been sentenced to 20 years' imprisonment and in addition to pay a fine of Kshs. 9,000,000/= for an offence of trafficking 1kg of heroine valued at Kshs. 3,000,000/= and 20 years' imprisonment and in addition to pay a fine of Kshs. 1,160,000/= for an offence of trafficking 124 grams of heroin valued at Kshs. 372,000/=. The 2nd appellant submitted that in the present case, the trial magistrate in sentencing the appellant did not ascertain whether the substances alleged to have been found in the appellant's bag were for his own consumption or for sale.

33. He relied on the case of **Josiah Mutua Mutunga & another vs Republic** [2019] eKLR on the role of sentencing where the Court held that the fundamental principle of sentencing is that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentences in the circumstance of crime committed. He submitted that in consideration of the fact that he has served 1 and ½ years since conviction and sentence, the street value of the drugs allegedly found in his bag was Kshs. 80,700/= and that he was a first offender, the 10 years sentence and a fine of Kshs. 1,000,000/= in default to serve a further 5 years' imprisonment was manifestly harsh and excessive in the circumstances.

34. To this end, the 2nd appellant relied on the case of **Charles Abuoga Ouma vs Republic** High Court Criminal App No. 219 of 1997 where the Court of Appeal found that the appellant was fit to be placed on community service where the appellant had been charged with three counts of trafficking in narcotic drugs, contrary to section 4(a) of the narcotic drugs and psychotropic substances Control Act No. 4 of 1994 and sentenced to serve 15 years on the 1st count, 10 years on the second count and five years on the third count, sentences set to run concurrently. The 2nd appellant submitted that the sentence meted out by the trial Court was against the objectives of sentencing as stipulated in the judicial sentencing policy guidelines 2016 and urged this Court to find that the time served is sufficient and/or make an order that the appellant be placed on a non-custodial sentence.

35. The 3rd appellant submitted that in this case, the prosecution never proved the *actus reus* nor the *mens reus* against him beyond reasonable doubt. He further submitted that the evidence tendered before the trial Court by the prosecution's own witnesses proved that the 3rd appellant was the driver of motor vehicle registration number KBY 986Z, he gave a lift to the 2nd appellant who boarded the vehicle with a green sack and a bag where the police found 390 rolls of cannabis and 24 sachets of heroin respectively. It was his submission that nothing was found on the 3rd appellant therefore the trial Court should have come to a conclusion that the prosecution had not proved its case against the 3rd appellant beyond reasonable doubt and acquitted him.

36. It was argued by the 3rd appellant that the trial Court having failed to state the standard of proof to which the prosecution had proved its case, one cannot tell whether it was the standard of beyond reasonable doubt or some other standard lower than that of beyond reasonable doubt thus the doubt should be resolved in his favor. He submitted that the trial Court erred in shifting the burden of proof from the prosecution to the 3rd appellant on the basis of a theory alien to the evidence on record when in law, a conviction can only be based on the weight of the evidence adduced in Court. The trial Court stated that the 3rd appellant said nothing about the bag in which the 390 rolls were found and that he did not controvert the evidence of the prosecution in cross-examination which amounted to shifting the burden of proof from the prosecution to the 3rd appellant.

37. The 3rd appellant relied on the case of **Okethi Okale & Others vs Republic** [1965] E.A 555 where the Court of Appeal held that in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence. It was submitted by the 3rd appellant that every person has a right to a fair trial under Article 50 of the Constitution which includes the right to adduce and challenge evidence. The 3rd appellant in his defense, tendered unsworn evidence. However, the trial Court in its judgment considered the prosecution's case in isolation and dismissed the 3rd appellant's defence. He relied on the case of **Karura v Republic** [1988] eKLR where the Court of Appeal held that failure to consider the defense is contrary to natural justice and unsettles the judgment.

38. It was submitted by the 3rd appellant that Section 4 (a) of the narcotic drugs and psychotropic substances (Control) Act provides for a

mandatory sentence of a fine of Kshs. 1 million or three times the market value of the narcotic drugs or psychotropic substance, whichever is greater, in addition to imprisonment for life. He further submitted that based on the supreme Court decision in **Francis Karioko Muruatetu & another v Republic** [2017] eKLR the mandatory nature of the sentence is unconstitutional as it deprives the Court if its legitimate jurisdiction to exercise discretionary power in sentencing.

39. He submitted that his sentence of 15 years' imprisonment in addition to a fine of Kshs. 1 million and in default to a further jail term of 5 years was harsh and excessive in the circumstances of the case and urged the Court to set it aside. To this end, he also relied on the case of **Caroline Auma Majabu v Republic** [2014] eKLR where the Court held that the use of the word liable in Section 4 (a) of the narcotic drugs and psychotropic substances (Control) Act gives a likely maximum sentence thus allowing the trial Court a measure of discretion in imposing sentence with the maximum limit being indicated.

40. He submitted that the 3rd appellant was neither a drug baron nor a serious drug dealer instead he was an innocent driver. He further submitted that he had no previous record, he is aged 44 years, he is a parent to three children and has a wife who has no job, mitigating factors which the trial Court ought to have considered during sentencing. The 3rd appellant urged this Court to allow the appeal, set aside the trial Court's judgment and substitute the same with the jail term already served by the 3rd appellant. Reliance was placed on the case of **Samuel Mutuku v Republic** [2016] eKLR where the appellant had been convicted for trafficking in narcotic drugs and sentenced to 10 years' imprisonment in addition to a fine of Kshs. 500,000/= and on appeal, the High Court reduced the sentence to three years and set aside the fine of Kshs. 500,000/=

41. The respondent submitted that the 1st appellant properly participated in the proceedings before the trial Court, he cross examined the prosecution witnesses at length and was aware of the criminal charges that he was facing as evidenced in the record of appeal thus the 1st appellant's constitutional rights were never violated by the trial Court or the prosecution. It further submitted that the 1st appellant has not stated at what point he failed to understand the proceedings or failed to follow the proceedings thus the Court cannot act in a vacuum and understand that the 1st applicant does not understand the proceedings in Court. in fact, the 1st appellant did not move the trial Court with an application to be provided with Counsel under Article 50(2) (g) neither did he address the Court on his pauperism and that he would suffer injustice if the matter proceeded without representation of Counsel.

42. It was submitted by the respondent that the appellants were not convicted with a capital offence to warrant an automatic appointment of an advocate by the Court neither is the appellant a child offender so as to benefit from this process. It relied on Nairobi Criminal Appeal Number 144 of 2015 **Herald Kurt Werthner** where the Court held that the appellant cannot argue that his right to a fair trial on account that he was not afforded free legal representation at state expense was violated.

43. On chain of custody, the respondent submitted that the chain of custody was properly handled by all the prosecution witnesses as can be seen from the record of appeal. furthermore, the appellants never raised this issue before the trial Court thus an afterthought meant to weep the emotions of this Court.

44. On consistency of the prosecution witnesses, the respondent submitted that all its witnesses corroborated each other and gave a consistent account of events leading to the arrest, identification and subsequently placing the accused at the locus in quo. Essentially, the prosecution proved both the *mens rea* and the *actus reus* of the offence beyond reasonable doubt. He submitted that in a criminal trial the burden of proof throughout rests on the prosecution to establish the guilt of an accused person beyond reasonable doubt, the prosecution satisfied this aspect and never shifted it to the appellants. In deed the appellants gave evidence in defense and the trial Court considered it but rightly dismissed it and agreed with the prosecution witnesses.

45. The respondent submitted that this Court is clothed with powers to re-sentence where the sentence meted by the trial Court is mandatory in nature as was held in the case of **Francis Karioko Muruatetu & another v Republic** (supra). However, in the present case, the appellants were properly sentenced, and their mitigation was taken into account by the trial Court. this Court was urged to dismiss the appeal in its entirety.

ANALYSIS AND DETERMINATION.

46. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174.**

47. I have considered the record of appeal and the grounds of appeal as well as the submissions by the respective parties on record and find that the Trials Court decision as to conviction is safe and therefore there is no need to interfere with the same. With regards to sentencing, the provision as to sentence is discretionary and not mandatory. In **Kibibi Kalume Katsui v. Republic [2015] eKLR** the court cited the case of **Carolyne Auma Majabu v Republic [2014] eKLR** where it was held that: -

> ***"[12] Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, sets out the penalty for trafficking in the following terms ...***
>
> ***...Any person who trafficks in any 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 …, and in addition, to imprisonment for life"***
>
> ***[13] In our view, the word "shall" is used in relation to the guilt offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as***

(i) Responsible by law, legally answerable, (liable to) Subject by law to;

(ii) (Liable to do something) likely to do something

(iii) (Liable to) likely to experience (something undesirable) Black's law Dictionary defines "liable" as Responsible or answerable in law; legally obligated Subject to or likely to incur (a fine, penalty etc.)

[14] Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms..."

48. The Court also stated that:

"In the premises, we shall state without tiring, that under the Narcotic Drugs and Psychotropic Substances (Control) Act, sentence is still discretionary. We are of course in no way suggesting that under this Act this Court or the High Court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. See Wanjema v Republic [1971] EA 493 and Diego v Republic [1985] KLR 621. The trial court and High Court meted out a life imprisonment sentence inclusive of a one million fine, on the premise that such sentence was mandatory hence they misdirected themselves. That misdirection calls for our intervention. In arriving at the appropriate sentence that we should substitute we are bound to consider the quantity of the drugs, its value, the mitigation canvassed by the appellant and her antecedents if at all relating to the same offence".

49. To this end, and in consideration of the Court of Appeal decision in **Moses Banda Daniel v Republic [2016] eKLR,** which when dealing with a similar issue held that: -

"What has, however concerned us is the sentence. Mr. Yamina, learned counsel for the respondent readily conceded and rightly so in our view that the two courts below misdirected themselves in importing mandatory language into section 4(a) of the Act, yet the section has conclusively been interpreted as discretionary by this Court in Kabibi Kalume Katsui v R Msa Criminal Appeal No.90 of 2014. With respect, we agree that the imposition of life sentence in addition to a fine of Kshs. 1,000,000/= was in error. The learned Judge (Meoli, J) too fell into that error even, after appreciating that this Court had departed from the holding in Chukwu v R, Criminal Appeal No.257 of 2007 in its subsequent decisions in Daniel Kyalo Muema v R Cr. Appeal No.479 of 2007 and Gathara v R (2005) 2 KLR 58.

For these reasons the appeal on conviction fails and is dismissed. However, we allow the appeal on sentence by setting aside the life imprisonment and a fine of Kshs. 1,000,000/= and in their place substitute, respectively ten (10) years imprisonment and a fine of Kshs. 10,000/= and in default three (3) months imprisonment. It is so ordered."

50. In light of the above, the sentence of fifteen years in custody, in addition, a fine of Kshs. 1,000,000/= each in default to serve a further five years in custody for the 1st and 2nd Appellant and a sentence of 10 years in addition, to pay a fine of Kshs. 1,000,000/= in default to serve a further five years in custody for the 3rd Appellant is not only harsh but also excessive. The trial court in sentencing is required to exercise its discretion while bearing in mind the quantity of the drugs, the value of the drugs, the mitigation and antecedents of the accused persons. In mitigation, all the Appellants prayed for leniency. The street value of the narcotic drugs was estimated to be Kshs. 360,000/= for the Cannabis and Kshs. 80,000/= for the Heroine. Taking this into consideration, I find the sentence imposed by the trial court to have been excessive.

51. This Court therefore upholds the conviction but set aside the sentence imposed by the trial Court and substitute it with a term of 10 years' imprisonment for each of the accused persons effective from the date of conviction and sentence in the trial court for the 1st and 3rd Appellants. In view of the fact that the 2nd Appellant was in custody during the pendency of the trial before the subordinate court, his sentence shall run from 19th August, 2015.

It is so ordered.

Right of appeal in 14 days.

Dated, Signed and **Delivered,** in open court this **3rd** day of **June, 2021**

HON. LADY JUSTICE A. ONG'INJO

JUDGE