



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.149 OF 2017

ELIZE DE JAGER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. L. O. Onyina (SPM) delivered on 25th August 2017 in JKIA SPM Cr. Case No.51 of 2016)

JUDGMENT

The Appellant, Elize de Jager was charged with 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 offence were that on 22nd November 2014 at Jomo Kenyatta International Airport within the County of Nairobi, the Appellant trafficked by conveying a narcotic drug, namely cocaine concealed in 33 lotion bottles, eight pieces of open shoes and three jars of hair cream with a total weight of 4,499.9 grams with a market value of Kshs.17,999,600/- in contravention of the provisions of the said **Act**. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was convicted as charged. She was ordered to pay a fine of Kshs.54,998,800/- or in default serve one (1) year imprisonment. In addition, she was sentenced to serve life imprisonment. The Appellant was aggrieved by her conviction and sentence. She filed an appeal to this court challenging the same.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She was aggrieved that she had been convicted in the absence of sufficient evidence to sustain a conviction and further, in the absence of evidence to establish the ingredients of the charge. She faulted the trial magistrate for failing to appreciate the fact that prosecution witnesses had adduced contradictory and discordant evidence to support its case. The Appellant was of the view that the prosecution had failed to establish the burden placed on it to prove the charge to the required standard of proof beyond any reasonable doubt. The Appellant stated that during her arrest and subsequent arraignment in court, her constitutional right to fair trial were infringed. The Appellant was aggrieved that the trial court had taken into account extraneous considerations and disregarded the Appellant's defence in arriving at the impugned decision to convict her. The Appellant pointed out that the exhibits produced by the prosecution failed to establish the evidential threshold of establishing the charge brought against the Appellant. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed by the trial magistrate.

Prior to the hearing of the appeal, both the Appellant and the prosecution filed written submission in support of their respective opposing positions. During the hearing of the appeal, the written submission filed by the parties were highlighted by Mr. Swaka for the Appellant and by Mr. Momanyi for the State. Mr. Swaka pointed out the deficiencies in the prosecution's case including the fact that the Appellant was arrested while she was at the transit area at the airport. She had no visa to enter the country. It was his submission that the Kenyan police and the Kenyan courts had no jurisdiction to arrest or try the Appellant. He pointed out that the Appellant was not present when the offending bag was allegedly retrieved from the airplane. She was not there when the bag was allegedly seized by the police. In fact, she denied that she was the owner of the particular bag. Learned counsel submitted that there was no evidence connecting the Appellant to the bag. The identification tag produced into evidence did not connect the Appellant to the bag. He complained that there was a lot of discrepancy in the evidence that was produced by the prosecution witnesses, which in his view, raised reasonable doubt as to the Appellant's guilt. He noted that the Appellant did not sign any of the documents that the prosecution adduced to support its case. It was not clear from the inventory or the sampling certificate who the officers who prepared the inventory or the sampling certificate were. He doubted that the photographic evidence produced by the prosecution marched the evidence adduced in support of the prosecution's case.

Learned prosecutor took issue with the fact that it had taken two years for the photographs to be printed. He was alluding to the fact that during this period, the photographic evidence may have been interfered with. He submitted that, taking into account the fact that most of the testimonies adduced by the prosecution witnesses was at variance with the witnesses' statements earlier prepared, the same could not sustain a conviction. He was of the view that the gaps noted in the prosecution's case raised reasonable doubt as to the Appellant's guilt. As regard sentence, he submitted that the trial court failed to take into consideration the mitigation of the Appellant. He also failed to take into consideration the fact that the sentence that was imposed was the maximum that was provided by the law and not mandatory. In particular, he

observed that the trial court failed to take into consideration that the Appellant suffers from cancer and had a dislocated discs. She had been in lawful custody since 2014. If these factors had been taken into account, a less severe sentence should have been imposed. He urged this court to impose a reasonable sentence in the circumstances.

Mr. Momanyi for the State opposed the appeal. He submitted that the prosecution had adduced sufficient culpatory evidence to establish that indeed the Appellant was guilty as charged for the offence that she was convicted. The evidence that was adduced by the seven prosecution witnesses was cogent, credible and consistent. He urged the court not to be persuaded by the Appellant's assertion that she had not signed any of the exhibits that were produced by the prosecution witnesses. He noted that the Appellant had refused to sign any of the exhibits. She could not be forced to sign the same. No constitutional rights of the Appellant were infringed during her arrest and subsequent arraignment in court. Learned prosecutor asserted that there was no conflict or contradiction in the evidence adduced by prosecution witnesses. It was his submission that the prosecution had established its case to the required standard of proof on the charge brought against the Appellant. As regard sentence, he agreed with the Appellant that the custodial sentence that was meted on her was indeed harsh. He proposed that the Appellant instead be sentenced to serve a custodial term of 25 years imprisonment.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution proved the charge of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic and Psychotropic Substances Control Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the submission made before this court, both written and oral. It was the prosecution's case that the Appellant was found in possession of a narcotic drug (cocaine) in circumstances that indicated that she was trafficking the same. *What was the evidence that the prosecution adduced in support of its case?* On 22nd November 2014, PW1 Cpl. Geoffrey Kipkurui, PW3 PC. Loraine Muhingi and Cpl. Bramwel Saima then attached to Jomo Kenyatta International Airport, Anti-Narcotics Unit, received intelligence report that there was a passenger who was travelling from Sao Paulo in Brazil using Qatar Airline who would be transiting through Jomo Kenyatta International Airport. The intelligence report identified the passenger as a drug trafficker.

Upon the plane landing, the three police officers went into the arrival gate and, based on description, met with the Appellant. They requested her to accompany them to their office. They requested her for her travel documents. She gave the police her travel documents. The documents included a baggage claim tag and boarding passes. PW2 and PW3 testified that using the claim tag, they requested for the Appellant's travel bags to be retrieved from the storage area. Upon retrieval of the bag (the bag was dark green in colour), the Appellant was requested to open the same. She complied. Upon opening the same, 33 women roll-ons and three hair oil jars, and four pairs of sandals were retrieved. Upon close inspection, it was noted that the roll-ons containers and the hair oil jars contained a powdery substance. When the four pairs of sandals were opened, a powdery substance was retrieved. Initial sampling showed that the substance was cocaine. The police seized the items and issued a seizure notice. An inventory of the recovered items was prepared. The Appellant was arrested. All these items were produced as prosecution's exhibit during trial.

After her arrest, the seized items were taken to the government analyst. The same were received at the government analyst's office on 24th November 2014 by PW2 Marian Chege. She testified that upon carrying test on the substance received from the Appellant, she confirmed the same to be cocaine, a narcotic substance. She prepared a report confirming the same. The report was produced into evidence as a prosecution's exhibit. The recovered substance was later weighed by Supt. Ruth Muinde, a gazetted valuation officer. She confirmed that the recovered drugs weighed 4499.9 grams. She formed the opinion that the value of the seized drugs was Kshs.17,999,600/-. She produced the valuation certificate into evidence as a prosecution's exhibit.

PW4 Stephen Kemboi, SSP of Police and a gazetted Scenes of Crime Officer, took photographs at the scene. He took photographs of the seized items including when the powdery substance later determined to be cocaine was being weighed. All the photographs were produced into evidence. He also produced a certificate of authentication confirming that he was present when the photographs were being printed. PW5 CIP Joseph Indeke was the officer in-charge at the time the cocaine was seized from the Appellant. He narrated the steps he took from the time the items were seized, the steps he took to process the same and the steps he took to supervise the investigation and later the arraignment of the Appellant in court. The case was investigated by PW7 Cpl. Teddy Gichira who after the conclusion of investigations, reached the determination that a case had been made for the Appellant to be charged with the offence that she was convicted. He produced all the exhibits that had been marked for identification.

When the Appellant was put on her defence, she denied committing the offence. She was emphatic that she was not the owner of the bag that the offending narcotic substances were seized from. She told the court that she was not present when the bag was retrieved from the airplane. Neither was she present when some of the statutory steps that were required to be taken were being taken by the police. In essence, she denied that she was found in possession of the narcotic drugs that she was being charged with trafficking.

Upon re-evaluation of these evidence, in light of the grounds of appeal put forward by the Appellant, this court reached the following conclusion:

- i. That the prosecution established to the required standard of proof that the narcotic drugs were recovered in a bag which contained

the identification tag in the name of the Appellant.

ii. That the prosecution established that the narcotic drugs were recovered belonged to the Appellant.

iii. That the prosecution established that the narcotic drugs were hidden in containers purporting to contain beauty products. Upon being opened, they were found to contain a powdery substance which was later confirmed to be cocaine, a narcotic substance.

iv. That all the statutory steps were followed and appropriate certificates issued upon the recovery of the narcotic drugs from the Appellant's possession.

v. That the narcotic drug was concealed with a view to enabling the Appellant convey it without raising suspicion. The Appellant was aware that she was conveying an illegal substance.

vi. That taking into consideration the weight of the narcotic substance that was recovered in the Appellant's possession, it was clear to this court that the prosecution proved to the required standard that the Appellant was conveying the same as a narcotic drug.

vii. That the evidence adduced by the Appellant in her defence did not dent the otherwise strong, cogent, credible and consistent evidence that was adduced by the prosecution witnesses.

This court cannot therefore disagree with the verdict of the trial court when he held thus:

“From the evidence on record, there is no dispute that the accused person (Appellant) was arrested at JKIA while transiting through Kenya on her way from Brazil. That is also in the accused's person testimony. The evidence adduced by the prosecution indicates that the bag (exh.8) belonged to the accused person. The luggage tag (exh.9) and the claim tag (exh.6) bear identical particulars. All the recovered items are listed in the inventory produced as exhibit 17 which the accused person signed on each of the three pages thereof. She stated in her testimony during cross-examination that she signed the same. All the recovered items and substances are listed in that inventory. The accused person also stated that the receipt (exh.15) was not recovered from her; but that the same appears as item number 32 on the inventory, just next to where she appended her signature on the third page confirms the evidence adduced by the prosecution witnesses that the same was indeed recovered from her; and it has the list of items, including roll on bottles that were found to contain cocaine. There is evidence on record that she is even the one who produced the key to the padlock that had been used to lock that bag, and opened the padlock. The key and the padlock were both produced in evidence as aforementioned, as exhibits 10(a) and (b). The evidence showing the substance was being conveyed by the accused person at the material time is really overwhelming; clear, consistent and credible.”

The Appellant's appeal against conviction therefore lacks merit. It is hereby dismissed.

On sentence, the Appellant is on firmer ground. The Appellant was sentenced to pay a fine of **Ksh.53,998,600/- or in default serve one (1) year imprisonment. She was additionally sentenced to serve life imprisonment.** That is the maximum penalty provided under **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act.** It was clear that the trial court, while sentencing the Appellant, proceeded on the assumption that the sentence provided by the above section was mandatory rather than the maximum sentence to be meted in appropriate circumstances. That is not the correct position in law. The Court of Appeal in various decisions has reiterated that the word “*liable*” in **Section 4(a) of the Act** merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated (See **Caroline Anna Majabu v R [2014] eKLR, Kabibi Kalume Katsui v R [2015] eKLR, and Antony Mbithi Kasyula v R [2015] eKLR.**)

In the present appeal, this court agrees with the Appellant that the sentence of life imprisonment that was imposed on her was harsh and excessive in the circumstances. In her mitigation, the Appellant states that she suffers from cancer. The court has seen several medical reports which confirms that indeed the Appellant has been in and out of hospital attending to various ailments both during the trial and after her conviction. This court has no doubt that the Appellant has the medical ailments that she is complaining of. The court has also taken into consideration that the Appellant has been in lawful custody for a period of approximately five years. This court has also noted the Appellant's age. She is 52 years old. She told the court that she was remorseful and had learnt her lesson during the period of her incarceration. The Appellant's mitigation does not however distract the court from taking judicial notice of the devastation that the narcotic drugs are causing to the health of human beings particular the youth. Drug traffickers can be classified as merchants of deaths. They do not give a hoot to the pain and suffering that the members of the families of drug addicts go through as a result of their illegal trade. Taking into consideration the amount of cocaine that was recovered from the Appellant, this court sets aside the sentence that was imposed by the trial court and substitutes it with a sentence of this court:

The Appellant is sentenced to pay a fine of Kshs.53,998,600/- or in default one (1) year imprisonment. In addition, the Appellant shall serve a term of imprisonment of fifteen (15) years with effect from 22nd November 2014 when she was arrested and placed in lawful custody. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE