



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.121 OF 2019**

**JUSTIN CAMARA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal arising out of the conviction and sentence of Hon. L.O. Onyina CM delivered on 8<sup>th</sup> May 2019 in JKIA Chief Magistrate Court Cr. Case No.47 of 2018)*

**JUDGMENT**

The Appellant, Justin Camara, 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 30<sup>th</sup> August 2015 at Jomo Kenyatta International Airport within Nairobi County, the Appellant, jointly with others not before court, trafficked by conveying narcotic drug namely heroin to wit 5060 grams with a market value of Ksh.15,180,000/- concealed in the false bottom of the Appellant's suitcase, in contravention of the provisions of the said **Act**. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged. He was sentenced to pay a fine of Ksh.30 million or in default serve one (1) year imprisonment. In addition, the Appellant was sentenced to serve a custodial sentence of twenty (20) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to comply with the provisions of **Section 74A(3)** as read together with **Section 79** of the **Narcotic Drugs and Psychotropic Substances Control Act**. He was of the view that he was arrested while on transit to another country and was therefore arrested on a no-man's land. He was aggrieved that the trial magistrate misdirected himself by improperly evaluating and analyzing the evidence on record and thereby arriving at the wrong decision. He took issue with the fact that the trial court failed to consider his defence in arriving at its decision. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, this court heard oral rival submissions made by Mr. Ondieki for the Appellant and Ms. Nyauncho for the State. Mr. Ondieki submitted that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. He averred that the prosecution failed to produce the certificate of inventory in evidence. He was of the view that lack of documentary evidence to establish items allegedly recovered from the Appellant during the search weakened the prosecution's case against the Appellant. He opined that the Appellant's right to a fair trial under **Article 50(4)** of the **Constitution** was violated by the trial court. He submitted that PW3 and PW4 admitted that they offloaded the brown bag from the plane in the absence of the Appellant. The narcotic substances were recovered from the said bag. He maintained that the Appellant ought to have been present when the said bag was being offloaded from the plane.

Counsel for the Appellant further submitted that the Appellant was a foreigner. His counsel ceased acting for him. When PW4 and PW5 testified, the Appellant did not have legal representation. He did not cross-examine the said witnesses. His right to a fair trial was therefore compromised. Mr. Ondieki further averred that the Appellant was in custody for a period of about five (5) years prior to his conviction. He was of the opinion that the trial court failed to take this period into account when meting out the custodial sentence against the Appellant. He asserted that the Appellant's sentence was harsh and excessive in the circumstances. He prayed that the court orders the repatriation of the Appellant to his country of origin. In the premises, he urged the Court to allow the Appellant's appeal.

Ms. Nyauncho for the State opposed the appeal. She made oral submission to the effect that the prosecution established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She averred that the Appellant was arrested at JKIA while on transit in possession of heroin weighing 5060 grams. He was on his way to Bamako, Mali. He was intercepted by PW3, PW6 and PW7 who were police officers on duty. They searched his bag and recovered heroin hidden in a false bottom of the suitcase. Learned State Counsel asserted that procedure of seizure of narcotic substance under **Section 74A** of the **Act** was observed. The narcotic substance was weighed and sampled and a preliminary test conducted. She stated that the certificate of inventory was not produced in evidence since the Appellant objected to the same, and his objection was upheld. She was of the view that failure to produce the same did not prejudice the Appellant, and

was not fatal to the prosecution's case since there was overwhelming evidence against the Appellant.

Learned State Counsel further submitted that the brown suitcase that was recovered contained the Appellant's name as well as the same reference number contained on his luggage claim tag. She maintained that there was no doubt that the recovered bag containing the narcotic substance belonged to the Appellant. With regard to the issue of fair trial, she submitted that all the prosecution witnesses who were not cross-examined by the Appellant were later recalled and cross-examined by his advocate. His right to fair trial was therefore not violated. She was of the view that the sentence meted by the trial court was neither harsh nor excessive as the same corresponded to the value of the drugs recovered from the Appellant. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW7, PC Odhiambo, was an officer based at the Anti-Narcotic Drug Unit at JKIA. He was the investigating officer in the present case. On 30<sup>th</sup> August 2015, he was on duty at JKIA together with Cpl. Indeke, PC Luke Kinoti (PW3) and Cpl. Kimeli (PW6). They received information that there was a passenger in transit area at the airport suspected of trafficking in narcotic substances. They proceeded to the Transit Lounge Boarding Gate No.5 where they intercepted the Appellant. The Appellant was a Guinean National. He had disembarked from a plane KQ263 that flew in from Antananarivo in Madagascar. He was on transit lounge at JKIA, about to board a plane KQ512 heading to Bamako, Mali. They confiscated his passport, boarding pass and a claim tag reference No.0706 KQ 230 838 for the checked-in luggage. His boarding pass indicated that he was about to board plane KQ 512 at 0740 hours from Nairobi to Bamako.

PW7 further instructed the airline to offload the Appellant checked-in luggage from the plane. The brown suitcase that was off loaded had a luggage tag that contained the Appellant's name and the same reference number as his claim tag. They seized the bag and escorted the Appellant to the Immigration Office where they gave explanation to the effect that the Appellant was being detained on suspicion of trafficking in narcotic drugs. They thereafter took the Appellant to the Anti-Narcotic Unit offices where they conducted a search on his person as well as the brown suitcase. After searching the suitcase, they recovered a polythene bag containing a brownish powdery substance, hidden in a false bottom of the suitcase. They also recovered an air ticket in the suitcase for the flight from Nairobi to Bamako. The process of searching the suitcase was documented by the scene of crime officer who took photographs. Weighing and sampling of the recovered substance was conducted the following day on 31<sup>st</sup> August 2015. The preliminary tests conducted indicated that the substance recovered from the Appellant contained heroin, a narcotic substance.

PW6 stated that he prepared a certificate of inventory of all items recovered from the Appellant. The substance was seized by PW6 and a Notice of Seizure was produced into evidence. PW7 also produced into evidence the record of custody of seizure and Notice of Intention to Tender Records prepared by himself. He also presented before the trial court items recovered from the Appellant, including the brown bag containing the narcotic substance, his passport, his air tickets from Antananarivo to Bamako via Nairobi, his boarding passes, his luggage tag and the corresponding claim tag.

PW1, Marian Njeri Chege was a Government Analyst. She stated that on 31<sup>st</sup> August 2015, she received a polythene sachet containing a brown powdery substance from the investigating officer, PW7. She was instructed to determine whether the substance contained any narcotic or psychotropic substance. After her analysis, she came to the conclusion that the substance contained heroin. She produced a report of the findings dated 8<sup>th</sup> October 2015 into evidence. She further testified that she conducted the preliminary sampling of the seized substance at the Anti-Narcotics Unit at JKIA on 31<sup>st</sup> August 2015 and prepared a certificate of sampling. The said certificate was also tendered into evidence.

PW2, IP Martin Ndegwa, was an officer based at the Anti-Narcotic Drug Unit at JKIA. On 31<sup>st</sup> August 2015, he was instructed to weigh the brownish substance that was recovered from the Appellant. He did the same in the presence of the Appellant and other police officers. The substance weighed 5,060 grams. He produced the certificate of weighing into evidence. The investigating officer (PW7) prepared an exhibit memo and forwarded samples of the substance to the Government Chemist for analysis. PW2 thereafter took over possession of the seized substance.

PW4, PC Bernard Serem was the Scene of Crime Officer. On 31<sup>st</sup> August 2015, he was instructed by the investigating officer (PW7) to take photographs of a brown suitcase that had been recovered from the Appellant. He also took photographs as the officers searched the Appellant's bag and recovered the narcotic substance from a false bottom in the suitcase. He similarly documented the weighing and sampling process of the recovered substance. He produced the photographs as well as authentication certificate into evidence.

PW5, C.I. George Mutiso, was a duly gazetted officer based at the Anti-Narcotic Unit. On 12<sup>th</sup> October 2015, he was requested by PC Odhiambo to do a valuation of a narcotic substance, namely heroin, which had been recovered from the Appellant. The substance weighed 5,060 grams. He valued the same at Ksh.15,180,000/-. He produced the valuation certificate into evidence.

The Appellant was put on his defence. He gave a sworn statement. He stated that on the material day of 30<sup>th</sup> August 2015, he had travelled from Madagascar and was on his way to Mali. Police officers intercepted him at Gate No.5 at JKIA. The officers searched him. They also searched his hand luggage but did not recover anything. They asked him if he was originally from West Africa, of which he answered in the affirmative. They asked him for money but he told them that he did not have any. They took him to JKIA Police Station. He was later arraigned at Kibera Law Courts. The Appellant asserted that the prosecution failed to produce into evidence a certificate of inventory of the items allegedly recovered from him. He averred that he was not present when the brown suitcase was removed from the aircraft. He asserted that the prosecution ought to have availed the airline staff who offloaded the bag to adduce evidence. He was adamant that the brown suitcase containing the narcotic substance did not belong to him. He denied the charge brought against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution adduced sufficient evidence to establish the Appellant's guilt on the charge of **trafficking in**

**narcotic drugs** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court, the Appellant's grounds of appeal as well as the rival parties' submission. Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act provides as follows;

***“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;”***

It was the prosecution's case that the Appellant was arrested in possession of the narcotic substance. PW3, PW6 and PW7 were police officers based at the Anti-Narcotic Unit at Jomo Kenyatta International Airport (JKIA). They told the court that on 30<sup>th</sup> August 2015 while on duty at JKIA, they received information that a passenger at the airport was suspected of trafficking in narcotic substances. The said suspect was the Appellant. They proceeded to boarding Gate No.5 at the transit lounge where they intercepted the Appellant. The Appellant, a Guinean National, had just disembarked from a plane that flew in from Antananarivo, Madagascar, and was about to board a plane to Bamako, Mali. They confiscated his passport, boarding pass as well as a claim tag reference No.0706-KQ-230838 for luggage that he had checked in.

PW7 sought the help of airline staff who assisted them offload the Appellant's checked-in luggage. The luggage was a brown suitcase. The suitcase had a luggage tag that contained the Appellant's name as well as the same reference number as his claim tag. When they searched the suitcase, they found a polythene bag containing a brown powdery substance. This was hidden in a false bottom of the suitcase. PW3, PW6 and PW7 all testified that narcotic substance was recovered from the bag belonging to the Appellant.

The Appellant denied being found in possession of the narcotic substance. In his defence, he admitted that he was arrested at JKIA while on transit from Madagascar on his way to Bamako, Mali. He also admitted that he had checked-in luggage and that the airline had given him a claim tag for the said luggage. He however denied that the brown suitcase where the narcotic substance was recovered belonged to him. He stated that when the police arrested him, they conducted a search but did not recover any narcotic substance from him or his luggage. He also asserted that the prosecution failed to produce into evidence the certificate of inventory of items allegedly recovered from him when he was arrested.

The Appellant's defence is however displaced by that of PW3, PW6 and PW7 who arrested him. The Appellant had in his possession a claim tag which matched the reference number on the luggage tag that was attached to the brown suitcase. In addition, the luggage tag also indicated his name, Camara J. The evidence on record clearly shows that the bag containing the narcotic substance belonged to the Appellant. Even though the court objected to the certificate of inventory being admitted into evidence, the evidence of PW3, PW6 and PW7 was to the effect that the Appellant was arrested in possession of the brown suitcase where the narcotic substance was recovered. The Appellant checked in the said suitcase. The suitcase as well as the Appellant's travel documents were produced into evidence. The defence offered by the Appellant was merely a denial and did not dent the otherwise strong cogent and credible evidence that was adduced by the prosecution. This court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that the narcotic substance was found in the Appellant's possession.

The prosecution adduced evidence which established that the substance found in the Appellant's possession was a narcotic substance within the meaning ascribed to the term by **Section 2(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act** and the 1<sup>st</sup> Schedule thereof. PW1, Marian Chege, a Government Analyst, testified that she conducted a preliminary test of the substance recovered from the Appellant. The test confirmed that the substance contained heroin. She also conducted a further elaborative test at the Government Chemist and after her analysis, she confirmed that the substance found in the Appellant's possession contained heroin. She produced a sampling certificate as well as an analysis report into evidence.

The other issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant trafficked the narcotic drugs. The particulars of the charge alleged that the Appellant was trafficking the narcotic substance by way of conveyance. From the evidence adduced, it was apparent that the Appellant was trafficking the narcotic substance. The drugs were recovered from the Appellant's possession. He had concealed the same in a false bottom in his suitcase. He had just disembarked from a plane that landed from Antananarivo in Madagascar and was about to board another plane to Bamako, Mali. His air ticket, boarding pass and passport were produced in evidence. The Appellant, in his defence, admitted that he was arrested as he was about to board a plane to Bamako.

The circumstance under which the Appellant was found in possession of the narcotic drugs clearly points to the fact that he was trafficking the said narcotic drugs from Madagascar to Mali. He was doing so with a view to benefiting financially from the delivery of the said psychotropic substance. This court holds that the prosecution did establish that the Appellant trafficked in the said psychotropic substance by way of conveyance. The defence adduced by the Appellant was correctly dismissed by the trial court as self-serving and meant to exonerate the Appellant from a crime which he was found red-handed to have committed. This court too finds no reason to depart from the decision by the trial court.

The Appellant submitted that the trial court failed to observe his right to a fair trial embedded under **Article 50 of the Constitution**. Counsel for the Appellant averred that the Appellant was a foreigner. His counsel ceased to act for him at some point during trial. When PW4 and PW5 testified, the Appellant did not have legal representation. He did not cross-examine the said witnesses. His right to a fair trial was therefore violated. This court has perused the trial court's record. While it's true that when the said witnesses first testified, the Appellant did not have any legal representation, this court notes that when Counsel for the Appellant came on record, he recalled the said prosecution witnesses and cross-examined them. No prejudice was therefore occasioned on the Appellant. The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant was sentenced to pay a fine of **Ksh.30 million or in default serve one (1) year imprisonment. He was additionally sentenced to serve a custodial sentence of twenty (20) years.** The maximum penalty provided under **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act** is a fine of one (1,000,000/-) million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is greater, and in addition, to imprisonment for life. However, 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.**

**This court notes that the Appellant spent close to three and a half years in custody prior to his conviction by the trial court.** This court has also considered the quantity of the narcotic drugs seized from the Appellant as well as the Appellant’s mitigation in the present appeal. This court is of the view that the sentence meted by the trial court was harsh and excessive in the circumstances of this case. The Appellant’s appeal on sentence is therefore allowed. The sentence imposed on the Appellant by the trial court is hereby set aside. The same is substituted by an order of this court sentencing the Appellant to pay a fine of **Ksh.30 million or in default serve one (1) year imprisonment. He is additionally sentenced to serve a custodial sentence of fifteen (15) years from the date he was convicted by the trial court i.e. 8<sup>th</sup> May, 2019.** This court has taken into account the period that the Appellant was in lawful custody prior and after his conviction by the trial court. Upon completion of his sentence, the Appellant is to be repatriated to his country. **It is so ordered.**

**DATED AT NAIROBI 6<sup>TH</sup> THIS DAY OF MAY 2020**

**L. KIMARU**

**JUDGE**