



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO.168 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Onginjo –

(CM) delivered on 22nd November 2016 in Kibera CM. CR.Case No.438 of 2012)

THOMAS MUTUNE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant 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 20th day of January 2012, at Jomo Kenyatta International Airport within Nairobi County, the Appellant trafficked by conveying 67 pellets of narcotic drug namely cocaine concealed on both legs inside a pair of socks above the ankle joint weighing 1176.4grams with a market value of Ksh.4,705,600/- in contravention of the provision 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 and sentenced to pay a fine of Ksh.14,116,800/-. In default of the same, the Appellant was to serve a thirty (30) years imprisonment.

In his petition for Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He took issue with the trial court's decision to convict him, yet the prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for failing to appreciate that the prosecution failed to establish that the mandatory provisions of Section 74A of the Narcotic Drugs and Psychotropic Substances Control Act had been complied with. He was aggrieved that the trial court contravened his rights to a fair trial under Article 50(2) of the Constitution by proceeding with the case in the absence of his advocate. He was of the opinion that the trial court failed to observe provisions of Section 169 of the Criminal Procedure Code in failing to provide reasons for its judgment. Finally, he complained that the sentence imposed by the trial court was harsh and excessive in the circumstances.

By consent of the parties, the appeal was disposed of by way of written submissions. Both parties filed their written submissions. During the hearing of the Appeal, counsel for the Appellant stated that the Appellant was charged with trafficking cocaine by means of conveyance. It was his view that the particulars of the charge failed to indicate where the conveyance was from and to where. The charge was therefore flawed. He submitted that the particulars of the charge and the evidence of the valuation report were in conflict. He argued that the prosecution failed to call material witnesses. He stated that the prosecution failed to comply with Section 74 of the Narcotic Drugs and Psychotropic Substances Control Act. The integrity of the evidence was compromised. He further submitted that the evidence of the prosecution witnesses were full of contradictions. He averred that the Appellant's right to a fair trial under Article 50(2) of the Constitution was compromised. The Appellant's advocate failed to attend court. He asserted that the Appellant was not granted the chance to make his final submissions in the absence of his advocate. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Atina for the State opposed the appeal. Learned State Counsel stated that the evidence of PW2, PW3 and PW4 implicated the Appellant on the issue of conveyance. He was on his way to Malaysia. His passport was tendered in court as evidence. He was arrested as he was about to board the plane. She asserted that the Appellant was clearly heading out of the country. The drugs were found in the Appellant's possession. Photographs of the same were taken at the crime scene were availed in court. She further submitted that the discrepancy between the valuation report and the charge sheet was not fatal. The same was curable under Section 382 of the Criminal Procedure Code. The Appellant was aware of the charges he was facing. The drugs were described under *Schedule 2* of the Act. The Appellant was therefore not prejudiced. She submitted that there were no contradictions in the evidence adduced by the prosecution witnesses. With regards to the sentence, she averred that the Act provides for a sentence of a fine which is three times the value of the narcotic drug. The same does not have a 2nd limb. She stated that the Appellant was liable to imprisonment for life. It was her submission that the Appellant was accorded a

fair hearing. He requested for several adjournments to enable him file his final submissions. The trial court indulged him. On 6th November 2015, the Appellant requested the court to write a judgment based on the evidence already on record. The Appellant was therefore not prejudiced in any way. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, Corporal Dominic Wambura, stated that he was based at JKIA Anti-Narcotics Drug Unit. On the material day of 20th January 2012, at about 5.00p.m., he got instructions to apprehend a passenger who was about to board a plane. He was travelling to Kuala Lumpur, Malaysia. Together with PC Onyango, they went to Gate 8 and were granted access to the airport lounge. They located the Appellant. They requested him to accompany them to their office for further investigations. PW1 stated that his superior, C.I Bondo, came to the office. PW1 left him with the Appellant and went off duty. He stated that he did not participate in the search of the Appellant.

PW2, C.I Earnest Maringa, stated that on the material day he was instructed by Corporal Peter Mugangi to take photographs of the Appellant. The Appellant was arrested with drugs hidden in his socks. He was held at the Anti-Narcotics Unit. He stated that the Appellant's left leg had 3 rolls of drugs concealed with socks and reinforced with rubber bands. The 1st, 2nd and 3rd rolls had, respectively, 10, 12 and 11 pellets each. His right leg had 11, 10, and 13 pellets in the 1st, 2nd and 3rd rolls respectively. He produced 34 photographs into evidence.

PW3, C.I Tobias Abondo, was the deputy in charge of the Anti-Narcotics Drugs Unit at JKIA. On the material day, he received information that a suspected drug trafficker was at the airport lounge about to leave the country. He instructed P.C Onyango and PW1 to locate the said suspect and bring him in to be searched. The two police officers brought the suspect to his office. He proceeded to interrogate the suspect. He searched the suspect as well as his luggage. He recovered 67 pellets tied around both of Appellant's legs. The said pellets were concealed with a pair of socks held together with rubber bands. The left leg had 33 pellets. The right leg had 34 pellets. They took photographs of the said drugs on the Appellant's legs. The pellets weighed 1176.4 grams. A preliminary analysis was conducted by the Government Chemist. He identified the substance in the pellets as cocaine.

PW4, P.C Francis Onyango, stated that on the material day, he was instructed by PW2 to apprehend a suspect at the airport Gate No.8 area. The suspect was carrying a red bag. He proceeded there accompanied by PW1. They located the suspect. The suspect was the Appellant. They took him to the Anti-Narcotic offices for interrogation. PW2 interrogated the Appellant. PW3 stated that he was present during the interrogation. They searched the Appellant and recovered the drugs hidden on his legs, inside his socks.

PW5, Simon Nandi Sunguti, a Government Analyst at the Government Chemist, Nairobi stated that he received 67 polythene sachets from PC Peter Mukangai. The said sachets contained a white crystalline substance. He was instructed to ascertain whether the white substance was a narcotic drug or psychotropic substance. He stated that from his analysis, the sachets contained Amphetamine, which was a psychotropic drug. He produced his report in evidence.

PW6, C.I Joshua Okelo, valued the seized drugs. The quantity of the seized drugs was 1,176 grams. He attached a value of Ksh.4,000/- per gram of the Amphetamine. The total value of the said drugs amounted to Ksh.4,705,600/-. He produced a certificate of valuation into evidence.

PW7, Corporal Peter Mukangai, was the investigating officer of the case. When he reported to work on the material day, he was informed that a suspected drug trafficker was being held at the Anti-Narcotics Unit. He proceeded to PW3's office where the suspect was being held. The suspect was searched. They found hidden pellets on his legs covered by his socks. Photographs of the pellets were taken. Weighing and sampling of the same was also done. PW5 stated that he prepared an inventory of all the items recovered from the suspect. An analysis of the recovered pellets was conducted by the Government Analyst. The same was classified as a psychotropic substance which fell under the Narcotic Drugs and Psychotropic Substances Control Act. The pellets weighed 1176.4 grams.

The Appellant was put on his defence. In his unsworn statement, the Appellant stated that he was a resident of Harambee Estate, in Nairobi. On the material day, he left his home and proceeded to the airport. He had booked a flight to Malaysia, set to depart at about 5.00 p.m. He checked in, underwent the security checks and was given a boarding pass. He proceeded to the main lounge. He then went to Gate 11 where he awaited to board the plane. Three men approached him. They introduced themselves as airport security officers. They took his passport and escorted him to the police station within the airport. He was interrogated by PW3. He was informed that he was a suspected drug trafficker. He denied the allegations. The police officers offered him food and a drink. The Appellant stated that after he consumed the said food, he felt hypnotized. When he came to his senses, he saw some white sachets on the table. A Mr. Sunguti introduced himself to him as a Government Analyst. He was examining the sachets. The Appellant was informed that the sachets contained cocaine. The Appellant denied having anything to do with the said sachets. He was detained from Friday up to Monday where he was presented before court to face the charge that he was convicted of. He pleaded innocence of the charge.

This being a first appeal, this Court is mandated to re-evaluate the evidence adduced before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge vs- Republic [1982 – 88] 1 KAR 1134** stated this on the duty of the 1st Appellate court;

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence which established 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; or

(b).....”

The Appellant denied having been found in possession of the psychotropic substance. He claimed that he was drugged when he was taken into custody at the JKIA police station. When he came to, he found sachets of the psychotropic substance on the table being analyzed. *So was the Appellant found in possession of the said narcotic drug?* PW2 produced photographs in evidence (*Prosecution Exhibit 3(a) to (z) and 13 (a) (i) to (viii)*). The photographs were taken when the drug pellets were still on the Appellant’s legs. Thereafter the photographs were systematically taken as the pellets were being removed from the Appellant’s legs. PW2, PW3 and PW4 narrated to court how the pellets were concealed inside the Appellant’s socks. They gave the number of pellets on each leg. Their evidence corroborated each other. The issue of being drugged was brought up by the Appellant in his defence. The same did not come up during cross-examination of the prosecution witnesses. This court therefore holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the psychotropic 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 psychotropic substance within the meaning ascribed to it by Section 2(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act and the 1st Schedule thereof. This confirmation was contained in the evidence of PW5 who analyzed the substance found in the Appellant’s possession.

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. “Trafficking” is defined in Section 2(1) of the Narcotic Drugs and Psychotropic Substances Control Act to mean:

“the importation, exportation, sale, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance...”

From the evidence adduced, it was apparent that the Appellant was trafficking the psychotropic substance. The Appellant in his submissions contended that the act of conveying the said drugs was not established by the prosecution. The Appellant was apprehended while carrying a psychotropic substance hidden in his socks. He concealed the same inside his socks on his legs. He was about to board a plane to Kuala Lumpur, Malaysia. His boarding pass and passport were produced in evidence. The Appellant, in his defence confirmed that he was arrested as he was about to board a plane that was scheduled to fly to Malaysia. 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 Kenya to Malaysia. 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. 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 merit with the Appellant’s defence that he had been framed by the police.

The Appellant contends that prosecution failed to abide by the provisions of Section 74A of the Narcotic Drugs and Psychotropic Substances Control Act. The said Section provides for the procedure to be followed upon seizure of narcotic drugs. The Appellant submitted that the value of Ksh.4,000/- per gram was attached to the cocaine when he was first arraigned in court. He stated that no evidence was adduced to prove that cocaine and amphetamine had the same market value. Therefore the certificate of value was irrelevant. He asserted that failure to value the amphetamine was prejudicial and therefore the entire trial court’s proceedings ought to be vitiated. He averred that this created confusion as to the charge the accused was facing. He argued that it was unclear whether he was charged with trafficking in cocaine or amphetamine.

This court has perused the trial court’s proceedings. The investigating officer indicated that the Appellant was arrested on Friday evening. Therefore the Government Chemist was closed till Monday. The substance found in the Appellant’s possession was indicated as cocaine in the charge sheet. The investigation officer stated that that was based on the preliminary spot test done by the Government Analyst at the station. They had to charge the Appellant within the constitutionally mandated 24 hours based on the preliminary results. They were only able to send samples of the substance to the Government Chemist on Monday. However, after the substance was analyzed at the Government Chemist, the Government Analyst found the drug to be amphetamine. The investigating officer intimated that they would later seek to amend the charge. However, there is no indication from the trial court’s record that the same was done.

This court is of the view that the prosecution ought to have amended the charge sheet to indicate the correct substance found in the Appellant’s possession. *Was the same curable under Section 382 of the Criminal Procedure Code?* It has previously been held that the test for whether a charge sheet is fatally defective is a substantive one. The court needs to inform itself whether the accused person was charged with an offence known to law. In addition, the offence ought to be disclosed in a sufficiently accurate fashion, so as to give the accused ample notice of the charges facing him. In the present appeal, the Appellant 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 said charge indicated that he trafficked cocaine instead of amphetamine. *Was the Appellant prejudiced by this?* This court is of the view that no miscarriage of justice was occasioned on the Appellant. The Appellant understood the charges he was facing well enough to understand the ingredients of the crime, enabling him to prepare his defence. The Appellant in his defence indicated that he was informed that the substance was not cocaine but amphetamine. This was before any prosecution witness adduced evidence. He was therefore aware of the charges he was facing. In any event, whether the narcotic drug was cocaine or amphetamine, the Appellant would equally have been charged under the same Section 4(a)

of the Narcotic Drugs and Psychotropic Substances (Control) Act.

The Appellant and his advocate were present in court when the investigating officer informed the trial court that they intended to amend the charges to read amphetamine instead of cocaine. From the record of the trial court, it can be seen that the Appellant vigorously participated in the trial and cross-examined witnesses according to his theory of defence. In addition, the Appellant never raised this objection in the trial court or even in his grounds of appeal. This shows that he understood the charges he was facing. This court is of the view that no miscarriage of justice was occasioned by the technical defect in the charge sheet. The trial process was fair and the Appellant had sufficient notice of the charges facing him. This court will therefore proceed to cure the same under Section 382 of the Criminal Procedure Code and hold that the Appellant was convicted of trafficking amphetamine and not cocaine.

PW2, PW3, PW4, PW5, PW7 established that the procedure under Section 74A of the said Act was followed. Photographs of the psychotropic substance were taken. The substance was weighed and found to be 1176.4 grams. A weighing certificate was issued in that regard. A preliminary spot test was conducted which indicated that the substance was cocaine. A certificate of sampling was adduced in evidence. A notice of seized substances was prepared and adduced in evidence. A notice of intention to tender records in evidence was also produced in court. However, after the substance was analyzed at the Government Chemist, it was found to be amphetamine. The same is categorized as a psychotropic substance under the Act. PW5 produced a report of his findings in court. PW6 valued the substance at Ksh.4,000/- per gram. A certificate of valuation was adduced in evidence. However, this valuation was based on the preliminary spot test which indicated the drug was cocaine.

This court is of the view that after the drug was confirmed by the Government Analyst to be amphetamine, and not cocaine, PW6 ought to have valued the same afresh. However, the valuation affects the sentence to be meted out to the Appellant and not his guilt as to the charges of trafficking in narcotic drugs. The Court of Appeal in Kabibi Kalume Katsui v Republic [2015] eKLR held that:-

“The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that PW4 and PW2 were part of the Anti-Narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks.”

The court of Appeal in that case further held:-

“The law is clear on the offence of trafficking, the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself.”

It therefore follows that failure to provide a valuation certificate cannot be a ground for quashing a conviction. The valuation certificate is only meant to assist the court in imposing the appropriate sentence.

The Appellant also contended that his right to a fair trial under **Article 50(2)** of the **Constitution** had been contravened. He asserted that he was not granted the chance to make his final submissions in the absence of his advocate. This court has perused the trial court proceedings. The Appellant was represented by an advocate throughout the trial process. Defence submissions were to be tendered on 27th April 2015. The Appellant was not ready with his submission on the stated date. This court notes that the Appellant was granted numerous adjournments with regards to the same on 27th April 2015, 8th June 2015, 4th August 2015, 15th September 2015 and 15th October, 2015. The court indulged him on the above mentioned dates as he was not ready to present his submission. On 6th November 2015, the Appellant informed the court that he still had not managed to prepare his final submissions. He requested the court to rely on the evidence on record in making its determination. This court is of the opinion that a fair trial process was accorded to the Appellant. He was given enough chance to present his submission but failed to do so. Therefore, this court holds that no miscarriage of justice was occasioned to the Appellant in that regard.

The upshot of the above is that the Appellant’s appeal against conviction lacks merit and is hereby dismissed. On sentence, the Appellant was sentenced to thirty (30) years imprisonment, since there is no evidence to suggest that he paid the fine that was imposed on him. However, having considered the mitigation of the Appellant, this court is of the view that the sentence imposed by the trial court was harsh and excessive. That sentence is set aside and substituted by a custodial sentence of this court. The Appellant is to serve fifteen (15) years imprisonment with effect from 22nd November 2016 when he was convicted and sentenced by the trial court. For the avoidance of doubt, the period that the Appellant was in custody **during trial has been taken into account. It is so ordered.**

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2019

L. KIMARU

JUDGE