REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 8 OF 2015

KEPHA OTIENO OKERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate Court at Lamu Criminal Case 430 of 2013, Hon. D.M. Ireri (SRM) dated 14th October 2014)

JUDGMENT

1. The Appellant was charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substance (Control) Act No. 4 of 1994 (herein after the N.P.S.C.A).

2. The particulars of the offence were that on the 18th September 2013 at Manda Island area of Amu Division in Lamu West District within Lamu County trafficked by way of conveying a narcotic drug namely cannabis to wit 1750 grammes with an estimated market value of Ksh. 20,000/- in contravention to the provisions of the said Act.

3. The accused pleaded not guilty and the matter went to full trial. At the conclusion of the trial, the trial magistrate found the Appellant guilty and sentenced him to imprisonment for 10 years and to pay a fine of Ksh. 1 million .

4. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the amended grounds reproduced verbatim as follows:-

(i) That the learned Magistrate erred in law and fact by failing to consider that the ten (10) years sentence is excessive as it did not take into account the quantity of drugs and their street value.

(ii) The learned magistrate erred in law and fact by failing to consider compliance to section 75A of the Narcotics Drugs Act (non-compliance by the respondent)

(iii) The learned magistrate erred in law and fact by failing to consider the period spent in remand custody in passing the sentence.

(iv) The learned magistrate erred in law and fact by failing to consider the non-production of the motor cycle used to convey the narcotic drugs as an exhibit during the trial.

(v) The learned magistrate erred in law and in fact by failing to consider my defence."

5. The Appellant filed his written submissions on the 13th March 2019 which he relied on during hearing. His submissions were to the effect that the sentence was excessive and harsh considering the quantity and the street value of the drugs he was found in possession of. He relied on the case of **Dennis Odhiambo Sundia v R (2018) eKLR.** He further submitted that the trial magistrate in sentencing him failed to consider that he had spent one year in custody. He relied on the South African Supreme Court decision in **Krugler vs 5 (506/11), (2011) ZASCA 219 (29 November 2011)** and the holding by the High Court of Singapore in **Sim Yeo Kee vs PP (2016) SGHC 209.**

6. The Appellant submitted that the prosecution did not comply with the stringent procedure of seizure of narcotic drugs in accordance with section 74A of the Narcotic and Psychotropic Substance (Control) Act No. 4 of 1994 which are mandatory. He urged that failure to comply with the mandatory provisions of section 74A was fatal to the prosecution's case thereby vitiating both the conviction and sentence. He relied on the case of **Moses Banda vs Republic C.A No. 62 of 2015 (UR).**

7. The Appellant also submitted that the prosecution failed to produce as evidence motor cycle KMCV 140F despite the prosecution claiming that he used it to convey the said drugs. He urged that it was mandatory that the seizure of drugs included all machines used in conveying of the drugs.

8. The Appellant finally submitted that the trial magistrate failed to consider his defence as it was unchallenged by the prosecution. He prayed that his appeal be allowed.

9. The appeal was opposed by the prosecution. In brief oral submissions Mr. Kasyoka learned counsel for the Respondent submitted that it had proved beyond reasonable doubt that the Appellant was trafficking by conveying narcotic drugs as provided for under section 4 of the N.P.S.C.A .

10. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR.**

11. I have considered the grounds of appeal, the record and submissions of the parties.

12. The first issue is whether the provisions of section 74A of the NPSCA was complied with. I note that the Appellant had indicated section 75A in his amended grounds but I take that was a typographical error.

13. Section 74A of the Act states as follows:-

> ***"(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of police and the Directors of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorized officers") shall, in the presence of, where practicable –***
>
> > ***(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");***
> >
> > ***(b) a designated analyst;***
> >
> > ***(c) the advocate (<u>if any</u>) representing the accused person; and***
> >
> > ***(d) the analyst, <u>if any</u>, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same."***

2. After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.

14. A reading of the above section shows the procedure to be followed when narcotic drugs are seized. The section requires that the drugs or substance be weighed by an authorized officer in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst before samples are released to the designated government analyst.

15. In the current case PW1, stated that when he confronted the Appellant he searched his bag (Pexh 3) where he discovered among other things 2 big bundles wrapped a polythene bag with dry leaves and a small polythene bag with dried leaves which he suspected to be bhang. He arrested the Appellant and together with PW4 took him to the CID officer where they interrogated him. PW1 stated that he prepared an inventory list (Pexh 16), which he signed together with PW4 and the Appellant.

16. PW4 testified that after they arrested the appellant they took him back to Lamu Police Station. He testified that he prepared the exhibit memo (Pexh 2) and sent the drugs to Mombasa for analysis.

17. PW6 was the investigating officer. He testified that on the 18/09/2013, he was away from Lamu when he was called by PW2 who informed him that he had arrested the Appellant after they had found 2½ bundles of a substance, which he suspected to be bhang. It was the evidence of PW6 that he instructed PW2 to weigh the substance and to prepare an inventory.

18. The government analyst (PW1), testified that on 31/10/2013, he received the exhibit memo together with three envelopes A1, A2 and A3 each with dry leaves weighing 26.1grammes, 31.8grammes and 31.9grammes respectively from PW2. He was informed that the dry leaves were a sample from 1750grammes. He proceeded to analyze the dry leaves and found them to be cannabis and prepared his report (Pexh 1).

19. From the evidence adduced it is clear that PW2 weighed the drugs in the presence of the Appellant as proved by the inventory list (Pexh 16), which shows that the 2 big bundles in polythene were found to weigh 800grammes each while the small bundles weighed 150grammes. Samples of the drugs were then taken to the PW1 for analysis. It has to be noted that there was no evidence tendered that PW2 was an authorized officer as envisaged by Section 74 of the Act.

20. However, non-compliance with the proviso of section 74A of the Act vitiate the proceedings for reason that the proviso of section 74A is not mandatory. It is to be applied "where practical". The other test is whether non-compliance would prejudice the accused.

21. In **Moses Banda Daniel v Republic criminal appeal no. 62 OF 2015 [2016] eKLR** the Court of Appeal stated as follows:-

"After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like "Where practicable" and "if any" convey the meaning that the procedure is not mandatory but directory and the use of the word "shall" must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure."

22. The Court of Appeal further looked at the purpose of section 74A of the Act as intended by the legislators and made a reference to the **Hansard record of Parliament of 6th December 2000** where The Attorney-General, Amos Wako (as he then was) moved a motion for the amendment of the Act. The Court of Appeal went on to hold that:-

"Clearly the intention of Parliament was to ensure that the drugs or substance once recovered

are not interfered with before the trial. That is why after ascertaining the nature and weight of the drug and obtaining the certificate of the analyst the rest of the drugs are to be destroyed immediately and only a sample and a certificate are presented as exhibits at the trial.The provision, in our view will be more relevant where a large haul of drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible."

23. This position was further reiterated in ***Joshua Atula & Another v Republic [2016] eKLR*** where the Court of Appeal pronounced itself as thus:-

"Accordingly, the objective of this provision74A was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances."

24. Guided by the above cases it is clear that there was substantial compliance with the said provision when the drugs were weighed in front of the Appellant and samples taken for testing to PW1. Further there was no prejudice suffered by the Appellant as the entire consignment of the drugs seized were produced in court as Pexh 5, 6 and 7. Additionally, the quantity of the drugs seized was 1750grammes which is not considered a large haul to invoke strict compliance with the said section. In the premise I find that the provisions of section 74A of the NPSCA were not violated.

25. On the second issue, the appellant faulted the failure of the prosecution to produce the motor cycle KMCV140F used for conveying the drugs as evidence.

26. Section 72 (1)(b) of the NPSCA provides for seizure and detention of a conveyance for purposes of evidence and states that:-

(1) Any police officer, or any other person authorized in writing by the Commissioner of Police for the purposes of this section, who has reasonable cause to suspect that any person is in possession of, or is removing, any narcotic drug or psychotropic substance in contravention of this Act may—

(a)….

(b) seize and detain for the purposes of proceedings under this Act any narcotic drug or psychotropic substance or any other thing (including any conveyance) which appears to be evidence of the commission of an offence under this Act, found in the course of the search; and…"

27. Section 72 of the Act uses the term 'may' on seizure and detaining of a conveyance. **Black's Law Dictionary, 9th Edition** defines the term "may" as **"to be permitted to", "to be a possibility"**; **or loosely put:, "is required to".**

28. In **Sony Holdings Ltd –vs- Registrar of Trade Marks & Another [2015] eKLR** the Court of Appeal stated that:-

"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision..... Whether the words "shall" or "may" convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."

See also **Republic v Engineers Board of Kenya Exparte Godfrey Ajoung Okumu [2018]**

eKLR.

29. The plain meaning of the word “may” permissive and therefore section 72 of the NPSCA confers on police officers powers to seize and detain a conveyance where it is deemed necessary. It shall be deemed necessary depending on the circumstances of each case.

30. In the present case, PW2 testified he was on a motorbike driven by PW3 on his way to Manda airstrip when he met with another motorbike going in the opposite direction towards Manda Maweni. The said motor bike had one passenger who was carrying a bag on his back covered by a jacket. It was his evidence that he got suspicious and ordered PW3 to follow the other motorbike. When they caught up with the other motorbike he asked the rider to stop and introduced himself and the Appellant tried to run away but was caught and arrested.

31. During re-examination and when PW2 was recalled he gave his evidence that he took a photograph of the motorbike registration number KMCV 140F the next day on 19/9/2013. He explained that he did not have a camera the day he arrested the Appellant. He produced the photograph of the motorbike as P exhibit 19 and a certificate of the photographic print as P exhibit 20.

32. PW3 who had PW2 as a passenger on his motorbike corroborated the evidence of PW2 that the Appellant was a passenger on motorbike KMCV 140F and that he was heading towards Manda Maweni. He testified that the accused had a blue bag covered with a jacket when he was arrested.

33. PW5 who was the owner of the motorbike registration KMCV 140F testified that on 18/09/2013 at around 2:00 pm, he was approached by the Appellant who had a blue bag and asked him to take him to Manda Maweni. That he requested PW5 to give him his jacket to protect himself from dust. He stated that on his way to Manda Maweni he saw another motorbike following him from behind and he slowed down then the accused jumped from the back and started running when he was caught by PW2. PW5 produced the photograph of the motorcycle and testified that he had sold the motorbike to enable him to attend a course at African International University.

34. From the evidence it is clear that PW5 was the owner of the said motorcycle KMCV 140F and that the Appellant was a fare-paying passenger heading to Manda Maweni. It is also clear that PW5 was not aware that the Appellant was carrying drugs and therefore had no knowledge of offence. As already stated PW2 was permitted to use his discretion to seize and detain the motorcycle and in this case there was no need to detain the motorcycle and further, I see no prejudice suffered by the Appellant in the non-seizure and production of the motor cycle.

35. On whether the defence of the Appellant was considered, the record shows that the Appellant gave a sworn defence. He stated that he was walking towards Lamu from Manda Mjini when he met 3 people with two motorbikes. He said that he greeted one of them who was a village elder and he did not let go of his hand. It was his evidence that one of the men whipped out a pistol. That PW3 removed a bag from one of the motorbikes, which was covered with a jacket and he was ordered onto the motorbike and taken to Lamu Police Station. It was his testimony that on arrival at the police station he saw the goods being removed and was frightened because of the pistol. He said he was not interrogated by the OCS and the next day he was taken to court.

36. In his judgment the trial magistrate at paragraph 11 stated that:-

> “***I find the accused untruthful in that what he stated in his defence was never put to PW2, PW3, PW4 and PW5 when the court gave him a chance to re-examine them. In my view, the accused’s defence is a mere denial and an afterthought and has not challenged the prosecution’s evidence.”***

37. I have considered the Appellant’s defence vis-à-vis the prosecution evidence. I find, as the trial court found, that it was an afterthought and did not in any way cost doubt on the prosecution evidence. From the analysis above, I find that the Appellant was rightly convicted and his appeal against conviction must

fail.

38. On the issue of sentencing, the Appellant has submitted that the sentence was harsh and excessive and that the trial Magistrate had failed to consider the fact that he had been in remand during the pendency of the trial.

39. I must confirm from the outset that the sentences on both counts were lawful. It was not however a mandatory minimum sentence as the term "shall be liable" provides for the maximum and not minimum sentence.

40. In **Daniel Kyalo Muema** V. **Republic, Criminal Appeal No. 479 of 2007** Court of Appeal sitting in Nairobi quoted with approval the decision of its predecessor (the Court of Appeal of East Africa) in **Opoya** V. **Uganda**(1967) E.A 752 in which it observed that:

> ***"It seems to us beyond argument the words "shall be liable" to did not in their ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see it fit to impose it"***

41. Similarly the Court of Appeal sitting in Malindi in **Caroline Auma Majabu V Republic, Criminal Appeal No. 65 of 2014** in finding that the term "shall be liable" imposes a maximum sentence rather than a mandatory sentence stated thus:-

> ***"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."***

42. It is trite that sentencing is at the discretion of the trial court and an appellate court can interfere with the sentence only under specific circumstances. See **Benard Kimani Gacheru vs Republic [2002] eKLR.** See also **Dalmas Omboko Ongaro v Republic Criminal Appeal No. 7 Of 2016 [2016] eKLR**

43. The appellant was sentenced to serve 10 years imprisonment and to pay a fine of Ksh. 1 million. Taking into account the quantity of drugs he was found in possession of and their street value, and the fact that he had spent 1 year in remand, I find that the sentence of 10 years and the fine was harsh. I hereby set aside the said sentence.

44. In the premises I reduce the 10 year imprisonment to the period already served which I consider sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly

Judgment dated delivered and signed at Garsen on this 18th day of June, 2019.

.....

R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

S. Pacho - Court Assistant

Mr. Kasyoka - For Respondent