**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 144 OF 2018**

**JOSEPH KINYANJUI.....1ST APPELLANT**

**ELIZABETH WAIRIMU NYOIKE.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at JKIA Cr. Case No.161 of 2016 delivered by Hon. L.O. Onyina, SPM on 23rd August, 2018).

**JUDGMENT**

1. Both 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 on the 7th day of December, 2016 at Mathare Drive-Inn Estate in Ruaraka within Nairobi County jointly with others not before court, trafficked in narcotic drug namely Heroin to wit 4,857.87 grams with a market value of Kshs. 14,573,610/= by storing in contravention of the said Act. They were convicted accordingly and each sentenced to pay a fine of Kshs. 42 million in default of the payment each to serve one year imprisonment. Additionally, each of them was to serve 20 years imprisonment. They were accorded a right of appeal which they exercised by filing the instant appeal.

2. The 1st Appellant filed **Cr. Appeal No. 145 of 2018** whilst the 2nd Appellant filed **Cr. Appeal No. 144 of 2018.** The appeals were consolidated during the hearing for purposes of writing this judgment. Learned counsel M/s Laichena Mugambi filed respective appeals on 3rd September, 2018. They are similar in all respects. I duplicate the Grounds of Appeal as under:

**a. That the learned trial magistrate erred in law and in law and in fact by convicting the Appellant for the offence charged without sufficient evidence to prove he charges.**

**b. That the learned trial magistrate erred both in law and in fact in convicting the Appellant when the prosecution did not discharge their duty to prove the case beyond the required standard.**

**c. The learned trial magistrate erred in law and fact by relying on contradicting and uncorroborated evidence contrary to the rules of evidence and law.**

**d. The learned trial magistrate erred in law and in fact by finding that the Appellant was the occupant and/or tenant in the house in Mathare Drive-Inn Estate (locus in quo) without any plausible evidence linking him to the scene of crime.**

**e. The learned magistrate erred in law and in fact by ignoring and failing to consider or appreciate the defence evidence and submissions in his judgment thus arriving at a wrong conclusion.**

**f. The learned trial magistrate erred in law and in fact by convicting the Appellant of the offence merely on the basis of being husband to his co-accused Elizabeth Wairimu Nyoike without cogent and tangible evidence linking them jointly to the alleged offence.**

**g. The learned trial magistrate erred in law and in fact by disregarding the Appellant's mitigation thereby passing an excessive and harsh sentence.**

**h. The learned trial magistrate erred in law and fact by misapplying the law and shifting the burden of proof to the Appellants.**

**Summary of Evidence**

3. The prosecution called a total of nine witnesses. Both Appellants are a husband and wife respectively. The consignment of the drugs was recovered from a house at Mathare Drive-Inn Estate in Ruaraka Nairobi which house was rented under the name of Elizabeth Wairimu Nyoike, the 2nd Appellant herein. According to **PW1, John Nyaga Mbura** who was the caretaker of the plot in which the house was located, the person who identified the house was the 2nd Appellant on 26th August, 2016. She returned on 29th August, 2016 requesting PW1 to show her the agent to whom rent would be paid. He then left it to the tenant to occupy the house. He said that he never entered into the house to confirm what household goods they took in. He did also testify that thereafter, the person who used to visit the house was a man who used to wear a helmet but later identified him as the 1st Appellant. He recalled that on the 7th December, 2016, police stormed into the compound and arrested the 1st Appellant. In cross examination PW1 said that he could not confirm who exactly owned the house because he was not involved in the transaction of writing the lease agreement.

4. According to **PW2, Martin Muchiri Wanjohi** of Top Mark Shelters Limited, and a property manager, the tenancy agreement to the premises was between himself and the 2nd Appellant. PW1 in his evidence said that the agreement was signed by a secretary and that he did not know that the 1st Appellant was a tenant or a visitor in the house. He however used to see him getting into the compound.

5. The 1st Appellant was the first suspect to be arrested. According to **PW6 PC John Weru** of DCI Headquarters, he and other detectives received information on 7/12/2016 that the 1st Appellant was dealing in narcotic drugs at Drive-Inn Estate in Mathare. He was joined in an operation to net the 1st Appellant by CPL Muli and PC Kimondo. They laid an ambush within the estate. They saw him entering a motor vehicle Registration number, KCG 031K, Mazda white in colour. They gave a chase and were able to block him at Ruaraka interchange. They arrested him. PW6 drove his car to Drive-Inn Estate. The 1st Appellant refused to identify any of the houses within the compound as his. PW1 identified one of the houses as belonging to the 1st Appellant. The latter refused to open and police accessed it by breaking in.

6. Police who were also joined by those from the Anti-Narcotics Unit conducted a systemic search of the house. In the sitting room was recovered a brownish bag, creamish bag and a Naivas supermarket branded paper bag. From one of the bedrooms was recovered 1230 sachets. They opened one of them and saw it contained a powderly substance. The sachets were labelled number 1230 and 1170 and were in two different bundles of packaging. Each of the bundles contained the total number of sachets indicated on the outer side. Other items recovered were six knives, three pairs of scissors, one screw driver, one separate knife, exercise books, assorted brochures, electric heaters, assorted packaging papers, black packaging papers, assorted polythene papers, a mixer, empty sachets, cut papers, gas masks, three weighing scales and some powderly substance in four packets inside the gunny bags. In the kitchen, were two jericans labelled 'luctose' with batch number L180061602. They had substances in Naivas Supermarket paper bags.

7. An inventory was prepared and signed at the scene indicating all the recoveries made.

8. The 1st Appellant was then driven to DCI Headquarters where a search of his motor vehicle was conducted.Cash Kshs.210,000/= was recovered from the dash board.

9. While at DCI Headquarters, police received information that the Appellant had another house within Kasarani Area near Safari Park Hotel. Reinforcement from Anti-Narcotics Police Unit was sought. Police proceeded to the house at Safari Park Gardens along Mirema Drive. Amongst the additional police officials who went to this house was **PW4 CPL Woman Sheila Kipsoi**. The house and home compound was opened by 2nd Appellant. The house was searched without any resistance. Amongst the items recovered were water and electricity bills in the name of the 1st Appellant, an affidavit indicating that both Appellants were a husband and wife respectively, cash Kshs. 98,000/=, USD 34, mobile phones and some papers bearing the names of the 2nd Appellant. PW4 prepared a search certificate and an inventory which were produced in evidence. All the recovered goods were also produced in evidence.

10. The 1st Appellant was driven and locked up at Muthaiga Police Station whilst the 2nd Appellant was locked up at Pangani Police Station.

11. The Powderly substances that were recovered were analyzed by **PW5, Dennis Owino Onyango** a government analyst working with government chemists. The analysis was done in all samplings. He ascertained that the powderly substances contained diacetylmorphine (heroine) at a purity of 30%. He produced in evidence the sampling certificate as well as the Analyst Report. PW5 witnessed the weighing of the drugs on 10/12/2016 at 15:24 hours at DCI Headquarters. They weighed 4, 857.87 grams. **PW7, CIP Joshua Ogola Okatto** valued the drugs in his capacity as a proper (valuation) officer within the meaning of Section 86 of the Narcotic Drugs and Psychotropic Substances Control Act, 1994. He assigned each gram a value of Kshs. 3,000/=. Hence the total value was Kshs. 14, 573,710/=. The valuation was done on 10/12/2016. He adduced in evidence a Valuation Report dated 6/2/2017.

**12. PW8, CIP Lilian Awino Saka**, a scene of crime officer on 10/12/2019 took photographs of all the recovered items at DCI Headquarters. He produced the photographs in evidence. **PW9, CPL Joseph Kipruto** attached to DCI Anti-Narcotics Unit was in the company of the arresting officers. He too corroborated the testimonies of PW3, PW 4 and PW6. He recorded witness statements and preferred the charges against the Appellants.

13. After the close of the prosecution case, the court ruled that each of the Appellants had a case to answer and were accordingly put on their defence.They each gave a sworn statement of defence. They did not call any witnesses. They denied committing the offence. On his part, the 1st Appellant said that he worked as a sand broker. That on 7/12/2016, he was coming from Muranga where had had gone to pay money to the Land Control Board for a land transaction. That while approaching Barclays Bank Ruaraka, where he was to bank some money that was not used in the transaction, he was intercepted by three men in a traffic jam. One man took control of his car whilst the other two

occupied the passenger seats. The men took him to a storey building in Mathare. He was taken to a house that was on 5th floor. They found police officers there both in uniform and civilian clothes. They broke into a particular house. He was made to sit on a seat as police conducted a search. They recovered some items including powderly substances after which they made an inventory.

14. The 1st Appellant went on to testify that he came to learn that some of the people who were in the house as the search was being conducted were caretakers of the building. He added that he was driven to Muthaiga Police Station from where police asked him to take them to his residence along Mirema Drive.

15. At his residence was his wife, the 2nd Appellant. Police conducted a search in the house and recovered many documents which they took away. He stated that he did not sign any document that was with the police including the inventory. He denied he had rented the house at Mathare. He also denied he knew PW1 and PW2, who according to him told lies to the court. He said that police put into a paper bag all goods they collected from both houses. He agreed that the 2nd Appellant was his wife.

16. On her part, the 2nd Appellant said that she was occupied in the sale of both new and second hand clothes in Roysambu. She corroborated the testimony of the 1st Appellant in so far as the police went to their home at Mirema Drive on 7/12/2016 at around 9.00 pm and the search and recoveries that were conducted in the house. She added that she was shown the lease (tenancy) agreement for the Mathare House where the police claimed they recovered the drugs. She however stated that she did not recognize the signature on it. She also denied she knew a person by the name Ben Mwangi, the person indicated as the landlord of the house.

**Analysis and determination**

17. Both the Appellants and Respondent filed written submissions which were highlighted orally. Skeletal submissions on behalf of the Appellants were filed on 20th September, 2019 by the law firm of M/s Swaka Advocates. It suffices to state that the Appellants were presented by both Mr. Kangahi and Swaka Advocates. Submissions for the Respondent were filed by prosecution counsel, Ms. Maureen Akunja on 7th October, 2019.

18. I have accordingly considered the evidence on record as well as the respective submissions. The Appellants urged the appeal on one main issue; that the prosecution failed to prove that the house in which the narcotic drugs were recovered from belonged to any of them. Further, that the prosecution failed to demonstrate that they trafficked in the drugs. As regards the 1st Appellant, it was submitted that he was arrested on the road and not in the residence. That furthermore, the evidence established there were many users of the residence as can be discerned from the charge sheet. Hence, it was improper to zero in on the Appellants as the persons who solely had access to the house.

19. It was also submitted that when the 1st Appellant was driven to the residence, the police broke into the residence yet the 1st Appellant was with them in which he would have been asked to open the house iff he really occupied it. That in any case, PW1 testified that he used to see three men go into house whom he did not know. That therefore, it was difficult to place the 1st Appellant at the scene. It was submitted that since nothing was recovered from the motor vehicle he was driving, police must have planted evidence on him by taking him to a house that did not belong to him.

20. As regards the 2nd Appellant, it was submitted that police introduced the lease agreement allegedly signed by her as the tenant of the residence much later so as to fix her. It was submitted that the said lease agreement although it bore her name and identity card number, it was witnessed by a secretary, that the said secretary was never called as a prosecution witness to confirm that indeed the 2nd Appellant had executed it.

21. Counsel submitted the 2nd Appellant was never arrested in the house where the drugs were recovered; the she neither was ever seen in or around the residence. As regards the lease agreement, counsel submitted that the same was not executed by the tenant and to that extent, it was unenforceable. Further, even assuming that there existed the lease agreement, the prosecution had nothing to show that the 2nd Appellant used to pay rent to the house, for instance any receipt in payment thereof or a bank deposit receipt. Moreover, no expert evidence was adduced to demonstrate that the 2nd Appellant executed the lease agreement. To this extent, it was submitted that although the agreement bore her name and identity card number, they could have been written by any person other than the 2nd Appellant.

22. On the whole, both counsel for the Appellants submitted that the prosecution failed to discharge their burden by proving the case beyond all reasonable doubt. That the conviction of the Appellants was not safe. They urged that the same be quashed. It was also prayed that the sentence which was deemed as harsh and excessive be set aside.

23. Miss Akunja in both the written and oral submissions stated that the prosecution had proved their case beyond all reasonable doubt. She submitted that the prosecution through the evidence of PW1 and PW2 established that the house from which the drugs were recovered was occupied by the Appellants. She submitted that the lease agreement adduced in court was signed by the 2nd Appellant and that both she and the 1st Appellant used to visit the house. She urged the court to note that there was no doubt that both Appellants were a husband and wife respectively and the fact that the 2nd Appellant was not arrested in the house where the drugs were recovered did not absorb her from the offence.

26. Miss Akunja submitted that the prosecution demonstrated that the 2nd Appellant signed the lease agreement as it bore her name and identity card number and that the identity card was adduced in evidence to buttress her real identity.

25. As regards the 1st Appellant, counsel submitted that although he was not arrested in the house where the drugs were recovered, police had used intelligence to know that he used to deal in drugs in the house at Mathare Drive-Inn Estate. That there was evidence that he used to be seen driving in and out of the house which PW1 identified and from which the drugs were recovered.

26. It was the counsel submission that the drugs were property listed and ascertained to contain heroine. As regards the submission that only 30% of the narcotic drugs was found in the substances recovered, she submitted that the purity of the drugs does not affect the weight or value of the drug. Further, **Section 4(a) of The Narcotic Drugs and Psychotropic Substances Control Act 1994** does not specify the percentage of the narcotic content that ought to be in a substance for it to pass the test under the Act. It was submitted that all the statutory requirements for weighing and testing narcotic drugs were followed, reasons wherefore she urged the court to find that the conviction was safe. She pleaded that the appeal be dismissed.

27. It is my view, in the foregoing, that the main issue for determination is whether the prosecution demonstrated that the house from which the narcotic drugs were recovered belonged to the Appellants and that therefore they were culpable of trafficking in the drugs by storage.

28. The investigators pinned both Appellants because they were a husband and wife respectively. This is not disputed as it was borne out in their respective defences. A marriage affidavit that was adduced in evidence further buttressed this. In furtherance to this fact, the prosecution advanced the case that the house from which the drugs were recovered was rented by the Appellants. They demonstrated this by the lease agreement adduced as P.Ext 1 bearing the name of the 2nd Appellant.

29. The point of departure with the defence is the lease agreement. According to the defence, the same was never executed by the 2nd Appellant. Further, the witness to it who was said to be a secretary was never called as a prosecution witness to confirm that the 2nd Appellant was the lessee.

30. I have combed through the original record of proceedings. I have come across two bundles of exhibits. As regards exhibit 1, which is titled Memorandum of Lease, none is an original copy. It was signed on 31st August, 2016 by the landlord named at the back as Mr. Ben Mwangi and the tenant Elizabeth Wairimu Nyoike. I have discerned a few things arising from the memorandum of lease. The first is that the alleged land lord has only executed on the 1st two pages of the lease. But has not confirmed ownership of the lease by signing it in his capacity as the landlord on the part provided on the last page. The only person who on this part signed is the tenant but whose name again is not written. Secondly, the landlord is named as Mr. Ben Mwangi whose postal address and telephone numbers are given. He did not ever come to testify as a prosecution witness to confirm that he owned the house and that he executed the memorandum of lease with the 2nd Appellant. Thirdly, and most interestingly is the evidence that the lease was attested by a secretary. The secretary is an amorphous person whose identity was not disclosed. It is also not stated whether this secretary signed on behalf of Mr. Ben Mwangi, the landlord and whether the signature of the secretary is represented at the space provided for the landlord/agent. My deduction in view thereof is that the Memorandum of Lease was not a document admissible in demonstrating that the 2nd Appellant had leased the house from a Mr. Ben Mwangi.

31. What is even more striking is the fact that attached to the Memorandum of Lease is what is marked as ***"Application for renting residential premises."*** The same is on a letter head from TOPMARK SHELTERS LIMITED which is an estate agency owned by PW2. In his evidence, PW2 stated that he leased out the house at Mathare Drive-Inn Estate to the 2nd Appellant on behalf of the landlord. This application purports that the 2nd Appellant was moving out from another house which was smaller and therefore wanted to occupy a bigger house. There is nothing that can be further from the truth because, at the time of her arrest, the 2nd Appellant was occupying a big house at Safari Park Gardens Estate and from the evidence of PW3, 4, 6 and 9, there was no indication that the 2nd Appellant was about to move from that house.

32. Nevertheless, it is pretty clear that the Memorandum of Lease was introduced into the inventory of the items recovered much later. That is why indeed, it is even written in a different pen from the other items that were recovered. With the evident anomalies in the lease agreement, it may not be far-fetched to state that the same was not authentic in the sense that it did not meet the legal requirements of a document capable of being admitted in evidence. This is more buttressed by the fact that its introduction into the inventory was after the 2nd Appellant had been arrested from her house at Safari Park Gardens. From that house, was recovered amongst other things her identity card which then would imply it was easier to insert her name in the lease agreement.

33. Be that as it may, there is no doubt that the 2nd Appellant was not arrested in house number 17 at Drive Inn Estate. The evidence of PW1 who was the residential estate caretaker was categorical that he used to see some men going into house number 17. The name of the 2nd Appellant only came in because she appeared in the Memorandum of Lease. From these circumstances, my view is that it was not established beyond all reasonable doubt that the 2nd Appellant was in actual occupation of the house. Although she is a spouse of the 1st Appellant, it does not follow that she would be privy to what her husband was doing. I say this candidly because they lived as husband and wife in the house at Safari Park Gardens. That is where all documentations relating to utility bills and the marriage affidavit were recovered. This applies also to the 2nd Appellant's identity card. It cannot be far-fetched again to conclude that herself, never having been seen or sighted at Mathare Drive Inn may not have had any dealings with the house or that even her own spouse could have used her identity card to execute a tenancy agreement. I will for these reasons give her the benefit of doubt.

34. It is trite that in a criminal case, the burden of proof always lies with the prosecution to prove their case beyond all reasonable doubts. It never shifts to an accused person to prove his/her innocence. In relation to this case, the 2nd Appellant was arrested squarely in her matrimonial home and her husband was driven into it by police officers after the recoveries from House No. 17 at Mathare Drive-Inn Estate. Police thoroughly combed her home and did not recover anything traceable to connect her with the offence charged. If the court were to find her culpable it would definitely shift the burden of proof upon her to disprove that she never made the Memorandum of Lease or lived in the house at Mathare. It would also be shifting the burden of proof for her to prove that nothing was recovered from her matrimonial home. That would go against the tenet of placing the burden of proof upon the prosecution to prove its case beyond all reasonable doubt. See ***Woomington vs DPP [1935] AC 462.***

35. As regards the 2nd Appellant, he was arrested after police received information of his dealings in narcotic drugs. Before his arrest on Thika Road, he had just been seen leaving Mathare Drive-Inn Estate from the plot in which house No. 17 was situated. The police thereafter gave a chase and intercepted him whilst driving his motor vehicle Reg. No. KCG 031K. He was thereafter driven to the said number No. 17

which was locked. It is true that he declined to open the house prompting the police to break into it with the permission of the caretaker. The issue of what was recovered is not in issue because even himself in his defence confirmed that the police conducted a thorough search of the house in his presence. He did also confirm that some powderly substances as well as some packaging papers and paper bags were amongst the items that the police recovered. His only defence is that he did not own the house.

36. However, from the testimony of PW1 the caretaker of the house, he used to see the 1st Appellant with other two men accessing the compound. In fact, after the police got into the compound and asking the 1st Appellant to identify his house, which he declined, it is PW1 who led them to the 5th Floor door No. 17. PW1 then told the police that that was the house the 1st Appellant used to frequent. All the exhibits related to the drugs and the packaging were adduced in evidence. An inventory was also made of the recoveries.

37. I now grapple with the question that the case for the prosecution was that the 1st Appellant was arrested not only on account of the evidence of PW1 but also on account that the tenancy lease agreement was executed by his wife, the 2nd Appellant and that therefore he must have owned or rented the said house. This court has discounted any culpability based on the Memorandum of Lease because was inadmissible in evidence. Therefore, the evidence that incriminates the 1st Appellant is squarely based on the testimonies of PW1 and 2 to the extent that they used to see the 1st Appellant visiting house no. 17.

38. It now behooves this court to determine whether statutory requirements of recovery, seizure, weighing and testing of the narcotic drugs were adhered to. I have already pronounced myself on how the drugs were recovered. Just to reiterate the recovery was done in the presence of PW3, PW6 and PW9 amongst other police officers who did not testify. Their evidence was that a systemic search was conducted. They gave a candid chronology of how each of the exhibits were recovered and from which room which I have restated in the summary of evidence above. Further, to concretize the recoveries an inventory was made with the parties present signing. The inventory was prepared by PW6 PC Weru who also had signed the search certificate. A seizure notice adduced as Exh. 61 was also produced in court. In the same spirit, the investigating officer caused the substances recovered to be analyzed by a government analyst (PW 5) and it was confirmed that all the substances contained heroine with a 30% purity. PW5 produced an analyst report (Exh. 54) in evidence. PW5 also adduced as exh. 56 a certificate of sampling the drugs. The sampling was done in view of the fact that different substances were collected at different locations in the house.

39. The drugs were weighed by PW7 who was a proper officer in the meaning of **Section 86 of the Narcotic drugs and Psychotropic Substances Control Act** 1994. He produced a Valuation Report, exhibit 58 dated 6th February, 2017. At the point of valuation, another witness, **PW8, Chief Inspector Awino Saka** was called to the scene to take photographs of all the exhibits that were recovered. He accordingly adduced the photographs and the certificate of the same as Exh. 59 (1-52). According to PW7, the drugs weighed 4857.87 grams which he assigned a value of Kshs. 3,000 per gram. The total value was Kshs. 14, 573,710 /=.

40. The defence questioned whether the substances analysed and valued were truly heroine in that they contained only 30% purity. However, according to PW5 who was an expert analyst, he stated that the purity of the narcotic drug does not affect either its weight or value. That implied that as long as a substance was tested to contain the heroine and was not prepared in any medical form, then a suspect would be charged under Section 4(a) of the Act. That drives me to restate the provision under which the charge was drafted**. Section 4(a)** provides as follows:

> **"Any person who traffics 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**

41. The provision above does not specify the percentage of purity that would constitute in a substance to guarantee the threshold for an offence. Consequently, the submission by the defence that the substances recovered were not purely narcotic drugs cannot hold.

42. I do also hold that the quantity of the drugs recovered could not have been for personal use. It was intended for trade. Thus meeting the threshold for a charge of trafficking in narcotics.

43. I find accordingly that the prosecution established a water tight case against the 1st Appellant, that he trafficked in narcotic drugs. His defence that he was arrested and driven to an unknown house where the drugs were recovered cannot stand. It is a defence that is ousted by the strong prosecution case that he was the occupier of the house and therefore was dealing in the narcotic drugs. His conviction was therefore safe and I uphold it.

44. As regards the sentence, the 1st Appellant was sentenced to pay a fine of Kshs. 42 million in default serve one year imprisonment on the first limb of the sentence and in addition serve 20 years imprisonment. There is no doubt on the second limb of the penalty as spelt out under **Sections 4(a) of the Act** is not mandatory. In that case, the court is enjoined to reevaluate the gravity of the offence and in this case, the quantity of the drugs. That is to say that the court in exercising its discretion must impose a sentence that is proportional to the offence.

45. Counsel for the 1st Appellant argued that the sentence of 20 years was harsh and excessive in the circumstances. However, counsel failed to attach any reasons for this argument. The only mitigation that was advanced before this court was that should the conviction be upheld in respect of both Appellants the court ought to consider that both are a husband and wife and therefore be lenient to accord them a reasonable sentence that would enable them to leave prison as soon as possible. Before the trial court, it was mitigated that the Appellants were remorseful, that the court considers they are a couple with a young family with nephews and nieces to take care of and that the 1st Appellant took care of his ailing and aging mother. It was also mitigated that the 2nd Appellant was running a business in the Central Business District

which risked to be closed and many employees losing their jobs. Mr. Kangahi asked the court to temper justice with mercy and impose a lenient sentence.

46. A more recent and comparative decision of concurrent court is a ruling delivered by Hon. Kimaru J in **H. C. Misc. Cr. App. No. 59 of 2019 – Ismael Mzee Ismael vs Republic** on 24th September, 2019. In the case, the Applicant therein was charged in trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act.** He was in the first limb sentenced to pay a fine of 5,534,100/= in default serve one year imprisonment. On the second limb he was sentenced to life imprisonment. Of course, the court in detail largely dealt with the interpretation of the penalty on the second limb under the provision and rightly observed that the life imprisonment provided was not mandatory. It was a case of resentencing following the Supreme Court decision in the case of **Francis Karioko Muruwateru vs Republic [2017] eKLR** which declared minimum mandatory sentence as unconstitutional. The High Court dealt with the matter as such because the trial court had misapprehended that life imprisonment under the second limb of **Section 4(a)** in the penalty was mandatory. The learned judge having regard to the quantity of the drugs, the mitigation that the Applicant offered set aside the life imprisonment and substituted it with five years imprisonment.

47. In the present case, given the value of the drugs and taking into consideration that the 1st Appellant has cumulatively been in custody for a period of about one year, four months and two weeks, I set aside the 20 years imprisonment and substitute them with an order that he shall serve 15 years imprisonment commencing the date the sentence was passed. I emphasize that the first limb of the sentence that he shall pay a fine of Kshs. 42 million in default serve one year imprisonment remains undisturbed.

48. In the result, the appeal in respect of the 2nd Appellant is allowed. I quash the conviction and set aside the sentence and order that she be forthwith set free unless otherwise lawfully held. As regards the 1st Appellant, the appeal partially succeeds only to the extent of the second limb of the sentence as delivered above. It is so ordered.

**Dated and Delivered at Nairobi This 3rd day of December, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of;**

1. Mr. Swaka for the Appellants.

2. Ms. Chege h/b for Ms. Akunja for the Respondent.