



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 446 OF 2010

(An Appeal arising out of the conviction and sentence of Hon. U.P Kidula - CM delivered on 17th February 2010 in Kibera CM. CR. Case No.625 of 2008)

CHRISTOPHER CANNON OSEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Christopher Cannon Osei, a Ghanaian Citizen, was charged with two (2) counts 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 11th March 2008, at Jomo Kenyatta International Airport in Nairobi County, the Appellant trafficked 231.4 grammes (16 pellets) and 1031 grams (70 pellets) of narcotic drugs namely heroin respectively of an estimated market value of Kshs.231,400/- and Kshs.1,031,100/- in contravention of the said act. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was found guilty as charged. He was sentenced to pay a total fine of Kshs.4,093,300/- or in default he was to serve one year imprisonment. In addition he was sentenced to serve 15 years imprisonment. The Appellant was aggrieved by his conviction and sentence. He duly filed an appeal to this court.

In his petition of appeal (contained in an amended grounds of appeal), the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted of trafficking in narcotic drug which was not a prohibited drug under the **Narcotic Drugs and Psychotropic Substances Control Act**. He was aggrieved that he was not accorded fair trial. He stated that the court proceeded with the trial despite the fact that he had indicated to the court that he was unwell. He took issue with the fact that the Ghanaian Embassy was not informed of his arrest in breach of International Treaties which Kenya was signatory to. He stated that he was not supplied with witnesses' statements during trial and therefore he was denied opportunity to adequately prepare his defence. He faulted the trial magistrate for failing to take into consideration that the prosecution had, firstly, not produced essential witnesses and secondly, failed to establish its case to the required standard of proof. He was of the view that the evidence adduced by the prosecution witnesses was full of contradictions and inconsistencies. He was aggrieved that his defence and submission were not considered before the trial court reached the decision to convict him. The Appellant faulted the trial magistrate for sentencing him to serve a custodial sentence without taking into consideration the period that he was in remand prior to his conviction. The upshot of the above reasons, 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, the Appellant presented to court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. The thrust of the Appellant's submission is that he ought not to have been arrested by the Kenya Police or tried by the Kenya courts. He submitted that he was kidnapped by the police while he was in international territory within Jomo Kenyatta International Airport as he was on transit to Mauritius. He submitted that the Kenya Police had no authority under international law to arrest him and forcefully make him enter Kenya for the purposes of trying him. In the same breath, he submitted that the Kenyan courts had no authority to try him. He further submitted that his rights as contained in the international conventions including the **Convention on International Civil Aviation** and the **Vienna Convention on Diplomatic Relations** were breached when he was forcefully removed from an international zone within the airport and brought within the jurisdiction of the Kenyan authorities.

On the evidence, the Appellant submitted that the prosecution did not adduce sufficient culpatory evidence to connect him with the recovery of the drugs within the toilet area at Gate No.10 at the Departures Lounge at Jomo Kenyatta International Airport. He further submitted that the entire evidence that was adduced was concocted to connect him with the offence that he was convicted. He pleaded his innocence and urged the court to find that the prosecution witnesses had failed to adduce evidence to prove his guilt to the required standard of proof. He urged the court to allow the appeal.

Ms. Ndombi for the State opposed the appeal. She submitted that the prosecution proved to the required standard that the Appellant was trafficking in narcotic drugs, in particular, heroin after he was found ferrying 86 pellets of heroin in his rectum. She submitted that a batch of

16 pellets were recovered from the toilet after the Appellant had used it. The subsequent 70 pellets were recovered when the Appellant was admitted at Kenyatta National Hospital for treatment. When tested, it was established that the pellets contained heroin, which is a narcotic drug within the meaning ascribed to it under the **Narcotic Drugs and Psychotropic Substances (Control) Act**. She explained that there was no basis in the complaint made by the Appellant to the effect that the Kenya Police and the Kenyan courts did not have authority to investigate and try him. She submitted that the Appellant was arrested within the Kenyan territory and therefore any criminal act committed within the Kenyan territory is subject to be investigated by the Kenyan Police and be tried by the Kenyan courts. She submitted that the prosecution had established all elements of the charge to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeal.

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

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

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

This court has carefully considered the rival submission, both written and oral made by the parties to this appeal. The court has also re-evaluated the evidence that was adduced before the trial court. There are essentially two broad issues that came to the fore for determination by this court. The first issue is the claim by the Appellant that the Kenya Police and the Kenyan courts had no jurisdiction to try him because he was a passenger on transit within an international area at the Departures Lounge at Jomo Kenyatta International Airport. It was not disputed that the Appellant was on transit from Accra, Ghana to Port Louis Mauritius. The Appellant had disembarked from a Kenya Airways flight from Accra, Ghana and was at the transit area of the airport waiting to board a plane that would fly him to Mauritius. According to the Appellant, the fact that he was in the transit area of the airport, meant that he could not be arrested by the Kenyan police or be tried by the Kenyan courts. The prosecution opposed this submission.

This court has considered the argument advanced by the parties in that regard. It was clear to the court that the Appellant misapprehended international conventions that apply to Civil Aviation. The Appellant is subject to the Kenyan jurisdiction if there is reasonable suspicion that he has committed an offence within the transit area. The fact that the Appellant did not have a visa to enter Kenya was not a bar from the police investigating him, and if necessary arresting him, if it was established that a crime had been committed. The **Vienna Convention on Diplomatic Relations** addresses persons holding diplomatic passports and not ordinary citizens transiting through international airports. This court is of the considered view that the Appellant misapprehended international law as regard his presence in Kenya at the time it was alleged he committed the offence. That ground of appeal lacks merit and is hereby dismissed.

On the merits of the appeal, the Appellant contends that the prosecution did not establish the charges that were brought against him to the required standard of proof beyond any reasonable doubt. On the other hand, it was the prosecution's case that it had established its case to the required standard. The Appellant was charged with two (2) counts of being found trafficking in narcotic drugs. In respect of the 1st count, PW8 Hassan Bakari Owiti, a cleaner at the airport testified that on 10th March 2008 at about 5.00 a.m., while he was outside the toilets at the Departures Gate No.10, he was approached by the Appellant and requested for a match box. PW8 assumed that the Appellant wanted the match box to light a cigarette. He told him that smoking was prohibited within the airport. The Appellant insisted. PW8 acquiesced to the request and gave him the match box. The Appellant entered the toilet. At that time, PW8 recalled there were no other persons within the toilet.

After about 2 or 3 minutes, the Appellant came out of the toilet. PW8 immediately entered the toilet to clean it up to ready it for the next user. He was shocked and surprised when he discovered that instead of passing stool into the toilet bowl, the Appellant had done it outside the bowl and wrapped the stool in a toilet paper. He removed the stool and placed it in a pallet that he used to clean the toilet. It was then that he saw there were some substances within the stool. He informed PW1 Sammy Bett, a security warder working for Kenya Airports Authority. He came to the scene and realized that there was a possibility that the substance could be narcotic drugs. He informed PW9, IP Mary Chepkorir who was then based at the Anti-Narcotic Drugs Office at the airport. The stool was cleaned. It was then discovered that there was substance contained in 16 bullet shaped pellets. PW1 told PW8 to be on the lookout for the person who had left the pellets at the toilet.

Meanwhile, while PW4 PC Bernard Leboo and his colleague PC Kimeu were on duty at the airport on the 11th March 2008, they saw the Appellant near Departures area Gate No.7. From their training, they suspected that the Appellant could be a drug trafficker. They requested him to accompany them to the Anti-Narcotics Office within the airport. They searched his luggage but found nothing. The Appellant appeared sick. PW9 requested for PW8 to be called to the office. When PW8 arrived at the office, he positively identified the Appellant as the person who had requested him for a match box and who had emitted the pellets with his stool at the toilet. The Appellant was arrested and detained by the police. He was kept in custody at the Jomo Kenyatta International Airport Police Station. His health condition deteriorated. The airport nurse advised that the Appellant be taken to hospital because there was likelihood that he had been poisoned by one of the pellets.

The Appellant was admitted at Kenyatta National Hospital on 15th March 2008 under the care of PW10 Dr. Paul Ngugi. From the information received from the police, PW10 suspected that the Appellant still had pellets in his body. He ordered an x-ray to be done. The x-ray revealed that there was a mass of substance within the Appellant's digestive system. The Appellant was admitted and given lactose to enable the Appellant expel the substance. In the course of three days upto 18th March 2008, the Appellant emitted seventy (70) pellets. During this period, he was guarded by PW2 PC David Loisinger, PW11 Cpl Feisal Juma, PW5 PC Stephen Enyatta and PW4 PC Bernard

Leboo. During this period, the Appellant used a bedpan when he went for a long call so as to enable the police retrieve the pellets. The Appellant was discharged from hospital on 19th March 2008 and subsequently arraigned before court.

The substance was tested by Simon Sunguti, a Government Analyst on 19th March 2008. He established that the substance was diamorphine or what is commonly known as heroin. The test report was produced as an exhibit on behalf of Simon Sunguti by PW3 Catherine Murambi, his colleague at the Government Chemist. PW6 CIP Justus Irungu, a gazetted Anti-Narcotic Officer, testified that on 19th March 2008 he weighed the 86 pellets of heroin and found it to weigh 1,262.5 grams with a value of Kshs.1,262,500/-. He produced his valuation report as an exhibit in court. PW12 Cpl Joan Ndurumo, the investigating officer testified that upon concluding investigations, she decided that a case had been made for the Appellant to be charged with the offences for which he was convicted. She produced the 86 pellets and other reports as exhibits before the trial court.

When the Appellant was put on his defence, he denied committing the offence. He attributed his travails to the work of his political enemies in Ghana. He also attributed the charges brought against him to conspiracy by the police to fix him with the charges.

On careful re-evaluation of the evidence adduced before the trial court, it was clear to this court the prosecution did establish to the required standard of proof that the Appellant trafficked the narcotic drugs in form of 86 pellets of heroin in his rectum. The 86 pellets were retrieved from his digestive system when he expelled them after he became ill and was detained by the police. There was no other reasonable explanation that this court can reach other than the fact that the Appellant had the 86 pellets in his body for the sole purpose of trafficking them. This court therefore holds that the Appellant's appeal against conviction on the charge of trafficking in narcotic drugs lacks merit and is hereby dismissed. The claim by the Appellant that he was framed with the charges for political or other reasons is incredible and is not supported by evidence. That defence was rightfully dismissed by the trial court and by this court as being without substance.

On sentence, this court agrees with the Appellant that the same was harsh and excessive. It was apparent that the trial court did not take into account the period that the Appellant was in remand custody prior to his conviction. The Appellant did not help his case because he was the primary cause for the delay in the hearing and conclusion of his trial. This court has taken into consideration the quantity of narcotic drugs that were found in the Appellant's possession. It has also taken into consideration the fact that the Appellant has been in lawful custody and prison for a period of ten (10) years. This court formed the view that the Appellant has been sufficiently punished. His custodial sentence is therefore commuted to the period served. The Appellant is ordered released from prison and handed over to the Directorate of Immigration so that he can be repatriated back to his country of origin, Ghana. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JUNE 2018

L. KIMARU

JUDGE