REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 162 OF 2013

JOHN MUGISHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 2727 and 2698 of 2010 delivered by Hon. Wachira (PM) on 1st March, 2013)

JUDGMENT

Background

The appellant was charged alongside his co-accused 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 of the charge were that on the 5th day of June, 2010, the appellant and Anne Birungi Bisaso, at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, jointly trafficked by conveying 21.2411 kg of narcotic drugs namely cocaine of an estimated market value of Ksh. 84,964,400 in contravention of the provisions of the said Act.

The prosecution called a total of fourteen witnesses. The appellant gave a sworn testimony in his defence and called one witness in support of his defence. Following the trial, the both the appellant and his co-accused were convicted and each sentenced to a fine of Ksh. 254,893,200 in addition to imprisonment for life.

Aggrieved by both the conviction and sentence, the appellant lodged this appeal. The appellant relies on the following 15 grounds of appeal in his Amended Grounds of Appeal filed on 29th November, 2016:

a. There was variance between the particulars of the charge and the evidence adduced, in breach of section 214(1) of the Criminal Procedure Code

b. The charge was defective as it was framed contrary to sections 134 and 137(a) of the Criminal Procedure Code as read with the Narcotic Drugs and Psychotropic Substances Control Act, 1994.

c. The proceedings are incurably defective for failure by the trial court to comply with the mandatory provisions of section 200(3) of the Criminal Procedure Code.

d. The trial court erred in relying on circumstantial evidence without corroboration to convict the appellant.

e. The trial court erred in convicting the appellant in disregard of sections 4, 67, 74(a), 79 and 86 of the Narcotic Drugs and Psychotropic Substances Control Act, 1994.

f. There was no evidence linking the appellant to the charge.

g. The court's finding on possession did not meet the required legal standards.

h. The conviction was arrived at on mere suspicion.

i. The trial court misapprehended the facts and applied wrong legal inferences to the appellant's prejudice.

j. The doctrine of common intention was not established as envisaged in section 21 of the Penal Code.

k. The trial court erred in advancing theories and speculations to fill glaring loopholes in the prosecution case.

l. The trial court erred in considering the respective prosecution and defence case in a speculative, skewed, slanted and unfair manner (the appellant was not accorded a fair hearing?)

m. The court erroneously relied on accomplice evidence.

n. The court erred in accepting and adopting written submissions in contravention of sections 213 and 310 of the Criminal Procedure Code.

o. The trial court rejected the appellant's defence without good reasons.

Appellant's submissions.

The appellant relied on his written submissions. On the ground that there was variance between the particulars of the charge and the evidence adduced, which was in breach of section 214(1) of the Criminal Procedure Code, the appellant submitted that his name in the charge sheet, John Mugisha was at variance with the names in various exhibits relied on by the court. He relied on the cases of ***Yongo v Republic*** **(1983) KLR** and ***State of Uganda v Wagara*** **(1969) EA 366.** It was the appellant's further submission that despite being jointly charged with his co-accused, only his co-accused was arrested in actual possession while he was arrested on a different day with nothing incriminating on him.

The appellant also submitted that the charge sheet was defective within the context of Sections 134 and 137 of the Criminal Procedure Code. In this regard, he questioned the valuation of the alleged cocaine when the authorized officer did not witness the weighing. He also pointed out the failure by the prosecution to call the government chemist, who was the author of the report, thereby denying him the opportunity to cross-examine on the actual process. The appellant urged the court to note that there was no sufficient ground to support the production of the sampling and weighing report under Section 77(1) of the Evidence Act without calling the maker. He cited the case of ***Elizabeth Kamene Ndolo v George Matata Ndolo*** **Cr. Application No. 128 of 1995** and the case of ***Singh Dhaley v Republic Cr. Appeal No. 10 of 1997.***

On failure to comply with section 200(3) of the Criminal Procedure Code, the appellant submitted that the succeeding magistrates did not seek the appellant's and his co-accused input in deciding how the matter should proceeding upon taking over the matter. He submitted that this failure was fatal to the case since the court lacks jurisdiction to continue with the case, as was held in ***Raphael v Republic*** **(1969) EA.** He

also relied on the cases of ***Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v Republic,*** **2010 eKLR** and ***Rebecca Mwikali Nabutola v Republic*** **(2012) eKLR.**

Further, it was submitted that the circumstantial evidence relied on was not sufficient. The appellant invited the court to consider that the prosecution did not produce evidence to demonstrate that the person referred to in the charge was the appellant, adding that the name John Mugisha was a common name in Uganda. He further submitted that the prosecution also gave contradictory evidence recovery of documents were recovered allegedly connecting the appellant to the offence. He also pointed out that the officer who entered the exhibits recovered from the appellant's co-accused was not called to testify, neither were the DHL documents entered in the inventory. He cited the case of ***Ndiema & Another v Republic*** **Cr. Appeal No. 297 of 2009** to support the view that he ought to have been arrested when he was in actual possession of the incriminating documents, arguing that constructive possession was not satisfactorily proved within the meaning of section 4 of the Penal Code. Furthermore, the appellant's possession did not feature in the trial till his co-accused testified that the appellant was an accomplice.

Regarding non-compliance with Sections 213 and 310 of the Criminal Procedure Code, the appellant faulted the trial court for accepting the co-accused's written submissions without giving him a copy of the said submissions which would prejudice the appellant. He relied on the cases of ***Ayub v Republic*** **2003) eKLR; Henry** ***Odhiambo v Republic*** **(2006) eKLR.,** ***Surinder Singh Kanda v The Government of the Federation of Malaya,*** **Appeal No. 9 of 1961**.

The appellant also noted that the doctrine of common intention was not proved since no evidence was presented to show that he was engaged in joint activities together with his co-accused. Furthermore, there was need for corroboration of the evidence by an accomplice. The cases of ***Karanja & Another v Republic*** **(1990) KLR;** ***Asumani Logoni s/o M*** **(1943) Uza v Rex 10 (EACA) 92 and** ***Rep. v Baskerville*** **(1916) 2 KB 658** were relied on.

The appellant also urged this court to find that certain provisions of the Act were contravened, in particular Sections 4, 67, 749A), and 86. He submitted that the prosecution failed to show that the appellant had committed any of the acts amounting to trafficking in drugs as set out under section 2. Furthermore, the prosecution did not comply with section 67 when it failed to call the substantive government chemist to testify. The appellant submitted he was not present when the analysis, weighing were done yet the substantive analyst was not called to testify. This failure, he argued, could have been cured had Section 74(A) which should be read together with Section 79 been complied with. He added that Section 86 was similarly not complied with when the evidence on analysis was not clearly presented.

The appellant finally submitted that the evidence on the mode of arrest was not sufficient to sustain a conviction since the evidence on the on information by an informer was not linked to any information by the co-accused. He cited the case of ***Patrick Kabui Maina & Other v Republic*** **Cr. Appeal No. 9 of 1986;** ***Kigecha v Republic*** **(1965) EA 773; to** support the view that evidence of an informer not called to testify should be treated as hearsay. Relying on the case of ***James Muchene Kambo v Republic*** **Cr Appeal No. 63 of 2003,** the appellant added that failure by the officer who ordered his arrest to testify left a gap in the prosecution case. In response to the respondent's submissions, the appellant maintained that he was not arrested on the same date with his co-accused, and neither were they were they travelling in the same direction.

Respondent's submissions.

The respondent was represented by Prosecution Counsel, Ms. Sigei who gave oral submissions in response. Prosecution counsel reiterated the evidence by prosecution witnesses, which she submitted was sufficient to prove the charges facing the appellant. She submitted that the DHL document had proved that the appellant's co-accused had sent a package to Uganda to John Mugisha who was said to be owner of the seized cocaine. The package was found to contain 8 set of keys which were found to open the padlocks of the boxes which contained the seized narcotic drugs. Counsel also reiterated the defence testimony of the appellant's co-accused who indicated that it was the appellant who had procured her to deliver the package that was found to contain the narcotic drugs. Counsel also observed that the appellant

did not call the said Shephard with whom he had travelled to Kenya. She further submitted that there were circumstances linking the appellant to the offence, notably, the airway bill which was found with the appellant's co-accused, a flash disk which contained a letter similar to a letter found in possession of the appellant's co-accused, and the set of keys which were being sent to Uganda, bearing the appellant's name. Counsel submitted that conveyance was proved by the fact of air transport of the seized drugs. She added that it was not essential to prove the appellant's physical presence during the seizure in order to link him to the offence. Counsel observed that all witnesses gave corroborating evidence.

Determination.

Following consideration of the evidence on record and submissions by both parties, I arrive at the main issues for determination as follows:

a. Whether the charge was defective as framed.

b. Whether section 200(3) of the Criminal Procedure Code was complied with.

c. Whether the trial court failed to uphold the appellant's fair trial rights were compromised in light of the alleged contravention of sections 213 and 310 of the Criminal Procedure Code.

d. Whether the evidence adduced was sufficient to prove the charges.

e. Whether the trial court disregarded of the appellant's defence without good reasons.

Defective charge.

One of the issues raised under this limb was that the court did not comply with Section 214 of the Criminal Procedure Code. The main contention by the appellant was that the appellant's name in the charge sheet, John Mugisha, was variant from the names in various exhibits, in particular, the pass from the Ministry of Foreign Affairs which bore the name Mugisha Keith King John; the driving permit bore the name Mugisha John King, the pass from the Office of the President of Uganda which had the name Mugisha Keith King John. In the appellant's view, the prosecution failed to show that these set of names referred to him, and further that there was no explanation as to why some of the names were omitted from the charge.

Section 214 of the **Criminal Procedure Code** provides for amendment of a charge where it is found that there is a variance between the evidence and the charge. The provision allows the court, where it finds at any stage of a trial before the close of the prosecution case that the charge is defective, to call for the alteration of the charge, by amendment, substitution or addition of a new charge. Where such an alteration is made, the court is required to call upon an accused person to plead to the altered charge. The accused should also be given an opportunity to demand the recall of a witness or witnesses to give evidence afresh or be cross-examined further.

The circumstances of this case do not call for the invocation of Section 214 for the reason that there was no alteration of the charges by the trial court. The question that would arise in light of the appellant's argument is whether the charge was defective by virtue of the variance in the appellant's names in the charge and the particulars in exhibits produced during the trial. In my view, this does not of itself render the charge defective. This is because under **Section 134** of the Criminal Procedure Code:

> ***'Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'***

The aspect of the accuracy of the appellant's names does not go to the core of the particulars of the charge. As held in the case of ***Yongo v Republic*** (supra) cited by the appellant:

'...a charge is defective under Section 214(1) of the Criminal procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars.'

This is not the case here. The correctness or otherwise of the appellant's description is a matter of evidence for the prosecution to prove on the identification of the person referred to in the charge sheet. As stated under **Section 137** of the Criminal Procedure Code, ***'the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name,...'*** This ground of appeal therefore, fails.

The second issue was that the charge sheet was defective within the context of Sections 134 and 137 of the Criminal Procedure Code. The appellant argued that the valuation could not be relied on when the valuing officer did not witness the weighing, and further that in the absence of a crucial witness, government analyst or other analyst as envisaged under section 74A(1)(d), the sampling, analysis and weighing evidence was almost non-existent, thereby leading to a defective charge. **Section 74A(1)(d)** of the Narcotic Drugs and Psychotropic Substances Control Act provides that:

'...the authorised officers") shall, in the presence of, <u>where practicable</u>—

(d) the analyst, if any, 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.'

It is notable that, firstly, the Act requires the presence of such analyst where practicable. Secondly, the reliability or otherwise of the valuation report goes to the sufficiency of the evidence and not elements of a charge sheet. Therefore, this ground similarly fails.

Non-compliance with Section 200(3) of the Criminal Procedure Code.

It was contended by the appellant that the trial court did not comply with section 200(3) of the Criminal Procedure Code when different magistrates took over the matter. Section 200(3) demands that.. ***'where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.'***

From the record of proceedings, the matter was heard was by various magistrates. The case was initially substantively heard by Hon. C. W. Githua (as she then was) who heard nine (9) witnesses. She was appointed judge of the High Court before the matter was concluded. Thereafter, there were several mentions before different magistrates. In between these mentions, the matter did not proceed to full hearing, Before the matter came up for substantive hearing of witnesses, the issue of compliance with section 200 could not be said to have arisen.

The matter eventually came up for hearing on 25th April, 2012 before Hon E. Ominde. The record of proceedings show as follows:

Court prosecutor: the matter is for hearing and I have two (2) witnesses and I am ready, Nine (9) witnesses have testified and five (5) are remaining and we are ready to take directions under

section 200.

Oundu: On behalf of the 1st accused we are ready to proceed with the matter from where it has reached

Accused 2: I am also very ready to proceed with the matter from where it has reached.

Court: hearing after the call over. Under section 200, the matter shall proceed from where the former trial magistrate left.

Thereafter, both the appellant and his co-accused expressed concern that the matter was being delayed due to non-availability of the trial magistrate. They requested that the matter proceed before a different court. This request was granted by Hon. Wachira on 28th June, 2012 who then took over hearing the case to its conclusion. The record of proceedings reflects as follows:

Oundu - this is a part-heard before three previous courts. On the part of the first accused, we can proceed under section 200 of the Criminal Procedure Code. We have about 4 days for hearing. We can proceed.

Hon. Wachira

P.M.

Prosecution: it is further hearing today. There are other dates I have liaised with officer in charge JKIA and he was expecting tow (2) witnesses. They are absent. I seek a hearing tomorrow. There is a witness outside the country and he comes on the 15-7-2012. We can take directions.

Hon. Wachira

P.M.

Oundu: 11 witnesses have testified. Hon. Ominde took only four witnesses. Since she is busy with other duties, I feel that we take dates before your honour and we can proceed. These accused persons are in custody, I will on behalf of 1st accused plead with the court to give us a court that can hear us.

Hon. Wachira

P.M.

Court: sentiments of parties noted section 200(3) of CPC duly complied with and Mr. Oundu states. We shall proceed from where we have reached.

Accused 2: I will also be ready to proceed from where we stopped.

Hon. Wachira

P.M.

Court: hearing to proceed from where it had reached. ....

From the above, it is clear that while the case came before various magistrates, it was substantively heard by three magistrates: Hon. C. W. Githua (as she then was), Hon. E. Ominde and Hon. Wachira. From the record captured above, it is clear that the question of compliance with Section 200(3) of the Criminal

Procedure Code arose, and the appellant, who was then acting in person responded in both instances that he was ready to proceed with the matter from where it had reached. While both succeeding magistrates did not clearly set out in verbatim what was stated to the appellant when they took over the case, it is clear from the appellant's response that he opted to proceed from where the case had reached.

Compliance with the appellant's right to a fair trial.

One of the grounds of appeal raised by the appellant was that the trial court erred in considering the respective prosecution and defence case in a speculative, skewed, slanted and unfair manner. He did not elaborate this ground further in his submissions. However, as already observed earlier, this court re-evaluated the evidence afresh including the judgment of the trial court. The judgment shows that the trial court considered both the prosecution and defence evidence exhaustively. Nevertheless, this being a first appeal, the appellant is entitled to have this court re-consider the evidence afresh and arrive at its own independent conclusion.

Another ground raised is that the court erred in accepting and adopting his co-accused's written submissions in contravention of **Sections 213** and **310** of the Criminal Procedure Code. He elaborated in his submissions that the court failed in accepting the written submissions of his co-accused without giving him a copy of the said submissions. He relied on several cases to advance the view that he ought to be given an opportunity to respond to any submission that had a bearing on his case.

The appellant faulted the trial court's acceptance of written submissions of the appellant's co-accused and failure to give the appellant an opportunity to consider them and respond to the submissions which had a bearing on his case. Following the defence case, the court set a date for hearing of submissions. Thereafter, the court granted a further mention to enable the appellant access copies of proceedings. In a further mention, the appellant indicated that his submission were ready and the court gave a date when the judgment would be delivered. No reference was made to written submissions by or on behalf of the appellant's co-accused. It appears however, that at the time, the appellant was the reason behind the court not proceeding to set the case for the judgment. The appellant filed written submissions as well.

In the case of ***Henry Odhiambo v Republic*** (supra), the Court of Appeal sitting in Kisumu addressed the issue of use of written submissions. The court cited with approval the decision of the court in the case of ***Salim Dean v. Republic*** **[1966] E. A. 272** where it was stated:

> ***'On our part we say this. The Criminal Procedure Code provides a precedent for the making of submissions in the court. In no part of the legislation is there a mention of written submissions. A presiding officer of a court is expected to orally hear such submissions as both sides in a criminal case wish to make and to seek clarification of such submissions as found necessary, in order to appreciate each side's case before delivering his opinion. The accused person is also supposed to hear those submissions and has the right to clarify any point raised or to object to it being raised where he considers it necessary for his own benefit. Written submissions deny the accused that fundamental right. It is fundamental because if it were not so, the drafters of the Constitution of this Republic would not have entrenched it in the Constitution.'***

The court went ahead to find that:

> ***It cannot be said that merely because the appellant's counsel acceded to putting in written submissions the accused thereby consented to that course of events. The question as to whether or not written submissions could be put in was not put to him. The Constitution envisages express consent.***
>
> ***So when section 213 and 310 of the Criminal Procedure Code are read with section 77(2) of the Constitution, it is clear that where written submissions are tendered without the accused's express consent, the proceedings of the court concerned are thereafter rendered null and void. That is the conclusion we have come to herein.'***

The court then ordered that the proceedings of the trial court that followed the order for written submissions were null and void which rendered the trial unsatisfactory. Consequently, the conviction was quashed and the sentence set aside after the court considered that a retrial was not appropriate in the circumstances. The court in the above cited case faulted both the trial court and counsel for the appellant for failing to give the appellant the opportunity to determine whether to argue his case by way of written submissions.

In the appeal before this court, the appellant elected to file written submissions. Further, it was upon him to demand for a copy of submissions by his co-accused, a copy of which is in the file. Furthermore, use of written submissions by parties is now an accepted practice, a shift from the previously held position due to the increased case load. I am fortified in this view by the persuasive decision of the two judges of the High Court in the case of ***Otieno Kopiyo Gerald v. Republic*** **Cr. Appeal No. 1226 of 1994 [2010] eKLR who stated as follows:**

> ***'..[I]t is not necessarily a fatal mistake for the court to accept written submissions. The mistake is only fatal if the express consent of the accused is not obtained by his advocate, who then files written submissions.***
>
> ***To our minds, that would therefore imply that when an accused is not represented by an advocate, he should, if he requests, be allowed by the court, to file written submissions. Our said reasoning is informed by the reality that plays itself before us on a daily basis.…***
>
> ***In the light of those experiences, we believe that the window of opportunity which the decision in Henry Odhiambo Otieno Vs. Republic (above cited) has opened, captures both the will of many accused persons, and the real sense of justice. That is because we cannot visualize how a person could purport to be prejudiced when he is permitted to do the thing which he asked for.'***

This ground of appeal also fails.

Disregard of the appellant's defence without good reasons.

The appellant stated in his amended grounds of appeal that the trial court disregarded his defence without good reasons, though he did not elaborate on this in his written submissions. Nevertheless, this court has evaluated the evidence before the trial court and the judgment of the trial magistrate that was delivered on 28th February 2013. In her judgment, the trial magistrate recalled the evidence that was adduced during the trial including the appellant's defence. Further in her reasoning, the trial magistrate considered both the appellant's evidence and his submissions as evidenced in pages 276 to 281 in the paginated typed record of proceedings. I find no basis for this assertion by the appellant and this ground is hereby dismissed.

Sufficiency of evidence to convict the appellant.

Several grounds of appeal fall under this limb. Firstly, the appellant argued that there was no evidence linking him to the charge. Secondly, that the trial court erroneously relied on circumstantial evidence without corroboration to convict the appellant. Thirdly, that the court's finding on possession did not meet the required legal standards. Fourthly, that the trial court misapprehended the facts and applied wrong legal inferences to the appellant's prejudice. Fifthly, that doctrine of common intention was not established as envisaged in Section 21 of the Penal Code. Sixthly, that the trial court erred in advancing theories and speculations to fill glaring loopholes in the prosecution case and finally that the court erroneously relied on accomplice evidence.

The prosecution relied on the evidence of 14 witnesses, and several exhibits that were produced in the course of the trial. It is not disputed that the appellant was not arrested together with his co-accused. The seizure of drugs happened at the JKIA when the appellant's co-accused arrived from Lima, through Johannesburg. **PW1 No. 51895 Cpl. Salome Oluobuyi,** then an investigating officer attached to the Anti-Narcotics Unit at JKIA testified that on 5th June 2010, while on duty with her colleague at the baggage

hall area, they stopped the appellant's co-accused at the airport, for a random check at the international arrivals. The accused had among others two boxes marked UN diplomatic boxes. PW1 called in the officer in charge, Chief Inspector Aden Guyo who called **PW2 Francis Munguti Ndithya,** a fire rescue officer at the Kenya Airports Authority, to open the boxes in the presence of the officers and the suspect. From these two boxes, several items were recovered, including 5 packages in each box which were later found to contain cocaine. **PW3 No. 231162 Chief Inspector Ernest Maringa** testified that he took photographs of the two boxes marked UN Diplomatic bags and their contents at the request of PW5. PW3 also took photographs of each package together with its weight, even though he did not capture the person doing the weighing which was done in his presence.

According to PW1, the 1st accused informed the officers that the boxes were to be delivered to a person in Uganda who was the owner and who had keys to the padlocks. The receipt recovered from her had the names of John Mugisha DHL Uganda Kampala.

The appellant was arrested on 7th June, 2010 by **PW9, No. 46124 PC Samuel Muriungi** and **PW6, No. 62382 P. O. Nathan Kibaba.** The two officers acted on information and direction of the officer in-charge in arresting him. The appellant was arrested at the waiting lounge as he waited to travel to Entebbe from Nairobi. Upon arrest, he handed over his passport, air ticket and a claim tag which was on his ticket. The officers also recovered from the appellant an ID card from the Ministry of Foreign Affairs Office of the President Uganda, an ID card describing the appellant as a special presidential assistant and privileged youth, a boarding card, a vaccination card, a boarding pass, three mobile phones and three SIM cards from Uganda Telecom. PW9 corroborated this account, adding during cross-examination that they used the names given to them and help from airline officers to identify the appellant who was accompanied by another person going by the name Shephard.

The appellant's arrest therefore, is not in question. What is in issue is whether the prosecution linked him to the commission of the offence charged. The appellant's arrest was according to the prosecution, in connection with the seizure of narcotic drugs from his co-accused. It is true that there was no direct evidence of the appellant's communication with his co-accused. However, among the recoveries made from the appellant's co-accused was a DHL airway bill issued in respect of a parcel allegedly sent to Uganda to the appellant by his co-accused.

PW1 testified that that the DHL receipts were voluntarily handed over to her by the appellant's co-accused, who explained that they belonged to the appellant who was the owner of the boxes. The receipts were however inadvertently omitted from the inventory. This receipt was eventually used by the police officers to intercept the parcel that was destined for Uganda. **PW5, No. 232811 Inspector Mary Jepkorir** who was then the Deputy Officer in charge at the JKIA Anti-Narcotics Unit, testified that the appellant's co-accused stated upon questioning that the airways bill showed that the keys to the boxes had been sent to a consignee, one John Mugisha though DHL PW5 further testified that on 8th June 2010, she requested **PW7, Martin Olimba** manager DHL Kenya JKIA by a letter dated 8th June 2010 to intercept the parcel allegedly sent to the appellant by the 1st accused.

The parcel was intercepted and personally handed over to PW5. It contained a set of keys which were tested and found to open the padlocks used to secure the boxes that had been found to contain the seized narcotic drugs. **PW4, No. 55008 Cpl. Virginia Wanjiku** took photos of the set of keys. The parcel containing the keys showed on the envelope that the consignor was Ann Birungi Bisaso while the consignee was John Mugisha. The opening of the padlocks with the intercepted keys was also demonstrated in court during the trial. Also recovered in this parcel was a flash disk, in which PW5 found an introductory letter similar to the one recovered from the 1st accused during her arrest dated 3rd June 2010 which bore a UNDP logo with the subject as Ann Birungi Bisaso allegedly authored by Luke Taylor Resident Representative.

PW7 identified the parcel in court. However, the copies of the airway bill and the commercial invoice attached to the bill were not admitted in evidence for non-compliance with section 65 of the Evidence Act being electronic evidence. That said, I do observe that at this point, it is apparent that there is a clear

linkage between the intercepted parcel and the seized luggage that was found to contain the drugs. That is, the airway bill recovered from the appellant's co-accused, the recovered keys which could open the boxes seized from the 1st accused and the letter from the flash-disk bearing semblance from the one recovered from the 1st accused.

The other issue is whether this linkage brings the appellant to the fold as to equally link him to the charges. The evidence presented indicated that the airway bill had the names of the John Mugisha as the consignees and his co-accused. It is true that there is no direct evidence linking the appellant to the seized drugs, the evidence produced by the prosecution being purely circumstantial. It is trite that a court can rely on this evidence to found a conviction as was held in **R *v.* Taylor, Weaver & Donovan[1928] 21 Criminal Appeal CA 20,** to wit:

> ***"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."***

Further in the case of **Sawe vs Republic [2003] KLR 364** it was held that:

> ***(i) In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than of guilt.***
>
> ***(ii) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
>
> ***(iii) The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***
>
> ***(iv) Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt"***

The appellant disputed that no attempt was made to ascertain that the names referred to him. He further submitted that these names were common in Uganda and therefore, there should have been evidence directly linking him to the consignment. Furthermore, he was not arrested in actual possession of the incriminating items. It is true that nothing was recovered from the appellant at the time of his arrest that linked him to the offence. The police indicate that they acted on information. The appellant was introduced to the scene by his co-accused. PW5 stated in court what the appellant's co-accused upon her arrest. This aspect of PW5's narration was supported by the testimony of the co-accused in her defence. In her sworn testimony, the appellant's co-accused stated that she was procured by the appellant for an assignment to pick documents from Peru. She stated that the appellant facilitated her travel including processing all the travel documents she needed, including getting a UN pass. She stated that she was the one who posted the parcel containing the keys on instructions from the appellant, who also gave her the receiving address in Uganda. According to PW1, the appellant's co-accused also stated that the seized luggage belonged to the appellant.

The appellant heavily faulted the court for relying on accomplice evidence. Evidence by an accomplice is admissible in court, in the words of **Section 141** of the Evidence Act:

> **'An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.'**

The principle established in practice is that accomplice evidence ought to be corroborated. The Court of Appeal in the case of ***Kinyua v Republic*** **[2002] 1 KLR 256** stated as follows on use of accomplice evidence:

(i) The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the aid of assessors, on the dangers of doing so.

(ii) Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.

(iii) If the Court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.

(iv) The trial judge did not explicitly direct himself and the assessors on the nature of accomplice evidence and the weight to be given to it as required by law. However, this omission would not invalidate the trial and the conviction in the circumstances of this case.

The appellant's co-accused is an accomplice. As stated by the Court of Appeal in the case *of* ***Karanja & Another v Republic*** **[1990] KLR 589, *'the corroboration which is required of an accomplice's evidence is in the nature of some independent additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon.'***

Considering these principles, the evidence by the appellant's co-accused is admissible. As a matter of prudence, this evidence ought to be corroborated. The corroborating evidence in my view, besides the account by the appellant's co-accused, was the airway bill which was recovered from her. This bill was the basis of the interception of the parcel from DHL. This recovery rendered the account by the appellant's co-accused credible. When the parcel was intercepted, it was found to among others contain keys, which were tested and found to open the padlocks. The airway bill contained both the names of the appellant's and his co –accused. It was destined for Uganda when it was intercepted. The appellant was also arrested at the airport as he waited to travel to Uganda. Coupled with the testimony of the appellant co-accused's testimony, I believe a credible link between the appellant and his co-accused and the seized narcotic drugs is created.

This evidence, pieced together, defeats the appellant's argument that the John Mugisha referred to in the various exhibits could not have been referring to him. His co-accused was certain about the person she was dealing with, and further recovery of the intercepted parcel put the pieces together. I therefore, dismiss the argument by the appellant that he was not the person indicated in the charges.

The appellant also faulted the evidence on weighing, and sampling of the seized narcotic drugs. He pointed out the failure by the government analyst to produce the report of his analysis denied him a chance of interrogate the process of the analysis. He further submitted that Sections 4, 67, 74(A), and 86 of the Act were contravened. He submitted that the prosecution failed to show that the appellant had committed any of the acts amounting to trafficking in drugs under section 2. Furthermore, the prosecution did not comply with Section 67 when it failed to call the substantive government chemist to testify. And further that that Section 86 was similarly not complied with when the evidence on analysis was not clearly presented.

Firstly, this court observes that the production of the report of Mr. Munguti, the government analyst by **PW13, William Kairu Munyoki.** Furthermore, the appellant did not object to the production of the report by PW13. Nothing therefore, turns on this aspect.

Regarding the process of weighing, sampling and valuation, **PW5** testified that the weighing and sampling were done by Sunguti in the presence of all who witnessed the weighing and who also signed the sampling certificates. PW5 testified that the weighing was done in her presence and that she prepared

the weighing certificate dated 6th June, 2010 showing the total weight of the seized drugs as 21.2411 kg and that the certificate was also signed by the officers present as well as the 1st accused. PW5 however stated in cross-examination that that she did the preliminary weighing awaiting confirmation by the analysis and that she also prepared the sampling certificate. **PW11, No. 63172 Sgt. Damaris Ouma,** then attached to JKIA Anti-Narcotics Unit and the initial investigating officer testified that the weighing certificate was prepared by Chief Inspector Guyo.

Section 74(A) requires that weighing of the recovered substance in the presence, where practicable, the accused, an advocate for he accused if any, the other analyst representing the accused and the designated analyst. There is evidence to show that the weighing was done in the presence of police officers including PW5, the appellant's co-accused, government analyst. Even if the other analyst contemplated under this provision was not present, neither was an advocate and an advocate were not present at the weighing and sampling, the act contemplates the presence of all these persons where practicable. The narcotic drugs were intercepted at night and placed in safe custody to till the following morning when the weighing and sampling was done. Thus, failure to have them all presence does not vitiate the process by that fact alone.

The valuation was done by **PW10, No. 218799 Judith Odhiambo SSP** who was then in charge of the Anti-Narcotics unit based at the CID headquarters. PW9 valued the drugs at Ksh. 84,964,000and prepared and signed a certification of valuation dated 6th June 2010. **Section 86** does not required the valuing officer to be present at the weighing and sampling process, neither does section 74A. Thus the allegation that section 86 was not complied with fails

Finally, the appellant challenged the finding on common intention and proof of the elements of the offence. He maintained that he was not found in possession neither was constructive possession proved.

The appellant was charged jointly with his co-accused with trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act with the particulars indicating that they did so by conveying 21.2411 kg. of narcotic drugs namely cocaine. **Section 2** of the Act defies trafficking as '***the importation, exportation, manufacture, buying, sale, giving, 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 or making of any offer in respect thereof.***'

From the evidence presented, the narcotic drugs in this case were intercepted at the JKIA, Nairobi, after they were conveyed from Lima, through South Africa. The parcel containing the keys meant to open the boxes was being sent to Uganda, an indication of the intended destination of the seized package. Even though the appellant pleads that he was not arrested in possession of any incriminating evidence, the evidence as pointed out above, creates a link between him, his co-accused and the seized luggage. In order to prove commission of an offence committed in concert with another, it is not important to show actual possession of the seized narcotic drugs. According to **Section 20(1)** of the Penal Code, a person is deemed to have taken part in committing the offence as a principal offender in the following instances:

> ***'(a) every person who actually does the act or makes the omission which constitutes the offence;***
>
> ***(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
>
> ***(c) every person who aids or abets another person in committing the offence;***
>
> ***(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.***
>
> ***(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.***

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Even though the seized narcotic drugs were not the appellant's actual possession, I find that the evidence links him with his involvement in the conveyance of the drugs. His co-accused indicated that she was procured by him to deliver some documents which turned out to be the drugs. The documentation presented and the recovered key similarly linked him with the luggage containing the seized drugs. In a joint enterprise, all the persons involved are deemed to have committed the offence. With the evidence available, I find that the evidence inextricably links the appellant to the offence. He cannot therefore claim innocence.

Finally, even though the appellant did not raise the issue of the legality of the sentence, I have taken liberty to address this issue for the interests of justice. The appellant was charged with conveying of 21.2411 kg. of narcotic drugs namely cocaine of an estimated market value of Ksh. 84,964,400. The trial court sentenced him to a fine of Ksh. 254,893,200 in addition to imprisonment for life. The basis of this sentence was **Section 4(a)** of the Narcotics Drugs and Psychotropic Substances Control Act which provides that:

'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;'

On sentencing, the trial court stated as follows:

'the court has considered the mitigation by the aused persons, the court has also had the chance to look at section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act that stipulates the sentence. The sentence in the section is mandatory and the court will be guided by the same. The court will sentence each of the accused person to a fine of Ksh. 254,893,200/- and in addition to the fine each of the accused persons shall service life imprisonment as stipulated under the law.'

The trial court took the view that the provision is couched in mandatory terms in imposing the sentence of life imprisonment in addition to the fine of three times the market value of the seized cocaine. This was the approach taken by courts until recent past when the Court of Appeal has now taken a different view as expressed in various decisions. The position now is that the court can nevertheless exercise discretion in sentencing accused persons under this provision, which in its view, does not impose mandatory sentences. I wholly concur with holdings by the Court of Appeal given that the word *'liable'* gives room to the trial court to exercise discretion in sentencing.

In the case of ***Daniel Kyalo Muema v*** *Republic* **Criminal Appeal No. 47 of 2007,** the Court of Appeal advanced the view that the Act does not provide for mandatory sentences. The court also expressed that the main principles governing sentencing as prescribed under the Penal Code are also applicable to other written laws including this Act. The court's reasoning in this regard reads in part as follows:

'Thirdly, the preamble to the Act does not show that one of the purposes of the Act is to provide for mandatory sentences. Indeed, for the more serious offence of trafficking in narcotic or psychotropic substances in Section 4, for example, the Parliament uses the phrase – "shall be guilty of an offence and liable" – which phrase does not import a mandatory sentence. That is why in Kolongei vs. Republic [2005] 1 KLR 7, the appellant who was convicted of trafficking in

27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine (see also Gathara vs. Republic [2005] 2 KLR 58 where the appellant was sentence to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa.'

In ***Caroline Auma Majabu v Republic*** **Criminal Appeal No. 65 of 2014** while departing from an earlier position, the Court of Appeal also reasoned as follows:

'On her part, the learned Judge of the High Court followed Kingsley Chukwu v R Criminal Appeal No. 69 of 2010 (actually Criminal Appeal No. 257 of 2007 cited as Kingsley Chukwu v R2010 eKLR), where the Court differently constituted held that a person convicted for an offence under Section 4(a) of the Act shall be fined Kshs.1000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life. With respect, that is not the purport of section 4(a). We find it appropriate to revisit the question whether section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act states provides for a mandatory sentence.

...

In our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as

"(i) Responsible by law, legally answerable, (liable to) subject by law to;

(ii) (Liable to do something) likely to do something;

(iii) (Liable to) likely to experience (something undesirable).

Black's Law Dictionary defines "liable" as

(i) Responsible or answerable in law; legally obligated,

(ii) Subject to or likely to incur (a fine, penalty etc.)

[14] 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.'

Guided by the above reasoning, I believe that the appellant is entitled to a review of the sentence imposed by the trial court. I shall therefore, invoke this court's discretion to interfere with the sentence in order to meet the interests of justice.

Having considered the foregoing, I dismiss the appeal on conviction. On sentence, I will take into account that the appellant had not actually received the drug and may not therefore have enjoyed its proceeds, the intention of the conveyance notwithstanding. I will therefore reduce the sentence downwards also taking into account that a sentence is intended to serve a deterrent measure and not to harden the offender. He will pay a fine of Kenya Shillings One Hundred and Twenty Million (Ksh. 120,000,000/) in default serve one year imprisonment. In addition, I set aside the life imprisonment and substitute it with an order that he shall serve 30 years imprisonment. For avoidance of doubt the total number of years of the sentence is thirty one(31). It is so ordered. The period of two years eight month the Appellant was in remand shall be taken into account to constitute part of the sentence.

DATED and **SIGNED** this **1st** day of **March, 2017**.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Kirimi for the Respondent.