



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.417 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. ODERA (MRS.), C.M. delivered on 1<sup>st</sup> April 2009 in Kibera CM. CR. Case No.2832 of 2007)*

**CHRISTIAN MARTEY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Christian Martey was charged with the offence of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act**. The particulars of the offence were that on 21<sup>st</sup> April 2007 at Jomo Kenyatta International Airport in Nairobi, the Appellant trafficked, by conveying 5,105.7 grammes of narcotic drugs namely cocaine with an estimated market value of Kshs.20,422,800/- in contravention with the provisions 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, he was convicted as charged. He was fined Kshs.61,268,400/- or in default to serve thirty (30) years imprisonment. In addition to the fine, the Appellant was sentenced to serve thirty (30) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of inconsistent and contradictory evidence. He took issue with the fact that the trial magistrate had ignored the evidence that the police had tampered with the evidence and had gone ahead to admit the same into evidence. He was aggrieved that the trial court had not taken into consideration the circumstance under which the alleged narcotic drugs were recovered (the Appellant insists that they were not found in his possession) and thereby reached the conclusion that he was guilty as charged. He faulted the trial magistrate for failing to call in the evidence of the first report made to the police, particularly the Occurrence Book (OB) of the police station of the material day. He was of the view that the prosecution failed to prove its case against him to the required standard of proof beyond any reasonable doubt. He was finally aggrieved that his defence had been ignored without any plausible reasons. He stated that the sentence meted on him was harsh and excessive in the circumstances. He urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. The State too presented to the court the written submission it had prepared in opposition to the appeal. Whereas the Appellant urged the court to allow the appeal in light of the contradictions and inconsistencies that he pointed out in his submission, the prosecution on the other hand asserted that it had proved its case to the required standard of proof beyond any reasonable doubt. This court shall revert to the arguments made in the submission after briefly setting out the facts of this case.

On 21<sup>st</sup> April 2007 at about 6.00 a.m., PW1 PC Bernard Leboo and PW3 PC James Mbui were on duty at Jomo Kenyatta International Airport. The two police officers were attached to the Anti-Narcotic Unit. They testified that on the particular morning, they were in the baggage hall observing passengers who had just arrived aboard Flight No.KQ 511 from Accra Ghana. This flight was operated by Kenya Airways. PW1 stopped the Appellant and requested to see his travel documents. He testified that the Appellant handed over to him a Ghanaian Passport No.PP.NO.H1675911 bearing the name Christian Martey. The Appellant showed the officer his return ticket of the route Accra – Nairobi – Accra. The ticket number was 4420315776. The Appellant also had a yellow fever vaccination card. After the Appellant had collected his travelling bag, PW1 and PW3 requested him to accompany them to their office within the baggage hall. The two officers testified that on checking the travelling bag, they noted that it bore tag No.KQ 472216 bearing the name Martey which corresponded with the name that appeared in the passport.

According to the two officers, the Appellant confirmed that the travelling bag was his. They also confirmed this fact based on the tag on the travelling bag. PW1 recalled that the travelling bag was a green suitcase. They requested to search the suitcase in the presence of the Appellant. Inside the bag they found personal belongings, including clothes and shoes belonging to the Appellant. PW1 emptied the suitcase. He realized that the suitcase was still heavy. On further examination of the suitcase, he realized the suitcase had a false compartment at the bottom. He opened the compartment and found three (3) packages glued to the true bottom. He noted that the three packages contained a white substance which he suspected to be narcotic drugs. PW1 then searched the Appellant and noted that he had US dollars 10,000 and 149,000 Ghanian cedis. PW1 immediately informed his supervisor PW5 Chief Inspector Aden Guyo who came to the office and immediately assigned PW6 PC Kenneth Kimeli to investigate the case. PW6 commenced the investigations. He called PW5 Corporal Shem Mogaka, a Scenes of Crime Officer to the scene. PW5 testified that he took photographs as instructed by PW6. The photographs including those of the polythene bags and the suitcase were produced into evidence. In total, PW5 took ten (10) photographs.

The substance recovered from the suitcase was taken to the Government Chemist for analysis. The same was analyzed by PW2 Habil Oketch Omondi, a Government Analyst. On examination and tests, he established that the substance was cocaine, a narcotic drug. He presented his report as an exhibit in court. PW4 PC Justus Irungu attached to the Criminal Investigation Department, Anti-Narcotic Unit testified that on 23<sup>rd</sup> April 2007 he was instructed by PW5 to make a valuation of the narcotic drugs seized at the Airport. He measured the drugs in the three polythene bags. It weighed 5,105.7 grammes. He formed the view that the value of the narcotic drugs was Kshs.22,422,800/-. He presented the certificate of valuation as an exhibit before the court. The recovered narcotic drugs, the suitcase, the air ticket and the passport of the Appellant were all produced into evidence by PW6.

When the Appellant was put on his defence, he denied ownership of the suitcase. He testified that on the material day, when he arrived at the Jomo Kenyatta International Airport, he was summoned by a man and told to show his travel documents. He showed the man his travel documents after which he was requested to follow the man to an office. While at the office, he was shown a green suitcase which he denied was his. It was his evidence that his suitcase, which was light-green in colour was swapped with the dark-green suitcase which was produced in court. He told the court that he had come to Kenya to purchase clothes for resale in Ghana. That was the reason why he had the kind of money in his possession. He was of the view that the suitcase with the drugs was framed on him. He urged the court to find that the prosecution had established no case against him.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced

so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. 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, Ruwalla v R [1957] EA 570)”.***

The issue for determination by this court is whether the prosecution adduced sufficient evidence which established the Appellant’s guilt on the charge of trafficking in narcotic drugs to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court and considered the grounds of appeal put forward by the Appellant. According to the Appellant, he was framed of the charge that he was in possession of the narcotic drugs. ***Was that the case?*** According to the prosecution’s case, the Appellant was found in possession of the narcotic drugs when two police officers who were on duty at the arrival hall at the Airport stopped him. PW1 and PW3 testified that upon searching the travelling bag that belonged to the Appellant, they found three polythene bags containing a whitish substance which was later confirmed to be cocaine. The prosecution adduced evidence in their bid to connect the Appellant with the suitcase. They produced the Appellant’s passport and airticket. They also produced a tag which was on the travelling bag which had the Appellant’s name. Upon analysis of the evidence adduced in that regard, this court holds that the prosecution did indeed established that the travelling bag that the narcotic substance was found in belonged to the Appellant. The testimony of PW1 and PW3 was compelling in that regard. They narrated how the Appellant identified the bag before they requested him to search it. The Appellant’s clothes were found in the bag. The Appellant does not deny that the clothes found in the suitcase belonged to him. If indeed the suitcase was exchanged with another one as claimed by the Appellant, ***what are the chances that the exchanged suitcase would have personal belongings of the Appellant?*** This court was not convinced by the Appellant’s explanation in that regard. The court believed the testimony of the two witnesses in regard to the circumstances under which the narcotic drugs was recovered in his suitcase. This court therefore holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt that the narcotic drugs was found in the Appellant’s possession.

The prosecution adduced evidence which established that the substance found in the Appellant’s possession was a narcotic drug within the meaning ascribed to it by **Section 2(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act** and the **First Schedule** thereof. In the schedule, among the substances listed as fitting the definition of narcotic drugs is **cocaine** or to use its scientific name **“methyl ester of benzoylecgonine”**. This confirmation was contained in the evidence of PW2. The other issue for determination by this court is whether the prosecution established to the required standard of proof that the Appellant **“trafficked”** the narcotic drugs. According to **Section 2(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act**, **“trafficking”** means:

***“the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug and 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, but does not include-***

***(a) the importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefor under this Act in accordance with the licence;***

***(b) the manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefor under this Act in accordance***

*with the licence; or*

*(c) the selling or supplying or administering for medicinal purpose, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or*

*(d) the selling or supplying in accordance with the provisions of the Act, of any narcotic drugs or psychotropic substances by a registered pharmacist."*

From the evidence adduced, it was apparent that the Appellant was trafficking the narcotic drugs. His case does not fall within the exceptions provided under **Section 2(1)** of the **Act**. He concealed it in a false bottom in his suitcase. The circumstance under which the Appellant was found in possession of the narcotic drugs clearly points to the fact that he was trafficking the said narcotic drugs from Ghana to Kenya. He was doing so with a view to benefitting financially from the delivery of the said narcotic drugs. This court holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant trafficked in the said narcotic drugs. The defence adduced by the Appellant was correctly dismissed by the trial court as self-serving and meant to exonerate the Appellant from a crime which he was found red-handed to have committed. This court too finds no merit with the Appellant's defence that he had been framed by the police.

The upshot of the above reasons is that the Appellant's appeal against conviction lacks merit and is hereby dismissed. On sentence, the Appellant was sentenced to serve sixty (60) years imprisonment since there is no evidence to suggest that he paid the fine that was imposed on him. However, having considered the mitigation of the Appellant and the circumstances of his arrest, this court is of the view that the sentence imposed by the trial court was harsh and excessive. That sentence is set aside and substituted by a sentence of this court. The Appellant is sentenced to serve fifteen (15) years imprisonment with effect from 1<sup>st</sup> April 2009 when he was convicted and sentenced by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**