



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 39 OF 2011**

NURUDIN MUSSA NZENGA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in Criminal Case Number 2094 of 2009 in the Chief magistrate's court at Kibera before G.L. Nzioka (SPM) on 3<sup>rd</sup> February, 2011)*

**JUDGMENT**

The appellant was 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. It was alleged in the particulars of the charge that on 16<sup>th</sup> May, 2009 at Jomo Kenyatta International Airport Nairobi, he trafficked by conveying 182.6 grams of narcotic drugs namely cocaine with an estimated market value of Kshs. 730,400/= in contravention of the provisions of that Act.

He denied the offence but after a full trial he was convicted and sentenced to pay a fine of Kshs. 2,191,200/= and in addition thereto, serve life imprisonment. This appeal arises from the said conviction. The prosecution called a total of six witnesses relating to profiling and the arrest of the appellant and subsequent emission and testing of the suspect drugs which the appellant is alleged to have been carrying in his stomach. It is the evidence of P.W. 1 that the appellant arrived at J.K.I.A at about 7 a.m. when he stopped him to see his travel documents.

On noticing that he had travelled to Brazil which was associated with narcotic drugs he interviewed the appellant who however did not give a satisfactory account. He was held as a drug traffic suspect and searched but nothing was found in his hand luggage or body. He was then examined after being asked to lie down and this officer suspected the appellant was carrying drugs in his stomach. He was subjected to sit on the drug toilet and over time, he emitted the suspect drugs.

P.W. 2 was at the airport alongside P.W. 1. The drugs were valued by P.W. 3 and subsequently examined by P.W. 5 a government analyst, who confirmed that the said drugs were cocaine under the Act. The said drugs were produced in evidence alongside all the certificates.

In his defence the appellant gave a sworn statement saying he is a businessman living in Dar es Salaam Tanzania and was coming from Brazil to Dubai and then Zanzibar. He alighted from a Kenya Airways plane and was going to board another flight when he met a group of people checking travel documents of passengers. Several people were stopped and interviewed and some gave out bribes and were released. He refused to give out any money and so he was detained until his flight had left.

It transpired that he was detained and held as a drug suspect and forced to sign some documents. He was later brought to court and charged with the present charge which he denied. The learned trial magistrate however believed the prosecution witnesses and convicted the appellant.

In this appeal the appellant has complained that he was convicted on contradictory evidence and that some vital and crucial witnesses were not called to testify as required under Section 150 of the Criminal Procedure Code. It is also his case that he was convicted on a defective charge and his case was not proved beyond any reasonable doubt. Finally, he complained that his defence was not considered.

The appeal is opposed and the learned counsel for the Republic submitted that the prosecution dispensed with its burden of proving the case beyond any reasonable doubt as required by law and that the defence of the appellant was duly considered. The sentence was also mandatory and that it cannot be said to be harsh or excessive.

As the first appellate court, I have gone through the evidence with the view to evaluating the same and arriving at independent conclusions. When the appellant first appeared in court he was represented by counsel who applied for bond on his behalf. At no time did his then counsel raise any issue as to the appellant being forced to sign any document. I say so because it was not until the appellant was giving evidence in defence that he raised that issue.

Before the trial started, yet another advocate appeared for him and applied that he be released on bail. This other advocate also did not raise any issue about the appellant being forced to sign any document. The logical conclusion is that any document said to have been signed by the appellant was voluntarily executed. Indeed, when he cross-examined P.W. 1 P.C. Benard Nyamosi the officer said he signed those documents voluntarily.

He has raised issue with the fact that P.W. 1 was never sworn before he gave evidence. I have looked at the original record and noted that this is true. All other witnesses however were sworn. The issue however is whether or not the evidence of P.W. 1 can be expunged for the sole reason that he was never sworn.

I believe it is evidential value of his evidence that should be in issue and not the technicality of whether or not he was sworn. In any case, he was subjected to lengthy and searching cross-examination by the appellant and I see no prejudice whatsoever that has befallen the appellant.

The typed proceedings of the lower court record show that the weight of the drugs was both 182.6 gms and 1,182.6 gms. I have had to peruse the original file and in particular page 88 of the handwritten notes. I have confirmed that this was a typing error and that P.W. 3 stated the weight was 182.6 gms and not 1,182.6 gms. No issue therefore arises in that regard.

The recovery of the drug, the weighing and the examination by the government analyst are corroborative and therefore the appellant cannot benefit from the allegation that the evidence was not corroborative. I have not noted any contradictions in the evidence that go to the root of the case against the appellant.

The learned trial magistrate considered the evidence of the prosecution witnesses and also the defence advanced by the appellant. She also found no evidence of a grudge or malice on the part of the arresting officers and found the defence less convincing. It is clear therefore that the appellant's defence was considered.

The offence against the appellant was proved beyond any reasonable doubt and the sentence imposed was lawful. This appeal is therefore dismissed.

**SIGNED DATED and DELIVERED** in court this **15<sup>th</sup>** day of May **2014**.

**A.MBOGHOLI MSAGHA**

**JUDGE**