



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 226 OF 2011

MOHAMED KHAMIS MWARO RAYMOND.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4598 of 2009

in the Chief Magistrate's Court at Kibera – Mrs. G. Nzioka (SPM) on 2/09/2011)

JUDGMENT

1. The Appellant, **Mohamed Khamis Mwaro Raymond** was charged with the offence of trafficking in narcotic drugs contrary to **Section 4(a) c** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars were that on the 13th day of October 2009 at Jomo Kenyatta International Airport in Nairobi jointly with others not before court, they trafficked by conveying 1282.6 grammes of Narcotic Drugs, namely, cocaine with an estimated market value of Kshs.5,130,400/= in contravention of the Act.

2. In summary the prosecution's case was that on 13th October 2007 PC Kimeria, PC Ogutu, Cpl Ayuma and Cpl Felista all of the Anti-Narcotics Unit at JKIA, were on duty when PC Jermiah Ogutu stopped the appellant at the departure section. The appellant was travelling to Istanbul via Turkish Airline. PC Ogutu requested and received from him travel documents which included a passport No. A1152676 in the names of Khamis Mwaro Raymond Mohamed, an ID card No.20828130 in the same names, an air ticket No. 2353601/639669 in the names Raymond Mohamed Khamis and a boarding pass No. ET 235360/639669 in the same names. Being suspicious of the appellant the officers took him to the Anti-Narcotic Unit for investigation.

3. No significant recovery was made from the search of the appellant's bag and body but he was detained under police watch. During the observation the appellant emitted 19 pellets at 5.00 a.m., 3 pellets at 8.15 a.m., 23 pellets at 8.55 a.m., 12 pellets at 5.00 p.m., 8 pellets at 11.00 p.m. and 17 pellets on the 14th October 2009 at 10.30 a.m. respectively. The pellets were suspected to contain narcotic drugs. Observation sheets and seizure notices were prepared and signed by both the officers on the observation duty at the respective times and the appellant. The appellant emitted a total of 82 pellets weighing 1282.6 gms.

4. **PW6** the Gazetted Officer, Judith Ayuma gave the substance contained in the pellets a value of Kshs.5,130,400/=. The samples of the recovered substance was analysed by the Government Analyst, **PW8** William Kailo Munyonki, and found to contain cocaine, a narcotic drug. The appellant was subsequently charged in court.
5. In his unsworn defence the appellant told the court that on the material day he checked in at the JKIA intending to travel to Turkey on a business trip. At the boarding gate he was requested to produce his passport. He was then led to the Anti-Narcotics Unit where the officers demanded a bribe of Kshs.20,000/= The charges were preferred against him because he refused to give the bribe demanded. He maintained that he knew nothing about the offence. He called no witnesses.
6. At the close of the trial the appellant was convicted and sentenced to life imprisonment in addition to a fine of Kshs.15,391,200/= (fifteen million three hundred ninety one thousand two hundred). He immediately filed an appeal in which he relied on six grounds. Learned State Counsel, Miss Njuguna opposed the appeal on behalf of the respondent and rebutted each of the six grounds.
7. In his first and second grounds of appeal, the appellant complained that he was denied access to witness statements hence his constitutional right to fair hearing was violated and also that witnesses were not re-called for cross-examination. In rebuttal Miss Njuguna contended that the court had given orders for the statements to be supplied to the appellant and that the record does not show that he had any problem getting the statements. Further that if he did, he did not inform the court of such problems so that an order could be made accordingly.
8. On the issue of failure to recall witnesses for re-examination, Miss Njuguna argued that the appellant refused to cross-examine **PW1** to **PW3** for reasons that he did not have their statements. That the court stood them down, and when they were recalled the appellant still refused to cross-examine them. Further that he was also given an opportunity to cross-examine **PW4** and **PW5** but he declined.
9. From the record the appellant was first brought before the court for plea taking on 13th October 2009. He was brought before the court again on 16th October 2009 when he pleaded to amended charges. On each occasion a plea of not guilty was entered. Bail was requested and denied and the case was ordered to proceed expeditiously. It was therefore set down for hearing on 10th December 2009.
10. At the first hearing on 10th December 2009, learned counsel Mr. Njugi holding brief for learned counsel Mr. Wandugi for the appellant, prayed for an adjournment stating that the appellant's counsel was not ready to proceed as he had not been supplied with witness statements. The prosecutor objected to the prayer stating that counsel was not serious with the matter as **"the order was made long time ago"** and the prosecution had not refused to provide the said statements.
11. The court agreed with the prosecution on grounds that counsel had always been in attendance and had not expressed any difficulty in obtaining the statements. Further that since the appellant had been denied bond it was in his interest for the matter to proceed expeditiously. The court proceeded to take the evidence of three witnesses.
12. Whereas it is laudable that the court wished to expedite the appellant's trial especially because he had not been granted bail, it would appear that the court sacrificed all else at the altar of expeditious trial. Expeditious disposal is a cardinal principle in a trial because as tis i said justice delayed is justice denied. In this instance however the strict application of the principle appears to have come into conflict with the appellant's right to fair hearing.
13. I say so because the appellant had a counsel on record who was not in court when the trial commenced. The court did not however, inquire as to whether the appellant preferred to have the matter deferred to give him a chance to contact his counsel, or whether he was able and ready to represent himself, or needed some time to engage another counsel altogether. More disturbing was the fact that at each juncture and contrary to Miss Njuguna's submissions that the appellant did not inform the court of his difficulties, he communicated to the court that he was unable to cross-examine the witnesses because

he did not have their witness statements.

14. This was, after all, the very first date of hearing and the court would not have been faulted for adjourning the matter at the behest of the appellant, if it was to enable him prepare for his trial properly. The court stood the witnesses down to wait cross-examination at a later date but did not recall them when Mr. Wandugi returned to the proceedings later on. It is doubtful that in this circumstances this court can find, with any degree of certainty that the appellant was accorded a fair trial.

15. In the third ground the appellant stated that the language of the court was not indicated from the record. Miss Njuguna urged that it was clear from the record that the translation was from English to Kiswahili, a language he stated that he understood during plea taking.

16. The record does reflect that at the time of taking plea the substance of the charge and every element thereof was stated by the court to the appellant in the language that he understood and the interpretation was indicated as English/Kiswahili. Thereafter the appellant was able to communicate with the court and to cross-examine some witnesses. At the close of the prosecution case he gave his defence.

17. The appellant participated in the proceedings and at no time did he signify that he had trouble following the proceedings due to language barrier. For him to raise this issue at this point is considered an afterthought which cannot avail him much.

18. In his fourth ground the appellant asserted that the total number of pellets suggested by the witnesses differed from what was alleged to have been recovered and that **PW4** only photographed 64 pellets. In her response M/s. Njuguna argued that **PW1** and **PW2** who were the first to observe him, testified that he first emitted 19, 12 and 8 pellets respectively. That **PW3** and **PW8** who were the next to observe him testified that he emitted 23, 19 and 3 pellets respectively. Miss Njuguna urged that according to the two observations, a total of 84 pellets were recovered. They weighed 1282 grams with a market value of Kshs.5,130,400/=.

19. **PW1**, CPL Kimeria and **PW5**, PC Ogutu testified that they took the first shift to observe the appellant after he was intercepted as he went to board the Turkish airline at 12.45 a.m. on 13th October 2009. According to the two witnesses the appellant emitted 19 pellets at 5.00 a.m. **PW1** prepared an observation sheet and a notice of seizure to that effect and they were signed by both officers and by the appellant. He handed the pellets to CIP Adan for safe keeping and the suspect to PC Guracha and PC Eyatta who took over duty after them.

20. **PW5** stated that he resumed the observation duties on 14th October 2009 and at 10.30 a.m. he observed the appellant emit 17 pellets. He prepared another observation sheet and a notice of seizure in respect thereof. He handed the suspect over to **PW8** Cpl Gufu and the pellets to IP Mary when his shift was over.

21. **PW2**, PC Nyamori testified that he took over the observation duties at 5 p.m on 13th October 2009. At 6 p.m. he observed the appellant emit 12 pellets. He together with PC Ayata and the appellant signed the observation sheet which he prepared in respect thereof. At 11 p.m. the appellant emitted another 8 pellets for which **PW2** prepared an observation sheet and had it duly signed. He handed these 20 pellets to CIP Adan.

22. **PW3**, IP Mary told the court that she called in the Government Analyst on two occasions to weigh pellets that had been emitted by the appellant. The Government Analyst first weighed 42 pellets and registered a weight of 630.3 gms. Then he weighed 40 pellets which registered a weight of 652.3 gms. In total the pellets weighed 1282.6 gms. IP Mary compiled the certificates of weighing and sampling respectively and produced them in evidence. She called in the Scenes of Crime personnel who took photographs of the 82 pellets and also called in the Gazetted Officer who gave the estimated value at Kshs.5,130,400/= . All this was done in the presence of the appellant.

23. **PW4**, CIP Mariga of CID Scenes of Crime Section confirmed that he took photographs of the pellets

at JKIA Anti-Narcotics Unit at 3.59 p.m. on 15th October 2009. He found them packed in six transparent packets that showed the contents of each bag as follows:

Bag No. 1 contained 19 pellets

Bag No. 2 contained 23 pellets

Bag No. 3 contained 12 pellets

Bag No. 4 contained 8 pellets

Bag No. 5 contained 17 pellets

Bag No. 6 contained 3 pellets

In total these pellets add up to 82 pellets and he took three photographs thereof in the presence of the appellant.

24. **PW6** was the Gazetted Officer who gave the value of the recovered substance as Kshs.5,130,400/= and prepared a certificate of valuation thereto. She told the court that she knew that she was dealing with cocaine and she used its weight which had been given as 1282.6 gms to estimate the prevailing market value. She told the court that she was a trained valuer for such substances and carried out the valuation in the presence of the appellant.

25. **PW7** was the Government Analyst. He testified that on 13th October 2009, he was at the Anti-Narcotics unit at JKIA where he was called to weigh and sample a recovered substance. He found two packets which contained a total of 42 pellets of a whitish substance. He weighed them and found that their weight was 630.3 gms. He took samples thereof which were escorted to the Government laboratories. Upon analysis he found that the substance he had taken as sample contained cocaine a narcotic drug.

26. On 16th October 2009 he returned to JKIA Ant Narcotics Unit and was presented with four packets containing 40 pellets of a whitish substance. He weighed them and found their total weight to be 652.3 gms. He took samples thereof and analysed the contents at the Government laboratories. He found it to contain cocaine a narcotic drug. He produced a report to that effect in evidence, and confirmed that the weighing and sampling of the substance was carried out in the presence of the appellant on both occasions.

27. **PW8**, CPL Gufu was the one on observation duty from 6 a.m. on 13th October 2009. He testified that at 8.15 a.m. the appellant emitted 3 pellets and at 8.55 a.m. he emitted 23 pellets. The officer prepared an observation sheet which he signed and the appellant counter signed. Following the evidence of all these witnesses I find no contradiction or inconsistency as to the number of pellets recovered. There was a total of 82 pellets recovered from the appellant and they contained a substance later established to contain cocaine.

28. Lastly the appellant urged that **Section 200(1)** of the **Criminal Procedure Code** was not complied with and that re-trial was denied contrary to **Article 50(2) of the Constitution**. Reading his grounds in context he must have intended to refer to **Section 200(3)** of the **Criminal Procedure Code**. Miss Njuguna submitted that there was no need to comply with **Section 200(3) Criminal Procedure Code**.

29. I agree with Miss Njuguna. The entire trial was conducted by one Magistrate, Senior Principal Magistrate Mrs. Nzioka (as she then was), who also wrote and signed the judgment. All that the subsequent magistrate did was to read it on behalf of the trial magistrate and she informed the appellant as much. The subsequent magistrate was therefore not required to invoke the provisions of **Section 200(3) of the Criminal Procedure Code**.

30. Having subjected the evidence to a fresh scrutiny therefore, I find that this appeal succeeds only on the ground of failing to accord the appellant a fair trial in the manner in which the proceedings were conducted. The right order to make in the interest of justice would have been one for re-trial. Miss Njuguna however, informed the court in her submissions that the exhibits which were stored at the Anti-Narcotic Unit at JKIA were gutted in a recent inferno making a retrial impossible.

31. For that reason the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **15th day of October 2014.**

L. A. ACHODE

JUDGE