REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 343 OF 2010

ISMAIL MZEE ISMAIL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.4064 of 2007 of the Chief Magistrate's Court

at Kibera by U.P. Kidula – Chief Magistrate)

J U D G M E N T

The appellant, **ISMAIL MZEE ISMAIL**, was convicted for the offence of Trafficking in Narcotic Drugs **contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act**. He was then sentenced to a fine of KShs. 5,534,100/-, or in default he was to serve one (1) year in jail. Secondly, he was ordered to serve a life imprisonment.

In his appeal he has raised a total of ten (10) issues, which can be summarized as follows;

(1) ***His constitutional rights were violated when he was not taken to court within 24 hours of arrest. Secondly, because the trial lasted for three (3) years, the appellant says that he was not tried within a reasonable time, especially considering that he remained in custody during the trial.***

(2) ***The trial was illegal as it was conducted at Kibera Law Courts, instead of at the Makadara Law Courts. He contended that pursuant to*** *section 71 of the Criminal Procedure Code.* ***Makadara Law Court were the courts within which the Jomo Kenyatta International Airport fall under.***

He argued that an illegal process could not produce a legitimate result.

(3) ***The provisions of*** *section 77 of the Narcotic Drugs and psychotropic Substances Control Act* ***were violated, when the seizure notice was not issued by the officer who actually seized the drugs in issue.***

(4) ***The production of the documentary evidence was irregular because they were not produced by the makers thereof.***

(5) ***The trial was a nullity because the trial court did not expressly stipulate, after the prosecution had closed its case, that it had complied with section*** *211 of the Criminal Procedure Code.*

(6) ***The prosecution did not prove its case beyond any reasonable doubt. For instance, they did not prove that it is the appellant who had either signed or thumb-printed the observation sheets.***

The prosecution is also said to have failed to prove that the drugs which were analysed by the Government Chemist were those that had been emitted by the appellant.

(7) ***The appellant asserted that he cannot have been trafficking or conveying drugs when a search on the appellant did not reveal that the appellant was in possession of any drugs.***

(8) ***The drugs, if any, were not emitted by the appellant but by one, JUMA HASSAN, whose name was recorded in the observation sheets. That name was then cancelled, and it was replaced by the appellant's name.***

As the appellant did not witness the cancellation of the name of the presumed owner of the property, he submitted that the credibility of the observation sheets was doubtful.

(9) ***The defence was not accorded due consideration by the learned trial magistrate. The appellant submitted that the said defence ought only to have been rejected if the trial court had cogent reasons for so doing. In this case, the trial court is said to have given no cogent reasons for rejecting the defence.***

(10) ***The sentence of life imprisonment was said to be too harsh. In handing down the said sentence, the trial court is said to have ignored the appellant's mitigation.***

The 3 children of the appellant will be adversely affected by the sentence, considering that their mother was deceased.

The appellant asked for leniency, saying that he was very remorseful.

In answer to the appeal, Ms Maina, learned state counsel, noted that although the initial search conducted on the appellant yielded nothing, the appellant ultimately emitted 128 pellets of heroin.

Being a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions from the re-evaluation, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses when they were giving evidence.

The particulars of the charge against the appellant were that on 30th June, 2007, at the Jomo Kenyatta International Airport, Nairobi, the appellant trafficked, by conveying 1844.7 grammes of heroin with an estimated market value of KShs.1,844,700/-.

The prosecution called eight witnesses. **PW 1** was a police officer attached to the CID Anti-Narcotics Section, at the Jomo Kenyatta International Airport. His duties included the detection and investigation of Narcotic Drugs' related cases.

On 30th June 2007 **PW 1** reported on duty at 5.00p.m. He was stationed at their office which was inside the baggage hall, where passengers who were arriving from outside the country collect their luggage.

PW 1 joined his colleagues in profiling passengers who had disembarked from an Emirates flight from Dubai. They were checking travelling documents including tickets and passports.

PW 2, was another police officer. He was working alongside **PW 1** on the material day. It is he who stopped the appellant. He then handed over the appellant's Tanzanian passport to **PW 1**.

PW 1 perused the passport and noted that it had a Visa issued by the Islamic Republic of Iran. As Iran was classified as a country from which drugs were sourced, **PW 1** suspected that the appellant could be a drug courier.

PW 1 escorted the appellant to the offices of the Anti-Narcotics police. The witness searched the appellant's hand luggage, but the search yielded no drugs. However, **PW 1** suspected that the appellant

may have swallowed the drugs when still in Iran. The police officers then decided to put the appellant under observation.

During the time when the appellant was under observation, he is said to have emitted pellets. The pellets were emitted in a clean and empty "Drug loo"

Each and every time the appellant pellets he signed "inspection sheets", upon which the details of the pellets were recorded.

The inspection sheets were also counter-signed by the police officers who were observing the appellant when he was emitting the pellets.

According to **PW 1**, it was possible to see the whole system of the "Drug loo" as it is made of glass. Therefore, the appellant was able to verify that the loo was clean and empty each time before he used it.

PW 2 was a police officer in the Anti-Narcotics Unit, based at the Jomo Kenyatta International Airport. He corroborated the evidence of **PW 1** regarding the manner of the appellant's arrest.

PW 2 also testified about the instances when he observed the appellant as he emitted pellets.

PW 3 testified that the appellant emitted 28 pellets.

The pellets were then handed over to **PW 6**, who prepared the Seizure Notice.

PW 4 was an Analyst at the Government Chemist, Nairobi. He analysed a total of 121 satchets. His analysis revealed that the satchets contained heroin.

PW 5 is also a police officer attached to the Anti-Narcotics Unit. He was present when the appellant was escorted to the offices of the Anti-Narcotics Unit, by **PW 1**. It is **PW 5** who booked the appellant into the O.B.

PW 5 was present when the appellant emitted a total of 24 pellets.

PW 6 testified that the pellets which were emitted by the appellant were first weighed, in the presence of the appellant, before **PW 4** anlaysed the contents. The 121 pellets weighed 1844.7 grammes.

Thereafter, **PW 6** issued the Seizure Notice although he was not the police officer who had literally seized the hereoin from the appellant.

PW 6 explained that each of the police officers who retrieved the pellets which were being emitted by the appellant, did hand over the said pellets to him. As it is he who kept the pellets in safe custody, **PW 6** described himself as the Seizure Officer.

PW 7 valued the heroin at KShs. 1,844, 700/-. He issued a valuation certificate. He explained that as at July 2007 the market value of heroin was Kshs.1,000/- per gram. Therefore, the 1,844 grams were valued at Kshs.1,844,700/-.

PW 8 was the Investigating Officer. He obtained the 121 satchets from **PW 6**, and kept them in safe custody.

He then forwarded the satchets to the Government Chemist for analysis. The results from the analysis showed that the satchets contained heroin.

As the substance was emitted from the body of the appellant, **PW 8** charged him with the offence of trafficking.

Having been put to his defence the appellant gave a sworn defence. He admitted having travelled from Iran at the material time.

Upon arrival at the Jomo Kenyatta Airport, Nairobi, the appellant was stopped by police officers who suspected that he was carrying drugs.

A search on his person and in his luggage yielded no drugs. At that stage, the appellant says that the police officers asked him for a bribe of US $1,000. As he did not have the bribe, the police charged him with the offence of trafficking in drugs.

The appellant denied signing or thumb-printing the observation sheets. He also denied being present when the drugs were being weighed.

I have re-evaluated all the evidence on record. I have also given due consideration to the submissions made before me. I now draw the following conclusions.

(a) Violation of **Section 72 (3) (b) of the Constitution.**

The Court of Appeal has made it crystal clear that the delay in taking an accused person to court for the first time after his arrest is not trial related. They said that;

"... the right protected by *Section 72 (3) (b)* ***is to be taken to court as soon as reasonably practicable. It is not a right not to be taken to court after unreasonable delay."***

The court went on to say that it had not been shown;

"that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could, logically, give rise to a civil remedy – money compensation as stipulated in *Section 72 (6).* ***That is the appropriate remedy which the appellant should have sought in a different forum."***

Therefore, the delay in bringing the appellant herein before the court cannot render the charge defective or the trial a nullity.

(b) Ordinary Place of Trial

By dint of the provisions of **Section 71 of the Criminal Procedure,**

"Subject to the provisions of *section 69,* ***and to the powers of transfer conferred by*** *sections 79 and 81,* ***every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or he has appeared in answer to a summons lawfully issued charging the offence."***

That would imply that if the Jomo Kenyatta International Airport, where the appellant was apprehended, fell within the jurisdiction of the Makadara Law Courts, the persons arrested there should ordinarily be tried within that court.

Although the law states that an accused person should ordinarily be tried within the court within the local limits of jurisdiction where the offence was committed or where the accused was apprehended, it does not render illegal or illegitimate a trial which was outside such jurisdiction.

The Chief Magistrate's Court, Kibera, had the requisite jurisdiction to hear and determine the case.

Furthermore, the fact that the trial was conducted at the Kibera Law Courts, did not in any manner whatsoever, prejudice the appellant.

(c) Notice of Seizure

The drugs in issue were emitted in the "Drugs loo", in the presence of **PW 1, PW 2, PW 3 and PW 5**. Each of those police officers then handed over the pellets which were emitted in their presence, to their boss, for safe custody.

PW 6 issued the Notice of Seizure to the appellant on 5th July 2007. He did so on the strength of the records of the seized substances which had been prepared by **PW 1, PW 2, PW 3 and PW 5,** respectively.

In effect, although **PW 6** issued the Notice of Seizure, it is not he who had actually seized any of the pellets which were later found to contain heroin.

PW 6 conceded, during cross-examination, that the Notice of Seizure ought to have been issued by the officer who had actually seized the various pellets. The witness was right because pursuant to **section 77 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act**, the;

"notice of seizure shall be given by the person seizing the "

Narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing liable for forfeiture which is seized under the Act.

Nonetheless, because **PW 6** is the person who received and retained in safe custody, all the pellets which were emitted by the appellant; and because the officers who witnessed the emission also gave him observation sheets that were duly signed by both the officers and the appellant, I find that appellant was not prejudiced by the failure to strictly comply with **section 77**.

I so find because each of officers who literally seized the pellets did testify in court, where they identified the pellets which each of them seized. That evidence, coupled with the signed observation sheets served to provide the vital link between the Notice of Seizure and the pellets seized from the appellant.

(d) Observation Sheets

The observation sheets were produced in evidence by **PW 6**.

As already indicated above, he was not the maker of the said documents. The persons who made the said documents were **PW 1, PW 2, PW 3** and **PW 5**.

Each of those witnesses identified their respective documents, which they had handed over to **PW 6**. At that stage, the said documents were duly marked for purposes of identification. Therefore, when **PW 6** ultimately produced the same documents, he did not flout any law. He was the Investigating Officer.

(e) Section 211 of the Criminal Procedure Code.

When delivering her ruling after the prosecution had closed its case, the learned trial magistrate did not specifically state that the court had complied with the provisions of **section 211 of the Criminal Procedure Code.**

Pursuant to that section, the accused person shall be put on his defence if the court is satisfied that a case had been made out against him "sufficiently to require him to make a defence".

In this instance, the court held that a *prima facie* case had been made out against the appellant. He was therefore put to his defence.

In the circumstances, although the trial court did not specifically cite **section 211 of the Criminal Procedure Code**, the trial was not rendered irregular or a nullity.

(f) Essential witnesses not called

It was the appellant's assertion that the document examiner should have testified, to prove that the signatures and the thumb-prints on the observation sheets were those of the appellant.

I note that it was only when giving his defence that the appellant first asserted that the signatures and the thumb-prints on the observation sheets were not his. That implies that that issue was nothing more than an afterthought.

Those that signed the documents in the appellant's presence; and also those who were present when the appellant signed the said documents, gave evidence in court. The learned trial magistrate believed their evidence.

I find no reason to doubt that the signature and the thumb-prints on the observation sheets were not those of the appellant.

(g) Contradictions and inconsistencies

At the time the appellant was in custody, there was also another person named ALI JUMA HASSAN, who was in custody. That other person was also charged with the offence of trafficking in narcotics. He too was placed under observation by police officers.

The name ALI JUMA HASSAN was typed onto Exhibit 15. That name was then cancelled, and the appellant's name written by hand. **PW 2** attributed the cancellation to a typographical error.

However, because the appellant was never called by the police officers to counter-sign the correction, he may have been prejudiced by that particular exhibit. I therefore find that Exhibit 15 should not have been admitted in evidence.

In effect, a total of 185.7 grammes of hereoin may not have been recovered from the appellant. That would therefore imply that the total weight of the drugs which the appellant emitted was 1,659.0 grammes, instead of 1844.7 grammes.

The reduction in the total weight did not in any way weaken the case against the appellant.

(h) Burden of proof

There is no doubt that the burden of proof always rests on the prosecution. If the persecution fails to prove the case against the accused, beyond any reasonable doubt, the trial court shall acquit the accused.

In this case, the prosecution proved that the accused flew into Kenya from Iran. As Iran is a country from which drugs are sourced, the police officers in the Anti-Narcotics Section profiled him as a suspect.

The search on the appellant's person and in his luggage yielded no drugs. But when he was placed under observation over duration of three days, the appellant emitted pellets. When the said pellets were analysed by the Government Chemist, he ascertained that they contained hereon.

Trafficking is defined as follows in **Section 2 of the Narcotic Drugs and Psychotropic Substances (Control) Act;**

"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, but does not include – "

In the light of the fact that the appellant was travelling from Iran; and because the drug was inside his body, he is deemed to have been conveying the said drug. I so hold because he was planning to travel through Nairobi to Tanzania. In other words, Nairobi was not his final destination. He cannot therefore be said to have imported the drug in Nairobi, Kenya.

The prosecution proved that whenever the appellant requested that he be allowed to use the toilet, he was first asked to verify that the "drug loo" was empty and clean. He did so easily as the said toilet was made of glass. Therefore, all the pellets that were recovered in the toilet after the appellant had used the said toilet, were definitely emitted from his body.

He then signed the observation sheets to confirm the quantity of pellets he had emitted on every single occasion when he had used the toilet.

As the evidence produced by the prosecution was so overwhelming, I find that the defence put forward by the appellant did not cast any doubt on it.

If, as the appellant conceded, he and the police officers had not known each other before the material day; and if the police officers did not recover anything incriminating on the appellant's person, it makes no sense that the officers would demand a bribe from the appellant before releasing him.

Had the police officers demanded a bribe from the appellant, he would have raised the issue when he was cross-examining them: But he did not do so.

In the result, I find that the conviction of the appellant was well founded, as the prosecution proved the case beyond any reasonable doubt. Accordingly, there is no merit in the appeal. The appeal is therefore dismissed.

I uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi, this 5th day of July, 2012.

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FRED A. OCHIENG
JUDGE