



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Criminal Appeal 191 of 2007

JENIPHER ATIENO ODUOLAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 2047 of 2006 of the Chief Magistrate's Court at Kibera by Ms Mwangi – Senior Principal Magistrate)

JUDGEMENT

The appellant was charged with trafficking in Narcotic Drugs contrary to section 4(a) of Narcotic Drugs and Psychotropic substances control Act No.4 of 1994. The particulars are that on 12th day of April 2006 at Jomo Kenyatta International Airport in Nairobi within Nairobi area was found trafficking by conveying 8.2 kgs of narcotic drugs namely cocaine with a market value of Kshs.41 million in contravention of the said Act. After full trial she was convicted and sentenced to serve 10 years in jail and to pay a fine of Kshs.123 million in default 1 year in jail. She is aggrieved by the said decision hence this appeal.

The appeal is conducted on behalf of the appellant by Mr. Wandugi Advocate who submitted that the conviction was improper and the sentence as harsh and illegal. He contended that the proceedings were not conducted by the language understood by the appellant since the appellant understood only Kiswahili. There is no indication and it is not clear whether appellant understood the language of the court. He stated that where it is shown that a person did not follow proceedings, then his rights to a fair trial has been violated. In reply Mrs. Gakobo learned counsel for the State submitted that although the trial court did not expressly indicate in which language PW1 testified, nevertheless the appellants said she had no questions for the said witness. She also contended that the appellant had an advocate in relation to the rest of the witnesses and she did not complain that the appellant had been prejudiced in any way.

I have considered the issue of language and in my humble view the appellant did not suffer any prejudice by the slight omission by the trial court in not indicating the language at the time PW1 gave evidence. It is clear from the time the appellant was taken to court, she had an advocate who appeared on several occasions but was absent on 20th July 2006 when PW1 was giving evidence. The said advocate Mr. Nyaberi who was appearing for Mr. Ombeta advocate was present when the court fixed the hearing date

of 20th July 2006. It is clear that the appellant did not complain that she did not understand the language or the nature of evidence that was tendered against her by PW1. She also did not inform the court that her advocate was absent and that she wanted the hearing to be adjourned to ensure that her rights are not violated. The appellant made no objection and raised no questions as to the nature of evidence that was given by PW1 therefore no prejudice or violation was occasioned by the failure of the trial court to indicate the language and to proceed in the absence of the appellant's advocate on 20th July 2006. In any case when the appellant's advocate appeared on subsequent dates he did not request the recalling of PW1 for purposes of cross examination or otherwise. The conclusion is that they were satisfied with the way the trial court conducted the proceedings of 20th July 2006. As was rightly pointed out by Mrs. Gakobo, the appellant's advocate had the opportunity to recall PW1 if the evidence tendered in his absence had materially prejudiced the case of the appellant. He did not exercise that right and it cannot be a basis for the appellant to question the proceedings of 20th July 2006. That contention has no merit and it is hereby rejected.

The second issue that was raised by Mr. Wandugi is that the charge sheet is incurably defective. It is alleged that the proceedings of 4th July 2006, the prosecutor asked for an amendment and requested to add the word 'conveying' in the charge sheet to read 'trafficking by conveying'. The record shows that the accused made no objection and the court admitted the amended charge sheet after reading and explaining to the appellant. The appellant after hearing the charge sheet and explanation by the trial court pleaded not guilty. It is therefore not true as alleged by Mr. Wandugi advocate that the trial court did not make any specific decision. From the records it shows the trial court heard the application by the prosecution to amend the charge sheet and asked the appellant whether she had any objection to the intended amendment of the charge sheet. The appellant and her advocate did not raise any objection and the trial court read over the charge to the appellant and made an order that the charge sheet be admitted. I think the objection by Mr. Wandugi on that ground is also without merit and baseless.

The third issue which was raised by Mr. Wandugi advocate is the issue of weighing of the drugs, who weighed and whether he was a proper officer. Mr. Wandugi contended that one of the particulars of the charge sheet is that the drugs weighed 8.2 kilogrammes and had a market value of Kshs.41 million. I agree that the weighing and the person weighing the drugs is an important ingredient of a proper charge. The evidence of weighing of the drugs is essential for the conviction to stand. Mr. Wandugi advocate submitted that PW1 and PW2's evidence is unclear as to what happened after the drugs were found. He contended that the evidence on record does not show when and who weighed the drugs.

There is no doubt that the drugs in question were weighed by PW6 who prepared a weighing certificate which was signed by the appellant and the Government analyst. PW6 also prepared a notice of seizure and the said notice was also signed by the counsel for the appellant. It is clear that the weighing would only affect the mandatory power of sentence relating to the fine to be imposed after ascertaining that there is credible and sound evidence to sustain the charges that were preferred against the accused person. There is also evidence on record that PW5 valued the drugs and at that time he was a properly gazetted officer qualified to make the valuation as required by the law. The substance weighed 8.2 kilogrammes and the market value was Kshs.41 million and imposing the relevant sentence the court is obliged to act on that valuation since it was rendered by a competent officer exercising his mandate. I am therefore satisfied that section 74(a) of Act No.4 of 1994 was complied and the conditions therein fulfilled by PW6. Again I find no merit in that contention that the suspect was not involved in the process of weighing the drugs since the evidence of PW4 is very clear on the steps taken by the prosecution before that task was undertaken and finalized.

The fourth point that was argued before me by Mr. Wandugi advocate is that the charge sheet did not create any offence since the appellant was charged under section 4(a) of Act No.4 of 1994. According to Mr. Wandugi advocate section 4(a) deals with penalty and Act No.4 does not have any provision for the creation of offence that the appellant was tried for. He therefore contended that the proceedings were null and void because they do not comply with section 77(8) of the Constitution. Section 4 reads as follows;-

“Any person who traffics 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; or

(b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years.”

The purport of Mr. Wandugi argument in respect of section 4(a) is that the charge sheet was defective because that section by itself did not constitute an offence and therefore, the appellant was wrongly charged and convicted for a defective charge sheet. In essence no offence had been committed since section 4(a) only provides for the penalty and it does not set out the offence and particulars that was allegedly committed by the appellant.

I have gone through section 4(a) and 4(b) of Act No.4 of 1994 and a clear reading shows that the offence and the sentence is provided therefore, the assertion by the learned counsel is very difficult to comprehend. In **Criminal appeal NO.300 of 2006 David Adoh v Republic His Lordship Justice Ojwang** faced with a similar question rendered himself as hereunder:-

“Is it the case, as Mr. Wandugi submitted, that a charge brought under s. 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 is improperly framed? I do not think so; for s. 4 of the Act is to be seen as a whole, and it has a general stem, followed by specifications, (a) and (b); it is the stem that creates the offence:

“Any person who traffics in any narcotic drug or psychotropic substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence....”;

And this stem is then followed by paragraphs (a) and (b) which specify the applicable penalties, depending on the relevant element of the stem.”

I am therefore in agreement to His Lordship Justice Ojwang that section 4(a) has a stem which specifies the offence and is followed by the specification which creates the offences and the sentence to be imposed by the trial court to a person who is convicted under that section. Again nothing turns on that ground and it is hereby rejected.

The last ground that was raised by Mr. Wandugi advocate is that the trial court did not comply with section 211 of CPC and failure to comply renders the proceedings nugatory. From the proceedings appearing at page 33, it is clear that the trial court complied with section 211 of CPC and the appellant informed court that she will give sworn testimony and call no witnesses. In my understanding of section 211 of CPC the trial court is required to give the appellant an opportunity to prepare for his defence after he/she was found to have a case to answer. There is no particular procedure or format that has to be followed in fulfilling the mandatory provisions of section 211 of CPC. It suffices to say that the appellant was represented by an advocate throughout the proceedings and there is no way it can be argued that she did not know the nature and consequences of the evidence that was tendered by the prosecution. In my understanding and a close scrutiny of the proceedings gives a clear manifestation that the trial court complied with the provisions of section 211 of CPC. It may be true that the charge sheet and the substance therein, was not read over to the appellant but from the nature of defence she tendered there is no indication that she suffered any prejudice to warrant the intervention of this court to say that the failure of the trial court to explain the charges afresh to the appellant after she was put on her defence resulted in miscarriage of justice. In that regard it is my finding that the trial court complied with the provisions of section 211 of the CPC and the appellant suffered no prejudice by the slight omission by the trial court in failing to explain the charges afresh to her. It is my determination that the ground that the trial court did

not comply with section 211 of the CPC has no merit.

On the evidence it is clear that on 12th April 2006 at around 6.15 a.m. KQ437 arrived from Lagos with passengers including the appellant herein. PW2 PC Salome Auma and PW4 PC Marcos Mbithi from the Anti Narcotic Unit were profiling passengers in order to determine whether they were in possession of drugs. They then intercepted the appellant and requested to check her travel documents which she handed to the said officers. The parcel was in the name of Jenipher Atieno Oduol and after a brief questions, PW4 decided to take the appellant to their office for further investigations. He then requested PW2 PC Salome Auma to a body search to the appellant in a room in the presence of PC Mangila who was also a lady officer. Nothing was found on the body of the appellant, and then the police officers demanded her boarding pass from Nairobi to Lagos in order to get her luggages. The luggage of the appellant was collected after she identified them to PW2, PW4 and PW6. After carrying out a search on the luggage of the appellant, she was found with the drugs covered in a black polythene paper hidden under a false bottom of her luggage box. PW3 Cpl Julius Musoga was then instructed to prepare an exhibit memo so that it could be taken to PW1, the Government Analyst for purposes of determining the nature of the substance contained in the sachets recovered from the appellant's box. PW1 then carried out an instrumental analysis and confirmed the substance was cocaine as defined and covered under Act No.4 of 1994.

PW5 on the other hand IP Julius Irungu alleges that he is a proper officer in accordance with Kenya Gazette No.3669 of 29th May 2001. He is the one who undertook the valuation of the drug that was found on the appellant and after undertaking his job he made a certificate of valuation and confirmed the drugs had a weight of 8.2 kilos with a market value of Kshs.41 million. He produced a certificate and a copy of gazette notice as an exhibit before court.

The appellant in her defence stated that on the material day she was coming from Lagos after having visited her sister in Nigeria and on arrival she informed PC Mbithi (PW4) that she was not feeling well and she needed urgent hospitalization. He then directed her to PW2 to do a search and after finishing her search, the said officer asked for her luggage because she was suspected that she may have swallowed cocaine. She contended that nothing was found on her and that she was framed by police officers who were stationed at arrival desk of Jomo Kenyatta International Airport.

I have considered the evidence in order to determine whether there is evidence to sustain the conviction of the appellant. There is no doubt that on the material day the appellant arrived from Lagos in Nigeria with Kenya Airways. On arrival she was stopped by PW4 and PW6 together with other police officers on suspicion that she was carrying drugs. On investigations, the appellant looked suspicious making PW6 to instruct PW2 and PC Mangila to carry out a body search. The officers also requested for her luggage tag in order to confirm whether there were any drugs in her luggage. As PW2 and other police officers were searching her two boxes they noted there was weight after the clothes and they got curious of the false bottom. They found one polythene paper bag and after a thorough search the drugs were found under the clothes in a false bottom. The appellant was then arrested and PW5 was alerted to undertake the valuation of the substance that was found in the appellant's bag. The substance was then sent to PW1 who confirmed that the items that were found were drugs. It is also clear that after the search, PW3 prepared an exhibit memo in respect of the substance and the same was taken to PW1 for examination. PW3 confirmed that he took two samples to PW1 and prepared an exhibit memo which was taken to PW1. From the totality of the evidence of PW2, PW3, PW4 and PW6 makes it clear beyond doubt that the appellant was found in possession of the drugs subject of this appeal. It is clear beyond doubt that the boxes where the drugs were recovered from belonged to appellant and she is the one who identified the said bags to the police officers after giving the tags identifying the bags as hers. I am therefore satisfied that the prosecution proved its case beyond reasonable doubt and that the evidence on record is overwhelming to sustain the conviction of the appellant. There is no evidence to show why PW2, PW4 and PW6 would frame her for non existent offence. There is no evidence to show that there was a grudge between the appellant and the said officers. However, the evidence on record clearly shows that the appellant arrived from Lagos on the material day and she was found in possession of cocaine weighing 8.2 kilograms and valued at Kshs.41 million. In short the prosecution has proved its case beyond reasonable doubt and there is no basis for me to disturb the sound decision of the trial court. The appeal

against conviction is rejected.

On sentence I am in total agreement with Mrs. Gakobo learned counsel of State is both lawful and lenient. There is no misdirection or error that was committed by the trial court. The appeal against sentence also fails.

Dated, signed and delivered at Nairobi this 4th day of November 2009.

M. WARSAME

JUDGE