



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & SICHALE, J.J.A)

CRIMINAL APPEAL NO. 103A OF 2017

BETWEEN

FEDMAN JAMES MUSINGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the HIGH Court of Kenya at Machakos (Nyamweya, J.) dated 16th November, 2016

in

H.C.C.R.A. No. 226 of 2014

JUDGMENT OF THE COURT

1. **FEDMAN JAMES MSINGA**, *the appellant herein*, was tried and convicted by the Principal Magistrate's court at Mavoko for the offence of trafficking in narcotic drugs contrary to **Section 4 (a)** of the **Narcotic Drug and Psychotropic Substance Control Act No. 4 of 1994**. He was sentenced to pay a fine of **Kshs.11,160,000/=** or 10 years in default, in addition to life imprisonment.
2. The particulars of the charge were as follows: the appellant on the 28th day of September, 2013 at about 3.30 a.m. along Mombasa-Nairobi Highway, Mlolongo Township within Machakos County, jointly with others not before court was found trafficking by conveying in a Motor Vehicle Registration No. T874 AUS, trailer No. T879 APE, a narcotic drug namely cannabis sativa to wit (15) fifteen sacks weighing 372 kilograms with a street value of **Kshs.3,720,000/=** in contravention of the Narcotic Drug and Psychotropic Substance Control Act.
3. Being dissatisfied with the lower court judgment, he appealed to the High Court against the conviction and sentence. The High Court, **(Nyamweya, J.)** dismissed the appeal in its entirety. Further aggrieved by the High Court decision, the appellant lodged the appeal before us raising several grounds vide his supplementary grounds of appeal.
4. In a nutshell the appellant is aggrieved; *that the trial court erred in adopting the final written submissions by his counsel without consulting him thereby contravening the provisions of Sections 213 and 310 of the Criminal Procedure Code; that the sentence imposed was harsh and excessive; that the circumstantial evidence was not free from error; and that the case was not proved beyond reasonable doubt.*
5. Our Jurisdiction in hearing this second appeal is limited to considering matters of law only by dint of **Section 361 (1)** of the Criminal Procedure Code. In ***Karani vs. Republic [2010] 1 KLR 73*** this Court stated as follows:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.” (See also ***Chemangong vs. Republic [1894] KLR 611***).

6. At the hearing of the appeal the appellant appeared in person while the State was represented by **Mr. Obiri**.

7. In light of the evidence on record, proceedings and submissions by both parties we are of the view that only three issues fall for our determination. They are;

- (i) *whether the Court's reliance on the final written submissions at the close of the defence case was fatal to the appellant's case;*
- (ii) *whether the offence was proved beyond reasonable doubt;*
- (iii) *Whether the sentence was harsh and excessive.*

8. On the first issue of the final written submission, it is contended by the appellant that his advocate did not consult him when he elected to file written submissions.

9. The record shows that the defence closed its case on 21st May, 2014. **Mr. Nyachoti** who appeared for the appellant requested to file and serve written submissions on 23rd May, 2014. The court proceeded to make an order for filing and service of the written submissions. This was complied with even though the record confirms that the parties were not heard on these written submissions.

10. It is the appellant's argument that he did not consent to the written submissions hence the provisions of **Sections 213** and **310** of the CPC were flouted. It was submitted that the failure to have the appellant heard on the written submissions was a violation of the relevant provisions of the law and resulted in the appellant not being given reasonable opportunity to be heard.

11. It is not in dispute that the request to file written submissions was made by Mr. Nyachoti who was acting for the appellant in the lower court. It is also noteworthy that the appellant together with his counsel were present throughout the hearing of the case before the lower court. In our view, we cannot in the circumstances see the prejudice occasioned to the appellant.

12. The appellant relied on the following cases to support his assertion: (i)

Akhuya vs. Republic Criminal Appeal No. 42 of 2002 Kisumu [2003] eKLR and (ii) **Henry Odhiambo Otieno vs. Republic Criminal Appeal No. 83 of 2005 Kisumu [2006] eKLR**

13. In the aforementioned cases, this Court found that the trial court erred in relying on written submissions to write a judgment when the parties had not been given an opportunity to be heard on the same. Such denial was found to be a violation of the accused person's right to a fair hearing which led to the quashing of the convictions and sentences.

14. In the more recent case of **Katana Kaka alias Benson, Kitsao Kalume Sanga & Changawa Charo Karisa vs. Republic, Criminal Appeal No. 93 of 2014 (Malindi) 2017 eKLR** the Court of Appeal faced with a similar circumstance departed from the above findings. It found that the trial court relying on the written submissions without calling the parties to address the court is not necessarily a breach of the fair trial provisions under **Article 50**. It expressed thus:

“[17] This address is what is colloquially referred to as a final submissions. From a reading of the above provisions, that address is mandatory and inalienable where the accused person does not intend to give or adduce evidence. This means the accused person would have declined to testify (on oath or otherwise) or to call witness(ess) to testify on his behalf. However, in the instant case, the appellants gave unsworn statements in their defence. So they cannot fault the learned trial Judge for not calling upon them to give an additional address to the court. In any case the prosecution did not have a final address either and it is counsel for the appellants who intimated to court, the appellants' desire to file written submissions as a final address to the court. Are the appellants' now approbating and reprobating at the same time”. It is without doubt that by directing the appellants to file their submission, the requirements of section 311 were fulfilled. The appellants were in no way prejudiced by their failure to give oral submissions as their counsel opted for written submissions. What emerges is a failure by counsel on record to comply with that directive. (Emphasis added).

[18] Revisiting the Akhuya case (supra) which was cited to support the assertion that the appellants had to be granted an added opportunity to participate and orally address court over and above the filing of the submissions; it was held that filing of written submissions without the accused persons' express consent and participation was found to be a denial of his right to a fair trial and thus a ground rendering a conviction unsafe. One distinguishing element however, is that in the present appeal, the appellants gave unsworn statements, unlike the Akhuya case where it remains unclear whether the accused was ever heard on defence as well as on closing statement at all.

[19] Of particular importance to note is that the Akhuya case (supra) was decided, before the current Constitution, according to section 77 (2) (1) of the repealed Constitution, it specifically provided that the right of the accused to be present at trial was only limited wither by his consent or his conduct. In the current Constitution, Article 50, the consent of the accused is not a deciding factor in the determination whether the trial is fair. Indeed, Article 50 (2) (f) of the

Constitution dispenses with the question of consent and envisages the conduct of an accused to be the deciding factor. As a result, the consent of an accused is presumed unless otherwise proven. Interestingly also, the case of Otieno Kopyiyo Gerald vs. Republic [2010] eKLR, echoes this position. In that it was held:-

“It is not necessarily a fatal mistake for the court to accept written submissions. The mistake is only fatal if the express consent of the accused is not obtained by his advocate, who then files written submissions”.

(Emphasis added)

... in this regard therefore we find the appellants were never prejudiced by the decision of the court to direct the filing of written submissions and by proceeding to issue judgment as directed. ...

On the same note, we wish to point out that section 230 of the CPC, upon which learned counsel for the appellants also relied, was repealed by section 82 of Act No. 5 of 2003. As such, the same is no longer applicable law. (Emphasis added)

[20] We have closely considered this line of argument and are of the view that the appellants were well represented by their respective counsel during the hearing, very vigorous cross examination of the prosecution's witnesses took place, the appellants gave their defence evidence and failure by their counsel to file written submissions as directed by court did not prejudice the appellants as they fail to point out any issue of law or fact that was missed in the said submissions. In any event there was no failure or lapse that can be ascribed to the learned trial judge. We would also hasten to add that if there was any lapse, it is a kind that would be curable under the provisions of section 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya which provides:

“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

Also see the case of **Joseph Maina Mwangi vs. Republic, Criminal Appeal No. 73 of 1993, Tunoi, Lakha and Bosire JJA**, held:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

15. It is clear from the record that at no point has it been shown that the proceedings were conducted in the absence of the appellant and/or his advocate. The appellant has also not set out before this court any error, omission or inconsistencies that he is disputing in the said written submissions which he may have wanted to point out to this court.

16. Our finding on this issue is that the appellant was well represented by Counsel who requested to file written submissions on his behalf, in open court and in his presence. It is thus our considered view that this was not fatal to his case and he was therefore not prejudiced at all.

17. Turning to the second issue of whether the prosecution proved its case against the appellant beyond reasonable doubt, there is no dispute that the appellant at the time he was charged was the driver of the trailer that was used to transport the cannabis sativa. It is the appellant's submission that the court relied on circumstantial evidence that was not free from error. According to his submission, no one saw him loading the cannabis sativa onto the lorry, neither was he within the sight of the lorry. Further, he explained that no witness came forward to clarify on whether the drugs were loaded in Kenya or Tanzania. He claimed that the court rejected his defense to the effect that he was not aware of the presence of the drugs on the trailer.

18. There is evidence by PW1 who testified that they had ordered 520 bags of maize from Tanzania. He was informed that the lorry carrying the maize had been confiscated in Mlolongo. It is at that point that he rushed to the police station and recorded a statement. He produced all relevant documentation (PMFi 1, 2, 3, 4, 5, 6, 7a and b) to prove that his company had nothing to do with the drugs. He was later absolved of any criminal involvement and the maize released to him.

19. PW2, the Police Constable testified that he was on patrol with two of his colleagues when they saw a trailer parked beside the road. They noticed some bags being offloaded from the lorry. Moving closer they saw two salon cars ahead of the trailer. They approached the loaders who ran away after they saw the policemen. They however found the driver (appellant) on the steering. On checking the 15 bags they found that they contained cannabis sativa. They then interrogated the appellant who told them that he had been hired by someone to traffic the drugs.

20. PW3 and PW4 confirmed that the bags contained bhang and proceeded to weigh them and later produced them as exhibits.

21. Looking at the evidence on record, we are of the view that as the driver of the vehicle, the appellant was entrusted to exercise due care and be vigilant of any happenings that may occur from the point of departure to its destination. In his unsworn defence, the appellant stated that he had gone to get some refreshments and on returning found the container of his vehicle open. He admitted seeing bhang in the vehicle but denied having loaded the bags. He intimated that it was his turnboy, who was arrested and later set free, who could have been the one who loaded the bhang onto the vehicle. The trial court dismissed this defence and termed it as a mere denial and blame shifting.

22. In that regard, we respectfully agree with the trial court's observation that *“the accused cannot purport to say that he does not know where the cannabis was loaded as it was his duty to know what he was carrying and he was the one in charge and control of the vehicle.”* The entire evidence on record, coupled with the testimony of the arresting officer (PW2), leaves no doubt, as the trial court found, that the appellant was transporting narcotic drugs in the manner described. The trial court considered all the evidence presented and having done so came to a proper conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record.

23. As regards the issue of sentence being harsh and excessive, the trial court considered the appellant's mitigation to the effect that the appellant was remorseful as he was a first offender and a young man aged 32 years married with one child. He also pleaded for leniency. However, the learned magistrate pointed out that the offence carried a minimum sentence and proceeded to mete out the sentence as prescribed by law.

24. In Caroline Auma Majabu vs. Republic, Criminal Appeal No. 65 of 2014 the Court of Appeal sitting in Malindi in interpreting Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act expressed as follows:

“Applying the above definition, the use of the word “liable” in section 4 (a) of Narcotic Drugs and Psychotropic Substance Control Act merely give a likely maximum sentence hereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicted. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.”

25. In light of the foregoing, it is our considered view that the sentence meted out though lawful was harsh and excessive as conceded by the State and thus the mitigating circumstances called for a lesser sentence. In the circumstances we allow the appeal on the sentence and order that the sentence of imprisonment is reduced to the period already served which we consider sufficient. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 8th day of May, 2020.

M. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR