



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MURGOR & KANTAL, J.J.A.)

CRIMINAL APPEAL NO. 126 OF 2019

BETWEEN

THOMAS MUTUNE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Nairobi (Kimaru, J.) dated 13th March, 2019 in HC. CR.A. No. 168 of 2016)

JUDGMENT OF THE COURT

In the charge sheet presented before the Chief Magistrate at Kibera, Nairobi the appellant, **Thomas Mutune**, 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** particulars being that:

“On the 20th day of January 2012 at Jomo Kenyatta International Airport in Nairobi within Nairobi County, trafficked by conveying 67 pellets of narcotic drug namely Cocaine concealed on both legs inside a pair of socks above the ankle joint weighing 1176.4 grams with a market value of Kshs.4,705,600/= in contravention of the provision of the said Act.”

This is a second appeal from the findings of the magistrate’s court as re-evaluated by the High Court on first appeal and our mandate as found in **Section 361(a)** of the **Criminal Procedure Code** is to entertain only issues of law if we find that they are raised in the appeal. We are not to entertain matters of fact which have been tried and re-evaluated on first appeal – See, for a judicial pronouncement on this issue the case of - **M’Riungu vs Republic [1983] KLR 455** where the following passage appears:

“ ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

All the eight prosecution witnesses save the Officer from Government Chemist were police officers and the totality of their evidence was that in the evening of 20th January, 2012 the appellant was arrested at Jomo Kenyatta International Airport as he was about to board an aircraft to travel to Kuala Lumpur in Malaysia. He had already checked in to fly out but while at the departure lounge **PC Francis Onyango (PW3)** accompanied by a colleague both of JKIA Anti-Narcotics Drug Unit approached him and asked him to accompany them to an office within the airport. He was interrogated by amongst others **Chief Inspector Tobias Abondo (PW3)** and upon a search being conducted 67 pellets of drugs were recovered hidden in his socks. Photographs of the pellets were taken by **Chief Inspector Ernest Maringa (PW2)** who produced them in court as part of the evidence. The **Government Chemist, Simon Nandi Sunguti (PW4)** received the said pellets on 23rd January, 2012 from **PC Peter Mukengei (PW7)** and he was required to ascertain what the white crystalline powdery substance contained – and whether it fell within The Narcotics Drugs and Psychotropic Substances Control Act of 1994. On examination he found that the white crystalline substance in the 67 sachets contained Amphetamine which was a psychotropic drug within the said Act. He made a report, signed it and produced it in court as part of the evidence.

Upon **Chief Inspector Joshua Okelo (PW6)** being given information on the recovered drug by **Chief Inspector Tobias Abondo (PW3)** who had established the quantity of the drugs as **1,176.4 grams** he (PW6) attached a value of Kshs.4000 per gram giving a total value of

Kshs.4,705,600 for the drugs. He prepared an appropriate valuation certificate which he produced in court with copy of gazette notice authorizing him as an officer who could value drugs (a “Proper Officer” under the said Act).

The trial magistrate found that the prosecution had established a *prima facie* case and in an unsworn statement the appellant denied the charge. He stated that he travelled often to Malaysia to buy textiles which he sold in Kenya. Of the particular incident leading to his arrest he stated that he was cleared by security agencies at the airport and was issued a boarding pass and was therefore surprised when, at the departure lounge, he was asked to accompany officers to be searched. He was fed with food and drinks and taken to a toilet where he passed out. When he came to he found white oval balls on the table. He denied having anything to do with those items. The trial court considered the prosecution case and the defence offered and after finding that the charge had been proved as required in law convicted the appellant. He was sentenced to a fine of **Kshs.14,116,800** in default to serve 30 years imprisonment.

A first appeal to the High Court of Kenya at Nairobi (Kimaru, J.) was dismissed on the issue of conviction but the sentence was found to be harsh and excessive; it was substituted to a sentence of 15 years imprisonment from the date of conviction.

Those findings provoked this second appeal through the homemade “**Memorandum Grounds of Appeal**” filed on 26th April, 2019. Four grounds of appeal are taken to the effect that the High Court erred in law by failing to adhere to **Section 333 (2)** of the **Criminal Procedure Code**; that the High Court erred in law by upholding conviction on a value of the drugs given by the prosecution as street value, not market value; that the High Court erred in upholding a conviction where there was a variance between the particulars in the charge sheet and the prosecution evidence; and, finally, that the High Court erred in law in not finding that there was lack of compliance with **Section 200 Criminal Procedure Code**.

When the appeal came up for virtual hearing before us on 13th July, 2020 due to the ongoing COVID-19 pandemic the appellant appeared in person while learned State Counsel **Mr. Gitonga Muriuki** appeared for the Republic. In an address to us the appellant stated that he was convicted on a defective charge sheet which gave particulars of the offence as trafficking cocaine while evidence by prosecution witnesses was that he was found trafficking a drug called amphetamine. He cited **Section 134 Criminal Procedure Code** to the effect that a charge should have sufficient particulars in support of the charge. Further, that the evidence by the witness from Government Chemist did not have proper expertise and did not provide any valuation for the drug. According to him he should not have been convicted where the charge was not amended and on sentence, the same should have been calculated to start from the date of his arrest.

In opposing the appeal Mr. Muriuki referred to the charge sheet which, in his view, contained description of the drugs, the quantity and the valuation and submitted that the underlying principle in drafting a charge sheet is for an accused person to understand the charge he is facing. Counsel submitted that the appellant was arrested on 20th January, 2012 and arraigned in court on 23rd January, 2012, a Monday before the drugs were tested. Counsel referred to the report by Government Analyst which reported that the drugs were found to be “amphetamine”, not cocaine and, according to counsel, the charge should have been amended, which it was not. Counsel further submitted that even if the charge was amended the charge itself would not have changed; and only the particulars would have changed. According to Mr. Muriuki non-amendment of the charge did not prejudice the appellant who was represented by a lawyer in the trial. Counsel referred to the Judgment of the High Court on first appeal where the Judge corrected the error in the charge sheet. In conclusion counsel submitted that the High Court, in substituting the sentence, gave an illegal sentence but counsel conceded that he had neither filed a cross-appeal nor given a notice to enhance sentence.

In a brief rejoinder the appellant emphasized that the substance, quantity and value of a drug are important aspects in an offence under the Act. In his view the case was not proved to the required standard.

We have considered the whole record, submissions made and the law.

The issues of law that we identify for our consideration in this appeal are whether there was compliance with **Section 333(2) Criminal Procedure Code**; whether there was variance between particulars in the charge sheet and the evidence led by the prosecution and if so, the effect of the same and, finally, whether there was breach of the requirements of **Section 200 Criminal Procedure Code**.

Section 333(2) Criminal Procedure Code is made subject to **Section 38** of the **Penal Code**. That section of the Penal Code gives provision for sentencing an escaped convict, who if serving imprisonment, would have the sentence to run consecutively or concurrently as the court may order, with the unexpired portion of the sentence which the convict was undergoing when he escaped. In the record before us the appellant was granted bail by the trial court and he did not escape from custody after he was convicted and sentenced. That ground of appeal has no basis at all and is dismissed.

On the issue whether there was variance between the particulars in the charge sheet and the evidence led by the prosecution it will be seen that the particulars in the charge sheet stated that the appellant was arrested for trafficking cocaine. The evidence led by the prosecution established that the appellant trafficked a drug called “amphetamine”. **Section 134** of the **Criminal Procedure Code** provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The law thus requires that the charge contain a statement of the specific offence charged together with such particulars as will inform the accused of the nature of the offence.

The Government Chemist (PW4) testified that upon examining the exhibits:

“.... I found that the white crystalline substance in the 67 sachets contained Amphetamine which is a psychotropic drug which falls under the Narcotics and Psychotropic Substance Control Act, 1994.”

He prepared a report showing that he had received 67 polythene sachets which he analyzed and found to contain amphetamine, a drug within the said Act.

It is common ground that although the prosecutor before the trial magistrate indicated that he would apply to amend the charge to indicate “amphetamine” instead of “cocaine” this was not done at all and the trial proceeded on the basis of the original charge.

Counsel for the State submits before us that even if the charge sheet was amended the charge itself would have remained the same as it is only the particulars that would have been altered to change the name of the drug the appellant was found trafficking.

This is how the Judge on first appeal addressed that issue:

“This court has perused the trial court’s proceedings. The investigating officer indicated that the Appellant was arrested on Friday evening. Therefore the Government Chemist was closed till Monday. The substance found in the Appellant’s possession was indicated as cocaine in the charge sheet. The investigation officer stated that that was based on the preliminary spot test done by the Government Analyst at the station. They had to charge the Appellant within the constitutionally mandated 24 hours based on the preliminary results. They were only able to send samples of the substance to the Government Chemist on Monday. However, after the substance was analyzed at the Government Chemist, the Government Analyst found the drug to be amphetamine. The investigating officer intimated that they would later seek to amend the charge. However, there is no indication from the trial court’s record that the same was done.

This court is of the view that the prosecution ought to have amended the charge sheet to indicate the correct substance found in the Appellant’s possession. Was the same curable under Section 382 of the Criminal Procedure Code? It has previously been held that the test for whether a charge sheet is fatally defective is a substantive one. The court needs to inform itself whether the accused person was charged with an offence known to law. In addition, the offence ought to be disclosed in a sufficiently accurate fashion, so as to give the accused ample notice of the charges facing him. In the present appeal, 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. The particulars of the said charge indicated that he trafficked cocaine instead of amphetamine. Was the Appellant prejudiced by this? This court is of the view that no miscarriage of justice was occasioned on the Appellant. The Appellant understood the charges he was facing well enough to understand the ingredients of the crime, enabling him to prepare his defence. The Appellant in his defence indicated that he was informed that the substance was not cocaine but amphetamine. This was before any prosecution witness adduced evidence. He was therefore aware of the charges he was facing. In any event, whether the narcotic drug was cocaine or amphetamine, the Appellant would equally have been charged under the same Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act.”

In the end the Judge cured the defect under **Section 382** of the **Criminal Procedure Code** and held that the appellant was convicted of trafficking amphetamine, not cocaine.

The appellant contends that the Judge was wrong when he did that.

Both “cocaine” and “amphetamine” are drugs within the meaning ascribed in the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. Under **Section 4** of that Act:

“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”

Under that section a person who traffics a narcotic drug or psychotropic substance is liable 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.

In respect of a substance, other than a narcotic drug or psychotropic substance – the fine is Kshs.500,000 and in addition, to imprisonment for a term not exceeding 20 years.

Cocaine (the scientific name is “methyl ester of benzoylecgonine”) is listed under the First Schedule of the said Act while Amphetamine or Amfetamine (“the scientific name is (±) – 2 – amino-1- phenyl propane) is listed in the Second Schedule.

The penalty for trafficking cocaine or amphetamine is the same under the Act and is determined by the value of the drugs.

The traditional approach in our jurisdiction was that courts employed a strict and technical interpretation while considering whether a charge sheet complied with **Section 134** of the **Criminal Procedure Code**. The evidence led by the prosecution had to fall on all fours with the charge sheet and particulars thereof and any variance made the charge defective leading to acquittal of an accused person – see, for instance, this Court’s holding in the case of **Paul Mwangi Murunga v R [2008] eKLR** where the Court had found that the allegation in the charge sheet that two or more men “jointly” raped one woman made the charge fatally defective. This Court departed from that position in the more recent case of **Isaac Nyoro Kimita v Republic [2014] eKLR**.

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principle of the law has a constitutional underpinning.

However, whatever the irregularity, it is not to be regarded as fatal unless there is prejudice to the person who is charged. It is the substance

that the Court must seek to ascertain. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the ball is lost in the labyrinth of insubstantial technicalities.

So, the question in this appeal is whether the variance (in terms of whether the drug was cocaine or any other substance) rendered the charge sheet defective thereby causing prejudice to the appellant person in view of the evidence led by the prosecution that showed that the appellant was arrested while trafficking amphetamine.

In making that determination, what is relevant is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or was confused on the nature of the charge facing him and as a result, he was not able to put up an appropriate defence.

Further **Section 382** of the **Criminal Procedure Code** which provides in part:

“Subject to the provisions hereinbefore 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:...”

In the case of **Benard Ombuna v Republic [2019] eKLR**, the particulars as set out in the charge sheet in respect of both the main and alternative counts disclosed the offence of defilement rather than attempted defilement or committing an indecent act with a child respectively. The Court held that:

“Be that as it may, as this Court appreciated in JMA vs. R [2009] KLR 671 that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:-

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

Similarly, this Court while faced with the same issue in **Isaac Nyoro Kimita & Another v R [2014] eKLR** echoed those sentiments as follows:

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?”

It was further held in the said case of **Isaac Nyoro Kimita (supra)** that:

“In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have “jointly” defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complainant. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself.”

The Court further added that:

“As a court of law, we should not be hyper technical. We should strive to do substantive justice in each case. That is the command to us from Article 159 of the Constitution”

The totality of what we find here on the issue of the charge sheet raised by the appellant is whether he understood the charge as laid; whether it confused him in any way or whether it prejudiced his rights at all. As we have shown, the charge sheet gave particulars of the drug as cocaine while the evidence led proved that the appellant trafficked a drug called amphetamine (or amphetamine – the government chemist explained that one was an English spelling while the other was an American spelling). Both of those are drugs within the meaning ascribed by the Narcotics Drugs and Psychotropic Substances (Control) Act, and the penalty for trafficking either of the drug is the same dependent on the value of the drug. The charge in the case before the trial court would not have changed as an amendment would only have altered particulars of the charge, not the charge itself. We agree with learned State Counsel that the appellant understood the charge facing him and, as the penalty for trafficking either cocaine or amphetamine was the same, the appellant was not prejudiced in any way at all when the charge was not amended to accord with the evidence led by the prosecution.

The last issue raised concerns whether there was compliance with the provisions of **Section 200 Criminal Procedure Code**. That section requires in substance that a magistrate who takes over a case partly heard by another magistrate should explain to the accused person that he has a right to have witnesses who have testified recalled to testify again. The record shows that the hearing was conducted by Hon. Wanjala, Chief Magistrate who appears to have been transferred after the close of the prosecution case. This is what appears at page 166 of the record:

“Mr. Odero: Advocate for accused matters (sic) is pending submissions.

We are ready to proceed from where matters reached.

Accused: that is position (sic) making matters proceed from where it reached.

Order: directions taken that matter proceeds from where it reached. Mention 8/6/2015 to oral submissions.

HON. ONGINJO

CM

12/5/2015”

It will therefore be seen that the appellant with his lawyer Mr. Odero elected that the succeeding magistrate proceed from where the retiring magistrate had left off and they did not apply to recall any witness. There is in the circumstances no merit in the said complaint.

On the whole there is no merit in this appeal which we proceed to dismiss in its entirety.

Dated and delivered at Nairobi this 6th day of November, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR