IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 153 OF 2019

BETWEEN

NNAMDI EGESIMBA..1st APPELLANT

LEILA MUNYIVA MULI...2ND APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 10th July, 2019

in

H.C. CR. A. 129 OF 2018)

****

JUDGMENT OF THE COURT

1. During the virtual plenary hearing of this appeal conducted vide, "GO TO MEETING" Platform pursuant to the Court of Appeal Practice Directions to mitigate the effects of COVID -19 Pandemic, ***Nnamdi Egesimba*** and **Leira Munyiva Muli** ,the 1st and 2nd appellants respectively, were represented by **Mr. Ondieki,** learned counsel, who informed us that he was only pursuing the appeal against sentence. The respondent was represented by **Mr. Abdi,** Senior Deputy Director of Public Prosecutions (SDDPP), who opposed the appeal. Although the appellants abandoned the grounds of appeal on conviction, we will give some key background information, albeit in brief, to place the issue of sentence in perspective.

2. Both appellants were jointly charged with the offence of trafficking in narcotic drugs contrary to ***Section 4(a)*** of the **Narcotic Drugs and Psychotropic Substances Control Act** before the Senior Principal Magistrates' Court at the Jomo Kenyatta International Airport (JKIA). The particulars of the offence stated that: -

"on 25th November, 2016 at Sarit Centre in Westlands within Nairobi County, the appellants, jointly with others not before court trafficked in a narcotic drug namely Heroin to wit 2,121.29 grams with a market value of Ksh. 6,363,870/- by conveying it in a black suitcase concealed in a false bottom of the said suitcase in contravention of the said Act."

3. The appellants were arraigned before the trial magistrates' court, where they pleaded not guilty to the charges and after a full trial, were convicted as charged. Each was sentenced to a fine of Ksh.18 million and in default serve one (1) year imprisonment. In addition, each appellant was sentenced to serve a custodial sentence of fifteen (15) years. Aggrieved by their conviction, each appellant filed an appeal challenging the conviction and sentence. The said appeals were consolidated and heard by **Kimaru, J.,** who in a considered judgment found no merit in the appeal and dismissed it. This is how the learned Judge concluded in the said judgement which has provoked the instant appeal;

"The upshot of the above reasons is that the Appellants' appeal against conviction lacks merit and is hereby dismissed. On sentence, the Appellants were each sentenced to pay a fine of Ksh.18 million and in default serve a one (1) year custodial sentence. The Appellants were additionally sentenced to serve fifteen (15) years imprisonment. The penalty provided under Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act is 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. The sentence meted by the trial court was

therefore not harsh or excessive in the circumstances. The same was proper and legal. The Appellants' appeal on sentence is similarly dismissed. It is so ordered."

4. Mr. Ondieki argued all the grounds of appeal touching on sentence together.

He submitted that the sentences meted against the 1st and 2nd appellants were excessive and harsh. He referred to the evidence of ***Dennis Onyango*** (PW3) who testified that he was a Chemical Analyst from the Government Chemist. According to him, he had received for analysis from the Anti-Narcotics Police unit, a sample sachet containing a creamish coloured powder. He examined it to establish whether the substance was a narcotic or psychotropic substance and found out that it contained heroin with a 30% purity level. This level of heroin, according to counsel, meant that there was over valuation of the drug which had a bearing on the sentence; that the sentence was manifestly harsh and excessive in the circumstances as the drug was not pure heroin. Counsel also poked holes on the value stated in the charge sheet which was described as heroin when it was not pure heroin; that the prosecution failed to prove to the required standard the value of the substance. Counsel urged us to consider the sentencing guidelines given by the Supreme Court in the case of **Francis Karioko Muruatetu vs. Republic [2017] eKLR** and commute the sentence of fifteen (15) years to the period served.

5. Opposing the appeal, Mr. Abdi relied on his written submissions and made some highlights stating that the principles that underpin a second appeal which is only on matters of law does not include severity of sentence, which is a matter of fact. He referred to the provisions of ***section 361 (1) (a)*** of the **Criminal Procedure Code** where it is stated that the jurisdiction of the Court of Appeal in a second appeal excludes matters of sentencing unless the sentence is illegal or some legal principles were not considered before sentencing. Counsel also referred to the case of **Dzombo Mataza vs. Republic [2014] eKLR**. As far as the sentence was concerned, counsel submitted that both courts below considered the evidence by three prosecution witnesses who carefully carried out the exercise of identifying the quantity, sampling, and analysis of the Narcotic drugs that were seized from the appellants and the value attached to it was the one found in the black market. Considering that the law provides a life sentence, the sentence of 15 years meted on the appellants was lenient. Counsel urged us to dismiss the appeal as the mitigating factors were duly considered by the two courts below, therefore there was no violation of the principles of fair trial as the appellants had pointed out none.

6. As stated above, this appeal turns only on sentence, that being the case, this Court is guided by the provisions of ***section* 361** of the **Criminal Procedure Code** which provides that: -

"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

> **(a) on a matter of fact, and severity of sentence is a matter of fact; or**
>
> **(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."**

7. The beginning point is for us to examine whether the respective sentences meted against the appellants were illegal and deserving of this Court's intervention. The case put forward by the appellants was that the two courts below misapprehended the value of the narcotic substances which was not pure heroin and therefore the sentences, which were predicated on its value, were manifestly excessive and illegal in the circumstances of the matter. The broad provisions that cover the principles of a fair trial especially ***Article 50 (1) (2)*** and ***(4)*** of the Constitution were cited by counsel for the appellants to support the argument that the two courts below failed to consider the market value of the narcotic drugs which affected the weight of the evidence in regard to the value attached thereto and consequently affected the sentence and had a bearing to the principles of a fair trial.

8. It is trite that sentencing is an exercise of the trial court's discretion and an appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or where the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle, in which event it becomes a matter of law. See this Court's decision in **Bernard Kimani Gacheru vs. Republic [2002] eKLR**. It is on that basis that we will proceed with this appeal by first revisiting the evidence on how the Judge dealt with the recovery, weighing, sampling and examination of the narcotic drugs that were recovered from the appellants. To establish whether the Judge erred in agreeing with the trial court on the value of the drugs that informed the sentences which he affirmed in his judgment, this is what he stated in a pertinent paragraph of the judgement; -

"The scene of crime officer photographed each step of the process. PW8 weighed the narcotic substance. The substance weighed 2121.29 grams. He prepared a weighing certificate for the same. Sampling was done by the government analyst (PW3) and a certificate of sampling prepared. PW3 also carried out a preliminary test and his findings indicated that the substance was heroin. Cpl. Joseph Wafula (PW5) was the seizure officer. He seized the narcotic substance and prepared a notice of seizure and a certificate of inventory. The suspects declined to sign the same. The documents were witnessed by the police officers who were present.

PW8 prepared a notice of intention to tender records in evidence, and an exhibit memo. He forwarded samples of the narcotic substance to the Government Chemist for analysis. He later arraigned the Appellants before court. After he got results from the Government Chemist, he instructed PW6, Chief Inspector Joshua Ogola, to value the seized narcotic substance on 27th November 2016. The substance which was found to be heroin weighed 2121.29 grams. PW6 valued the same at Ksh.3,000/- per gram. The total value was Ksh.6,363,870/-. PW6 produced the valuation certificate in evidence. PW7, Chief Inspector Nancy Ekaroro was requested by PW8 on 26th November 2016 to assist in documentation of exhibits recovered from the Appellants. She produced the photographs and a report into evidence. She stated that both Appellants were present as she took the said photographs."

9. From this excerpt of the Judge's key findings, it clearly demonstrates step by step the series of events after the drugs were seized from the appellants. Upon certifying the weight, the samples were analyzed at the government chemist, a certificate was issued by an enforcement officer after which the appellants were charged under the provisions of ***section 4(a)*** of the **Narcotic Drugs and Psychotropic Substances**

Control Act (Act) which provides 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."**

10. The certificate that indicated the value of the narcotic drugs recovered from the appellants was issued by ***Joshua Okalla*** (PW6). The fact that he was a certified Anti Narcotic Enforcement officer under the provisions of ***section 86*** of the Act was not challenged. He gave evidence of how the substances were weighed, they weighed 2121.29 grams; based on the weight, and the certificate of chemical analysis by also a certified government analyst, this witness assigned the value of Ksh. 3,000 for each gram, being the market value per each gram, giving a total of Ksh. 6,363,870 and all these certificates were produced in evidence. Upon evaluating the evidence we find that the Judge took into account the relevant factors as stated in a key paragraph of the impugned judgment that;-

"The Appellant contended that the narcotic substance was erroneously valued since the purity level of the said heroin was found to be 30%. PW6, who was a qualified gazetted officer, valued the heroin at Ksh.3,000/- per gram. He produced a certificate of valuation to that effect. He explained that the purity level of the narcotic drug was not a determinant in valuation of the narcotic drug. He stated that the value was based on the identity and weight of the narcotic drug. It was his testimony that the value was determined from the street market value of the narcotic substance. PW6 was a qualified officer as envisaged in Section 86 (1) of the Narcotic Drugs and Psychotropic Substances Control Act. The same was not disputed by the Appellants. The said Section provides that a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof. This court therefore holds that the narcotic drug in the present appeal was properly valued."

11. Clearly, the above evidence shows the procedures provided by the Act upon seizure of narcotic drugs were followed, after arresting the appellants the narcotic drugs were identified, weighed and sampled for analysis. The value given by PW6 was said to be based on the back-street value. For obvious reasons, this being an illegal trade, one cannot differentiate the thin line that would divide open market value and street market value. **The Narcotic Drugs and Psychotropic Substance Control Act** refers to market-value and not street-value, which matter we note was clarified in the case of **Kabibi Kalumu Katsui vs. Republic [2015] KLR**. This Court had this to say about market value and street value: -

"This should not split any hairs as it is fundamentally one and the same thing as both terms refer to a situation of a willing seller-willing buyer even though the thing traded in is illicit. This Court differently constituted in the case of Priscilla Jemutai Kolongei v Republic [2005] eKLR ironed out the doubt in the use of these terminologies. It held:-

> **"We do not find any definition of "market value" in the Act as contended by Mr. Obuo, although those are the words used in the relevant section. In common parlance it connotes the price which an item ought reasonably to be expected to fetch on a sale in the open market that is between a willing seller and a willing buyer. When the market is legal, formal, free and above board, no questions would of course arise. It is however a matter of notoriety, and we take judicial notice of it, that prohibited or illegal transactions would normally be carried out in the "black market" or the 'street market.' There would still be a willing seller and a willing buyer there and it is no less a 'market' in that sense. The illegal item would have its 'market value' there."'**

12. The appellants, (although we appreciate they had no obligation to say anything in a criminal trial), if indeed they contended the value that was given by the prosecution was erroneous, did not challenge the prosecution evidence regarding the value at all, by disapproving the market value put forward. There was no evidence tendered even in defence to show the value of the narcotic drugs was less because of its purity level. In the circumstances therefore, we see no justification for interfering with the sentences meted by the two courts below. The appellants' mitigation was duly considered, and having also considered the issue of market value of the narcotic drugs, as long as the narcotic drug was certified upon analysis, to fit within the provisions of ***section 4*** of the Act, the percentage of heroin content was inconsequential as the substance was a narcotic drug.

13. On the severity of sentence, both courts below were alive to the fact that the Act provides for life sentence, but sentenced the appellants to fifteen (15) years, which is an indication that the mitigation was considered and the two courts below exercised their respective discretion to determine the appropriate sentence. Accordingly, we find no merit in this appeal which we dismiss and uphold the sentences imposed by the two courts below.

Dated and delivered at Nairobi this 4th day of December, 2020.

M. K. KOOME

………………..………

JUDGE OF APPEAL

D. K. MUSINGA

………………………

JUDGE OF APPEAL

F. SICHALE

……………………….

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR