IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 25 OF 2018

BETWEEN

BORA SALIM MWENDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated on 11th May, 2012)

in

(H.C.CR.A. No. 143 of 2009)

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JUDGMENT OF THE COURT

[1] ***Bora Salim Mwenda*** (appellant) was charged, tried and convicted before the Subordinate court with the offence of trafficking in narcotic drugs. He was sentenced to both life imprisonment and a fine of Ksh.1million. The appellant's appeal before the High Court on both conviction and sentence was also unsuccessful; hence this second appeal. By dint of the provisions of ***Section 361*** of the **Criminal Procedure Code**, we are enjoined to consider only matters of law. The long standing principle of this Court is that it cannot interfere with the decision of the High Court on matters of facts unless it is demonstrated that the two courts below 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* ***Karani vs. R*** ***[2010] 1 KLR 73).***

[2] A brief account of the facts from the courts below is that on 17th October, 2009 ***Cpl Shadrack Opondo*** (PW1) along with his counterpart from the Anti-Narcotic Unit ***Cpl Munialo*** (PW2), ***PC Mugambi***, ***PC Mukundu*** and members of community policing, were at Mbuyu wa Kusema area in Malindi after receiving a tip off of an intended narcotic drug delivery within the said area. PW1 with his team planned and laid an ambush as they had been given the description of the man who was to deliver the narcotic drugs would be donned in dreadlocks and was to come riding a motor cycle.

[3] Shortly after, the appellant arrived at the scene fitting PW1's expected description. The appellant stopped the motor cycle and PW1 and his team approached him while making clear that they were police officers. The appellant became nervous and upon being searched by PW2 in the presence of the team, their suspicions were confirmed that he was indeed in possession of substances that they suspected were narcotics. PW2 who conducted a search on the appellant recovered 78 sachets of a brownish substance from the left pocket of his trouser which the officers suspected to be heroin. PW1 and his team later escorted the appellant to the police station.

[4] At the Malindi police station, PW2 prepared an exhibit memo form containing the recovered substances which were handed to the government chemist for analysis under reference No GCK 729/2009 by ***CPC Peter Ouma***. The analysis was done by a government chemical analyst, ***Constance Kasera Tumaini*** (PW3) who found the 78 sachets of powdery substances to be heroin. She produced the report in court as exhibit. The appellant was consequently charged before the Chief magistrate's court at Malindi 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.** The particulars being that:

> **"On the 17th day of October, 2009 at about 12.00 noon at Mbuyu wa Kusema Village in Malindi Location within Malindi District of the Coast Province was found trafficking in narcotic drugs to wit 78 sachets of heroin valued at Kshs. 7,800/- in**

contravention of the said Act."

[5] The appellant denied the charge and after hearing the evidence by three prosecution witnesses, being the two police officers who arrested the appellant and the government analyst, the learned trial magistrate found the appellant had a case to answer and on placing him on his defence he gave unsworn statement and did not call any witness. In his defence, the appellant stated that while tending to his usual motor cycle taxi business, he was accosted by police officers; PW2 arrested him after a female passenger led him to the scene with her luggage which PW2 later claimed contained drugs. The appellant further claimed that he had been framed by the police officers who colluded with the female passenger, he told the court that he even witnessed one of the police officers handing over some money to his passenger as he was being handcuffed.

[6] After considering the evidence, the learned trial magistrate disregarded the defence evidence which she found lacking credibility in the face of what she termed overwhelming evidence by the prosecution witnesses; she further found no reason whatsoever demonstrated from the evidence on record as to why PW1, PW2 and PW3 would frame up the appellant with the offence charged.

Being satisfied that the prosecution had discharged its burden of proof, the appellant was found guilty and convicted. In his mitigation the appellant implored the magistrate to consider a non-custodial sentence so as not to separate him from his child who suffers from cerebral palsy. In passing the sentence the trial magistrate noted that the offence was serious and the appellant was found with a huge amount of narcotic drugs, the offence called for a custodial sentence so as to discourage a repeat. To that end he was sentenced to pay a fine of Kshs. 1,000,000/ and in addition to serve life imprisonment.

[7] Aggrieved, the appellant as aforesaid unsuccessfully filed an appeal in the High Court; the court based its findings on the strength of the prosecution's evidence and found the sentence to be within the law. In doing so the learned Judge relied on **Criminal Appeal No. 257 of 2007 Kingsley Chukwu v R 2010 eKLR** and upheld the conviction and sentence hence this second appeal that is predicated on the appellants' own home grown grounds which can be paraphrased into three being that the learned Judge erred in law by failing to consider;

i. Narcotic and its value was small. That sections 72 and 74 of the Narcotic Drugs and Psychotropic Substances(Control) Act was not complied with by the respondent;

ii. That no valuation certificate was produced as an exhibit in accordance to s. 86 of the Narcotic Drugs and Psychotropic Substances(Control) Act; and

iii. That both the trial and first appellant court erred in law in failing to observe that the conviction and sentence meted out against the appellant was too harsh and excessive considering that the quantity of the alleged.

[8] During the plenary hearing of the appeal, the appellant relied on his written submissions which principally challenged the sentence meted on him which he argued was harsh and excessive compared to the quantity and value of the recovered narcotics. The appellant drew the Court's attention to the charge he faced which was trafficking in narcotic drugs worth Kshs.7,800/- and for that paltry value of the narcotics he was sentenced to life imprisonment and a fine of Kshs. 1,000,000/- which was not proportionate to the offence. The appellant further submitted that the trial court wrongfully considered the sentence of life imprisonment under ***Section 4*** of the contravened Act to be mandatory. The appellant also cited this Court's decision in **Criminal Appeal 138 & 139 of 2011 Republic v Rehema Kahindi Kalume & another [2013] eKLR;** in particular where this Court stated that;

"By s.4 (a) of the Act, a person who traffics in narcotic drugs or psychotropic substances "Shall be guilty of an offence and liable" to a fine of one million shillings or three times the market value of the narcotic drugs or psychotropic substance whichever is greater, and, in addition, to imprisonment for life.

The section does not use the word, shall be liable, in reference to the sentence. Even if s.4 (a) of the Act is construed thus the words shall be liable are not mandatory, and the court may give any appropriate sentence other than life imprisonment. (see Opoya v Uganda [1967] EA 752 at p. 755 para F)." (Emphasis added).

[9] The appellant went on to submit that the purpose of sentencing is to deter, rehabilitate and eventually re-integrate an offender and urged us to find the sentence meted out on him defeated the aforesaid purpose. In reviewing the sentence, he urged us to consider that he was incarcerated for a period of almost 10 years and we should also be guided by the dicta in **Criminal Appeal No. 90 of 2014 Kabibi Kalume Katsui v Republic [2015] eKLR** where this Court upheld the appellant's conviction and while taking into account the mitigating factors and the term served by the appellant, the sentence of life imprisonment was set aside and fine of Kshs1,000,000/- imposed was substituted instead with a term of 10 years' imprisonment from the date of conviction and sentence in the trial court.

[10] Opposing the appeal was Mr. Isaboke learned Senior Prosecution Counsel; he urged us to take note of the Supreme Court's guidance on sentencing in; **Francis Karioko Muruatetu & another v Republic Petition 15 & 16 of 2015 consolidated [2017] eKLR)**. On the issue of conviction, the prosecution maintained that the appellant was arrested with sachets of narcotic drugs which were confirmed as heroin by the government chemist. Counsel therefore suggested a sentence of 20 years from the time the appellant was arrested in 2009 while noting that the appellant had already served 10 years.

[11] We have considered the record, the grounds of appeal, deliberated on the submissions and the applicable law. We shall deal with the first ground that the police officers acted without the warrant of arrest. It is trite as provided under ***Section 80*** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** any police officer can arrest without a warrant any person who has committed, or has attempted to commit, or is reasonably suspected by such police officer of having committed or attempted to commit or being about to commit an offence in contravention of the said Act.

[12] Regarding the question over failure to produce a copy of a valuation certificate of the said narcotics as an exhibit, we find this

issue was not raised during the trial and was only raised during this second appeal. Moreover, the appellant did not attach a different value from the one stated in the charge sheet. As it was held in **Criminal Appeal No. 90 of 2014 Kabibi Kalume Katsui v Republic [2015] eKLR** failure to provide a valuation certificate was not fatal to the prosecutions' case. The Court stated;

> **""There was therefore no real basis for ascertaining the value of the drugs so as to justify the sentence imposed. The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that PW4 and PW2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks".**
>
> (Emphasis added)

We therefore find no justifiable reasons for faulting the concurrent findings by the two courts below that the appellant was caught in the act of delivering narcotic drugs, and in the manner that the arrest was effected as well as the evidence that was adduced which proved the case to the required standard.

[13] That settles the grounds of appeal on conviction. We nonetheless have to determine whether the sentence imposed on the appellant was appropriate while bearing in mind the provisions of; ***Section 361*** of the **Criminal Procedure Code** which provides that;

> **"S. 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;"** (Emphasis added)

We have a duty also to address the legality, propriety and correctness of the sentence in this appeal. In **Shadrack Kipchoge Kogo v. Republic Eldoret, Criminal Appeal No. 253 of 2003 eKLR** this Court commented at length on the principles to bring to bear when dealing with sentencing as thus;

> **" Sentencing is essentially an exercise of the trial court and for the Court to interfere, it must be shown that in passing sentence , the Court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."(See. Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000)**

[14] The other auxiliary issue to consider is whether ***Section 4*** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** imposes a mandatory sentence? This Court was dealing with a similar predicament in **Criminal Appeal No. 248 of 2014 M K v Republic [2015] eKLR** where it expressed itself as follows;

> **"What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of** Opoya -v- Uganda (1967) EA 752 **had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in** James -v- Young 27 Ch. D. at p.655 **where North J. said:**
>
> **"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".**
>
> **We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".**

[15] This interpretation was also reiterated in **Criminal Appeal 65 of 2014 Caroline Auma Majabu v Republic [2014] eKLR** where the Court observed that;

> **"Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act, sets out the penalty for trafficking in the following terms:-**
>
> **4. Penalty for trafficking in narcotic drugs, etc.**
>
> **Any person who trafficks 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" in our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as**

"(i) Responsible by law, legally answerable, (liable to) subject by law to;

(ii) (Liable to do something) likely to do something;

(iii) Liable to) likely to experience (something undesirable).

Black's Law Dictionary defines "liable" as

i. Responsible or answerable in law; legally obligated,

ii. Subject to or likely to incur (a fine, penalty etc.)

Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. 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."

[16] In the ***Caroline Majabu case*** (supra) this Court was convinced that the ambiguity in ***Section 4*** left room for judicial discretion and as such the Court was reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion. The Court departed from the finding in **Criminal Appeal No. 257 of 2007 Kingsley Chukwu v R 2010 eKLR** in which the Court held:

"That a person convicted for an offence under *Section 4(a)* of the Act shall be fined Kshs.1,000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life".

Further this Court in ***Caroline Majabu case*** (supra) considered that the same was made *per in curium* and further observed that both the trial magistrate and the learned Judge misdirected themselves in holding that the sentence was mandatory and also failed to exercise their discretion by addressing the appellant's mitigating circumstances.

[17] Having considered both the mitigating and aggravating circumstances in this appeal as part of the requirements of the **Sentencing Policy Guidelines,** we are inclined to go with the reasoning in **Criminal Appeal No. 90 of 2014 [2015] eKLR Kabibi Kalume Katsui v Republic** where this Court considered the greater evil facing the society being the rampant drug abuse especially the devastating effect they have on the youth. It is also a matter of law that the quantity of the drugs and its value has a bearing on sentencing and all matters taken into consideration affects the gravity of the offence as well. We agree a custodial sentence was appropriate, in the circumstances of this case, however, considering the quantity of the narcotic drugs involved, and its street value of Ksh 7,800 we think a life sentence was not proportionate but rather went against the principles of sentencing as stated above. For instance how would the appellant pay a fine of Ksh 1 million if he was going to serve a life sentence, these are some of the considerations that both courts failed to take into account.

[18] In the upshot we dismiss the appeal against conviction but interfere with the life sentence which we set aside and substitute thereof with a term of ten (10) years imprisonment from the date of conviction and sentence. In addition we impose a fine of Ksh. 1,000,000/- and in default the appellant to serve an additional term of one (1) year.

Dated and delivered at Malindi this 19th day of June, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR