IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 133 OF 2016

SAMMY OMBOKE..... 1ST APPELLANT

TOM OKUMU OGUTU..... 2ND APPELLANT

versus

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kisii (R. Sitati. J.) dated 24th July 2014

in

HC Cr. Appeal No. 233 A of 2011)

****

JUDGMENT OF THE COURT

1. The appellants were charged with trafficking in narcotic drugs contrary to Section 4 (1) of the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. *(Emphasis supplied - Section 4 (1) of the Act though does not exist).* The particulars were that on the 3rd day of January 2011 at Nyabohanse Komomwamu road within Kuria District of Nyanza Province, the appellants were jointly found transporting 2071 stones of cannabis (bhang) with a street value of Ksh. 410,000 using motor vehicle Registration No. KBJ 487B in contravention of the provisions of the said Act.

2. The appellants were arraigned before the trial magistrate and were convicted of the offence as charged. They were sentenced to a term of seven (7) years imprisonment. Aggrieved by the conviction and sentence, the appellants lodged a first appeal to the High Court. The learned judge of the High Court dismissed their appeal against conviction and set aside the sentence of 7 years' imprisonment. The judge then enhanced the sentence to a term of life imprisonment in addition to a fine of Ksh. 1,000,000. In setting aside the term of seven-year imprisonment, the learned judge expressed himself as follows:

> *In the instant case, the learned trial magistrate sentenced each appellant to 7 years' imprisonment without a fine. This sentence was irregular. As the street value of Ksh. 410,000/= was not proved by expert evidence, the minimum fine of Ksh. One million should have been imposed by the trial court upon conviction. The appellants should also have been sentenced to imprisonment for life.*

3. Aggrieved with the judgment of the High Court, the appellants lodged the instant appeal against conviction and sentence.

4. The prosecution case was grounded *inter alia* on the testimonies of PW1 Corporal Daniel Otieno Ogach; PW 2 PC Stanley Korir and PW 3 Cpl. John Pele.

5. In his testimony PW1 Corporal Daniel Otieno Ogach testified as follows:

> *I recall 3rd February 2011 at about 6.00 am. I was on normal patrol with my colleagues Corporal John Pele; PC Masitsa, PC Amos and PC Alex Were. We received a tip off that a certain vehicle Registration No. KBJ 487 B grey in colour a Toyota Corrolla was approaching with contraband goods. We intercepted the vehicle. The vehicle had two suspects Tom Okumu and Sammy Omboke. We arrested them. We drove the vehicle to the District Officer's Office at Mabera. Inside the vehicle were stones of what we suspected to be cannabis. The back seat had been removed and the stones arranged there…. At Mabera, we counted them and found them to be 2071…. The 2071 stones of cannabis are here in court… The motor vehicle registration No. KBJ Toyota Corrolla grey in colour is*

produced as an exhibit.

6. PW 2 PC Stanley Korir testified as follows:

> *I recall 3/2/2011. At about 10.00 am, I was in our office. I received a call from Cpl. Pele from Mabera D. O's office who informed me that he and his colleagues had intercepted some suspects with cannabis. I went to Mabera, D. O's office. I found the said cannabis packed in motor vehicle registration No. KBJ 487 B Toyota Corrolla. The same was in the D.O.'s yard. I was also shown two suspects by the arresting officers. We off-loaded the cannabis and found them to be 2071. …I then prepared the charges after recording statements from the arresting officers. I prepared an exhibit memo form and a sample for purposes of taking them to the Government Chemist for analysis. ….. I received a report from the Government Chemist. This is the report dated 31st March 2011. It indicates that the contents were examined and found to be cannabis. I kept all the exhibits in my custody. I produce them as exhibits.…..*

7. PW 3 Cpl. John Pele testified that "*on 3rd February 2011 at about 6.00 am he was on patrol with his colleagues along Nyabohanse – Komomwamu road; they received a tip off that there was a vehicle packed with cannabis approaching from Komomwamu direction; that the vehicle approached and they stopped it; the vehicle was registration No. KBJ 487B Toyota Saloon grey in colour; that they inspected the same and found it to be packed with narcotic drugs cannabis; that there were two occupants - a driver and a passenger; that the two occupants are the appellants in this matter."*

8. In his defence, the 1st appellant, Sammy Omboke in an unsworn statement stated that he was a businessman dealing in grains and cereals at Oyugis; that he was arrested on 3rd February 2011; that on the same day together with the 2nd appellant they had left Isebania at 5.00 am to check on one of their business associates Mr. Mwita Nyamohanga (now deceased); that on reaching his home, they found he had just departed for Isebania on a motor cycle; that they decided to catch up with him; that while on the road, they bumped into a human barrier manned by Police Officers; that they were stopped and ordered out of the vehicle; they were arrested; that nothing was recovered from the car.

9. The 2nd appellant Tom Okumu in an unsworn statement repeated the statement by the 1st appellant; that when they were arrested one of the police officers drove the vehicle to the AP camp; that he was not given an opportunity to call the owner of the motor vehicle to testify.

10. The trial magistrate in convicting the appellants stated as follows:

> *I have carefully considered the evidence on record. To begin with, there is no dispute that the accused persons were found in the said vehicle…. The report from the Government Chemist is categorical the contents of the sack that PW3 tested as a sample was cannabis and included under the Narcotic Drugs and Psychotropic Substances (Control) Act. This evidence proves that the 2071 stones… are cannabis. Neither PW1 nor PW 3 knew any of the accused persons prior to the material day and there is no suggestion that they had any grudges against either of the accused persons. The evidence of these witnesses was very consistent, that the said vehicle was ferrying 2071 stones of cannabis. On the other hand, the accused person's testimony is mere denial…. I find the prosecution has proved its case against the accused persons to the required standard. I find each of the accused persons guilty as charged and convict them accordingly under Section 215 of the Criminal Procedure Code.*

11. Aggrieved by the trial magistrate's conviction and sentence, the appellants lodged a first appeal to the High Court. As stated earlier, the learned judge upheld the conviction and enhanced the sentence from a term of 7-years imprisonment to life imprisonment. Of relevance to this appeal are paragraphs 2 and 29 of the learned judge's judgment. The paragraphs read as follows:

> *1. ……..…..*
>
> *2. The two appellants were charged in the lower court with the offence of trafficking in narcotic drugs contrary to Section 4 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.……..*
>
> *3. ……..*
>
> *29. The appellants were charged in the lower court with the offence of trafficking in narcotic drugs contrary to Section 4 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. Section 4 (1) of the Act provides as follows:*
>
> *4 (1) 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 greater and in addition to imprisonment for life.*

12. In this appeal, the appellants are aggrieved by the judgment of the High Court and have proffered the following grounds of appeal:

> (i) Section 4(1) of the **Narcotic Drugs and Psychotropic Substances (Control) Act** No. 4 of 1994 does not exist and is not known to the law. It follows that the entire trial process, the conviction and sentence of the appellants was fatally defective since the appellants were charged under a provision of law that does not exist.
>
> (ii) The learned judge erred in law in unilaterally altering and enhancing the sentence meted on the appellants without notice and warning.

(iii) The judge erred as she did not give an opportunity to the appellants to mitigate afresh since the sentence to be imposed was more severe than the one imposed by the magistrate.

13. At the hearing of this appeal, learned counsel Mr. C. O. Kanyangi appeared for the 1st appellant. The second appellant acted in person while the State was represented by Mr. Kakoi, the Principal Prosecution Counsel. All parties filed written submissions in the appeal.

APPELLANTS' SUBMISSIONS

14. Counsel for the 1st appellant submitted that the two courts below erred in law in convicting and sentencing the appellants for an offence alleged to contravene Section 4 (1) of the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994;** that Section 4 (1) does not exist in the Act; that what exists is Section 4 (a) and (b). Counsel submitted the charge sheet was never amended to reflect the correct Section of the Act; that **Section 382** of the **Criminal Procedure Code** cannot cure the defective charge sheet; that the alleged Section 4 (1) goes to the root of the charge against the appellants; that the two courts erred in law thereby rendering the trial, conviction and sentence of the appellants bad in law and a nullity.

15. The appellants further submitted that the learned judge erred in law in enhancing the sentence meted on the appellants from a term of 7 years' imprisonment to life imprisonment in addition to a fine of One Million shillings. It was submitted that the judge erred in enhancing the sentence without warning and notice to the appellants; that it is illegal for a judge to enhance sentence without notice and warning; that the judge further erred in failing to give the appellants an opportunity to mitigate on the enhanced severe life sentence.

16. The 2nd appellant, acting in person, relied on his written submissions. He submitted that the judge had no jurisdiction to enhance the sentence since the respondent had neither appealed nor cross-appealed against sentence; that there was no notice to enhance the sentence; that a notice of enhancement of sentence should issue before a court can legally enhance a sentence meted on a convicted person.

RESPONDENT'S SUBMISSIONS

17. The respondent in opposing the appeal filed its written submissions. The Principal Prosecution Counsel reiterated that this was a second appeal that must be confined to matters of law; that the prosecution proved its case to the required standard; that the learned judge did not err in enhancing the sentence meted on the appellants because the trial magistrate imposed an illegal sentence.

18. On the issue of defective charge sheet, the respondent conceded that Section 4 (1) does not exist in the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.** Notwithstanding, it was submitted that Section 382 of the Criminal Procedure Code cures the defect in the charge sheet; that the appellants did not suffer any prejudice during the trial and there was no miscarriage of justice arising from the fact that Section 4 (1) does not exist in the Act. It was submitted that at the time of taking plea, the particulars of the offence were read to the appellants and they understood the charge which they were faced with. It was urged that there was no failure or miscarriage of justice in the manner in which the trial and appeal of the appellants was conducted by the two courts below.

19. Submitting on enhancement of sentence by the judge, the respondent conceded that the record does not show if any warning was issued to the appellants. It was also conceded that the State did not a file an appeal or cross-appeal against sentence.

ANALYSIS and DETERMINATION

20. This is a second appeal and by *dint* of ***Section 361(1)*** of the **Criminal Procedure Code, Chapter 75**, **laws of Kenya,** this Court's jurisdiction is limited to matters of law only. In **Chemagong vs. Republic [1984] KLR 213** at page 219 this Court held:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)".***

21. A ground urged in this appeal relates to enhancement of sentence without warning, notice or a cross-appeal. This Court in ***Samwel Mbugua Kihwanga – v - Republic, Cr. App. No. 239 of 2011,*** explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal. It is worth recalling that in **Ogolla s/o Owuor, [1954] EACA 270** the predecessor of this Court stated:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

22. Further, in **EGK vs Republic, [2018] eKLR this Court** observed:

> *"Be that as it may, we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the Sexual Offences Act is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. This court has had occasion to consider an enhancement of sentence without a cross-appeal and without warning an appellant in the decision of JJW vs Republic [2013] eKLR wherein it states: -*

"We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

23. Moreover, this Court in ***JOA v. Republic, Cr. App. No. 25 of 2011*** and ***Charles Muriuki Mwangi v. Republic, Cr. App. No. 24 of 2014*** held that in the absence of a cross-appeal, it was necessary for the court to warn the appellant that the sentence was likely to be enhanced, and having failed to do so, the appeal against sentence was allowed. In **Mutuku – v- Republic, [1980] KLR 532,** this Court set aside enhancement of sentence by the High Court due to inordinate delay on the part of the prosecution in making an application for enhancement.

24. In **Josea Kibet Koech V Republic, Criminal Appeal No. 126 of 2009,** this Court expressed;

"Similarly, the State did not give any notice of enhancement of the sentence. In his submissions before us Mr. Omutelema conceded that the learned Judge of the superior court had no jurisdiction to enhance the sentence.

The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submission that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction. In the circumstances, this appeal is allowed to the extent that the sentence of 30 years imprisonment imposed by the High Court is set aside and in its place we reinstate the sentence of seven (7) years imprisonment to commence from the date the appellant was sentenced by the Senior Resident Magistrate."

25. In **H.O.W. Vs Republic, Criminal Appeal No. 326 of 2010**, this Court likewise expressed;

"Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning. (Emphasis supplied)

All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice.

We think we have said enough to indicate that this appeal must succeed. The appeal is allowed. Conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held."

26. In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence.

27. Further, we have considered the submissions on the alleged defective charge sheet due to non-existence of Section 4 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. In **Sigilani - v – Republic, [2004] 2 KLR 480** it was stated:

"The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged 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."

28. This Court while addressing itself to the question of a defective charge stated as follows in the case of **Obedi Kilonzo Kevero vs Republic, [2015] eKLR (CA at Nairobi)** per **Koome, G.B.M. Kariuki & Sichale JJA**.

"The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an Appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case of J.M.A v R [2009] KLR 671, it was held inter alia that:

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the Appellant is not discernible."

29. Further, this Court observed in ***Samuel Kilonzo Musau - v - Republic, Cr. App No. 153 of 2013,*** that Section 382 of the Criminal

Procedure Code insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also ***George Njuguna Wamae v. Republic***, ***Cr. App. No. 417 of 2009***). *The Section provides:*

> ***382: "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:***
>
> ***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."***

30. *In the instant matter, the contestation is that Section 4 (1) does not exist in the* **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. We have examined the Act. Indeed, there is no Section 4 (1). This fact was not brought to the attention of the two courts below. It would seem even the prosecution was not aware that Section 4 (1) does not exist in the Act. Otherwise the prosecution would have amended the charge sheet. Due to non-existence of Section 4 (1) in the Act, we find the appellants were charged and convicted under a provision of law that does not exist. The trial, conviction and sentence meted out on the appellant is hereby set aside on that score as well.

31. The upshot is that this appeal has merit and is hereby allowed. The convictions are quashed and the sentences set aside. The appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR