IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 64 OF 2015

BETWEEN

MOHAMED FAMAU BAKARI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.)

dated 21st September, 2012

in

Criminal Appeal No. 64 of 2010)

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JUDGMENT OF THE COURT

The appellant was aggrieved by the conviction and life sentence in addition to a fine of Kshs.1,000,000 imposed by the trial court in the Malindi Chief Magistrate Criminal Case No. 1048 of 2009, in which he was found guilty of trafficking in narcotic drugs contrary to **section 4(a)** of the **Narcotics Drugs and Psychotropic Substances (Control)Act**. His first appeal to the High Court was dismissed after that court (**Meoli, J.**) found no substance in the grounds proffered. He now comes to this Court with a second appeal arguing that the High Court erred in upholding the Kshs.1,000,000 fine without evidence of the market value of the drugs determined by a proper officer; failing to see the defect in the charge sheet which did not specify the manner of trafficking; failing to appreciate the application of **Section 179(2)** of the Criminal Procedure Code which permits the court, where the facts disclose a minor offence than that charged, to conviction the minor offence; failing to hold that without the evidence of the arresting officer, the reason for his arrest was not established; and failing to find that the case was not proved beyond reasonable doubt and that his defence was not considered.

Before us the appellant relied on written submissions in which he argued that the charge sheet upon which he was tried was defective for failing to specify the manner in which he was *"trafficking"* in narcotic drugs; and that without this evidence the trial court ought to have convicted him on a lesser charge of being in possession of narcotic drugs. He relied on this Court's decision in **Madline Okoth & Another v R(2007) eKLR.** He also submitted that there was no basis for the market value of Kshs.3,900 reflected in the charge sheet without a certificate of a proper officer as required by **Section 86** of the Act; and that

since his arrest was initiated by an informer's lead, the failure to call the informer as a witness even though the court is empowered to do so by **Section 150** of the Criminal Procedure Code was fatal.

Mr. Yamina learned counsel for the respondent opposed the appeal against the conviction but urged us to interfere with the sentence imposed. He submitted that there was sufficient evidence to warrant the conviction for the offence of trafficking and that the two courts below properly so found; that both courts were in agreement that the manner of trafficking was clear from the evidence; that the appellant was transporting; that although transportation is not part of the definition of trafficking, it is synonymous with the word conveying which is part of that definition; and that in any case the appellant was not prejudiced by the failure to specify the manner of trafficking since there was no dispute that the appellant was travelling in a *matatu* from Mombasa towards Malindi when he was arrested and found with the drugs.

Regarding the value attached to the drugs, counsel submitted that the police officers who arrested the appellant were from the Anti-Narcotic Unit and were qualified by experience to give that value; and that the value of the drugs is not material to prove the charge under **section 4(a)** of the Act but is only necessary for the purpose of sentencing. The failure to call the informer, it was argued, did not affect the value and weight of the evidence presented at the trial.

Under **section 361(1)** of the Criminal Procedure Code the jurisdiction of this Court is specifically limited to consideration of matters of law and severity of sentence is a matter of fact. The other fundamental jurisdictional principle is that this Court will not interfere with concurrent findings of fact by the two courts below unless the findings were based on no evidence at all or on a perversion of the evidence, or if no court would reasonably have concluded as the lower courts did had it followed that evidence. See **M'Riungu v R(1983) KLR 455**.

We for our part are satisfied with the concurrent finding of the two courts below that the appellant was arrested following a tip-off and upon being searched the drugs in question were recovered on his person. The charge sheet upon which he was tried was framed thus:

> **"TRAFFICKING IN NARCOTICS DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTICS DRUG AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT NO. 4 OF 1994 MOHAMED FAMAU BAKARI: ON 27TH DAY OF JULY 2009 AT ABOUT 2100 HOUR AT SERENA AREA IN MALINDI LOCATION WITHIN MALINDI DISTRICT OF THE COAST PROVINCE WAS FOUND TRAFFICKING IN NARCOTICS DRUGS TO WIT 7 BIG ROLLS OF CANNABIS AND 50 TABLETS OF ROHYPNOL ALL VALUED AT KSH.3,900/- IN CONTRAVENTION OF THE SAID ACT."**(our emphasis)

The main complaint in this appeal is that the charge as framed did not specify the manner in which the appellant was trafficking in drugs, since under **section 2(1)** of the Act, trafficking can entail the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution; and that the charge sheet ought to have identified one of the foregoing transactions that the appellant was allegedly engaged in at the time of his arrest. We agree that since trafficking under the law involves 12 distinct activities, the specific transaction or transactions a suspect is accused of must be specified in the charge. As part of fair trial the suspect must know the case against him. In this case, the appellant was entitled to know whether he was accused of buying, selling, giving, supplying, conveying or even distributing the drugs. Having said that, we are satisfied that in the circumstances of this case the appellant was not prejudiced by the failure to specify the transaction because the transaction in which he was engaged at the material time was not in controversy.

In any case **section 134** of the Criminal Procedure Code requires that only statement of the specific offence or offences together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged, ought to be contained in the charge or information.

The charge reproduced above, in our view contained sufficient particulars as to the nature of the offence. The particulars of the offence and the evidence presented were that the appellant was travelling in a *matatu* when he was arrested having 7 rolls of plant substance which were confirmed by the Government

Chemist to be cannabis, a narcotic drug in the First Schedule; and that he also had 50 green tablets similarly confirmed to be flunitrazepan listed under the Second Schedule to the Act as a psychotropic substance. The trial court found that the trafficking was by transporting. Mr. Yamina also urged us to so find. In the definition of *"trafficking"* the word transportation is not included. The learned Judge for her part was of the view that the appellant was trafficking by way of *"conveying"*. The term **"conveyance"** is defined to mean;**"... a conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel**". As defined above and used throughout in the Act, **"conveyance"** is not the action or process of transportation but the means of transport. See also **section 72(1) (a) (b)** and **(1)** where this is confirmed. The answer as to the nature of the transaction the appellant was engaged in when he was arrested is to be found in the words *"illicit traffic*" in **section 2**. Those words as defined in that section mean;

> **"2… in relation to narcotic drugs and psychotropic substances,**
>
> **…...**
>
> **c) engaging in the conveyance, production, manufacture, possession, sale, purchase, transportation, warehousing, concealment, use or consumption, importation, exportation, or transshipment of narcotic drugs or psychotropic substance;...."**
>
> (Emphasis ours)

All forms of trafficking in drugs and psychotropic substances are illicit. In terms of the provisions of **sections 2(1), 4** and in view of the circumstances of this appeal we are in agreement that the appellant was trafficking by transportation. We find and hold that the offence of trafficking was proved beyond any reasonable doubt and the appellant was liable to the penalty provided for under **section 4(a)**.

We turn to consider the question of sentence and reiterate that by **section 361(1)** of the Criminal Procedure Code, severity of sentence not being a matter of law is outside the jurisdiction of this Court on second appeal. The sentence imposed has, however been challenged, not on its severity but for being illegal. **Section 4(a)** provides the penalty for trafficking in narcotic drugs or psychotropic substance as follows:

> **"4. 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;**
>
> **….".**

This section has been the subject of varying interpretation since the passage of the Act and the courts have not been unanimous in its meaning and application. The widely held view has been over the years that the penalty was mandatory and the court had no discretion but to impose a fine of Kshs.1,000,000 in addition to a life imprisonment. Influenced by this trend the learned trial magistrate, in passing the sentence noted that;

> **"This offence is very serious. In the Court of Appeal decision in Kingsley Chukwu v R Cr. Appeal No. 257 of 2007 which has been brought to my attention, the court held that the sentence for trafficking in narcotic drugs is mandatory and the court has no discretion but to mete it out."**

Clearly the trial magistrate's attention was not drawn to this Court's decision in **Daniel KyaloMuema v R, Cr. Appeal No. 479 of 2007** made subsequent to **Chukwu** case (supra). In that case, though not

brought under **section 4(a)** like the one before us or **Chukwu**the common denominator is the construction of the phrase *"shall be liable"*used in **section 4(a)**.Relying on the provisions of **sections 66(1)** of the Interpretation & General Provisions Act and **section 26(2)** and **(3)** of the Penal Code, the Court held that the principles espoused by these provisions are of general application and were indeed applicable to the Narcotic Drugs and Psychotropic Substances (Control) Act. **Section 66(1)** aforesaid stipulates that:

> **"66(1). Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".**

Section 26 on the other hand states that;

> **"26(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.**
>
> **(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment".**

The court further explained that although trafficking in narcotic drugs is a more serious offence, the use of the phrase *"shall be guilty of an offence and liable"*, did not import a mandatory sentence. That explains why in **Priscilla JemutaiKolongei v R (2005) 1 KLR 7** the appellant who was convicted of trafficking 27.8 kgs of heroin was sentenced to 18 years imprisonment plus a fine and not the prescribed life imprisonment plus a fine. **Gathara v R (2005) 2 KLR 58**is another example where the appellant was sentenced to 10 years imprisonment plus a fine for trafficking in 11 bags of cannabis. As can be seen from the dates of these cases both the learned trial magistrate and Judge still relied on the **Chukwu** case even though courts had departed from its position.

This Court, in addition but in more recent decisions of **Carolyne Anna Majabu v R Cr. Appeal No. 65 of 2014, Kabibi KalumeKatsui v R, Msa Cr. App. No. 90 of 2014,** and **Antony Mbithi Kasyula v R, Criminal Appeal No. 134 of 2012**has reiterated that the word *"liable"* in **section 4(a)** of the Act merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated. In **Antony Mbithi** (supra), after observing that the quantity of drugs with which the appellant was found was substantial, and that from that quantity it was apparent he was a serious drug dealer the court confirmed the life sentence in addition to Kshs.1 million imposed by the High Court. Therefore, depending on the quantity and value of the drugs, the past relevant record of the accused, the court retains its discretion to impose, as it did in the above case, the maximum sentence.

For the foregoing reasons the appeal on conviction is accordingly dismissed. However regarding sentence, considering the appellant's past record, a previous conviction for a similar offence, and in view of the quantity of the drugs he was found transporting, and having regard to what we have said about the sentence under **section 4 (a)** of the Act, we allow the appeal on sentence by substituting the life sentence with 10 years imprisonment and in place of a fine of Kshs.1,000,000 we impose a fine of Kshs.10,000, and in default the appellant to serve three months imprisonment.

Dated and delivered at Mombasa this 11th day of March 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR