IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 62 OF 2015

BETWEEN

MOSES BANDA DANIEL ……APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Meoli,J.) dated 13th February, 2012

in Criminal Appeal. No.36 of 2011)

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JUDGMENT OF THE COURT

The appellant has been relentless in challenging the decision of the Malindi Chief Magistrate in which he was sentenced to life imprisonment in addition to a fine of Kshs.1,000,000/= for the offence of trafficking in narcotic drugs contrary **section 4** of the Narcotic Drugs and Psychotropic Substance (Control) Act, (the Act). After his first appeal to the High Court was dismissed he has now brought this appeal arguing that the two courts below erred in failing to see that the procedure provided for under **section 74** of the Act was not followed, and called in aid of that position the case of **Tumaini Hamadi** v **R** Criminal Appeal No.45 of 2010 and **Hamida Hamisi and another** v **R** Criminal Appeal No.42 and 43 of 2009.

The existence of these decisions copies of which the appellant did not furnish the court is doubtful as our efforts to obtain the actual copies of the judgments have been futile. They are also not reported in the law reports or on the National Council for Law Reporting Website. Our librarians, both in Nairobi and Malindi have been utterly unable to trace them. The appellant also contended that the two courts below ignored to consider his defence.

It was conceded by the appellant that the police officers who arrested him were known to him, and that on the material day they called him as he walked home from the hospital and conducted a search on him, but nothing was found on him. The only question raised in this appeal is whether **section 74** aforesaid was violated. The question whether or not the drugs were found on him, being a question of fact and bearing in mind our duty under **section 361** of the Criminal Procedure Code to consider only matters of law, is not available for our consideration, the two courts below having made concurrent findings that indeed the drugs were recovered from his person.

The jurisdiction of this Court on second appeal has been stated over and over again and does not bear repeating. See **Dzombo Mataza** v **R** Criminal Appeal No.22 of 2012. There is no doubt that under **section 72**of the Act a police officer who has reasonable cause to suspect that any person is in possession of any narcotic drug or psychotropic substance, can stop and search such person or any conveyance in which he is, to seize and detail the aforesaid drugs or substance or any other thing including any conveyance being used for this purpose and to arrest and detain the person found with the drugs or substance until he is brought before the court. **Section 74 A**, the subject of this appeal, on the other hand provide a very elaborate and complex procedure to be adopted upon seizure of narcotic drugs to be used as exhibit in any trial. Because this is the only question in this appeal we reproduce the provision.

> ***"74 A. Procedure upon seizure of narcotic drugs***
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> ***(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorized officers") shall, in the presence of,where practicable-***
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> > ***(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");***
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> > ***(b) a designated analyst;***
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> > ***(c) the advocate (if any) representing the accused person; and***
> >
> > ***(d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same."***

After identification and analysis of the recovered drugs, only the sample is to be returned to the authorized officer together with the analyst's certificate for production at the trial. Thereafter arrangements are made with the trial Magistrate for destruction of the rest of the drugs in the presence of the Magistrate, the accused person, where practicable, and his advocate, if any, and thereafter the Magistrate is required to sign a certificate signifying the fact of such destruction. At the trial the sample, the analyst's and Magistrate's certificates shall be taken as conclusive proof of the nature and quantity of the drug or substance concerned and of the fact of its destruction.

The evidence presented at the trial in this matter was that three police officers, among them PW1 and PW2 from the Anti-Narcotic Unit who were on drugs detection duties in Majengo area of Malindi town noticed the appellant's suspicious behaviour, including his attempt to flee from them. Upon searching him they recovered from his trouser's pocket a substance in powder form wrapped in 23 cigarette paper and newspaper sachets which they suspected to be narcotic drugs. These were packed in appropriate bag, and submitted, using an exhibit memo form, to the Government Chemist. In the exhibit memo form the chemist was requested to analyze and ascertain whether the powder in the 23 sachets were drugs under the Act and they were to identify and indicate the type. PW3, an analyst with the Government chemist, Mombasa, upon examining the powder in the 23 sachets concluded that they were diacetylmorphine which is listed in the First Schedule of the Act as a narcotic drug.

The procedure under **section 74 A** was not raised as an issue during the trial, where the learned Magistrate was satisfied that the charge was proved beyond any reasonable doubt. In the High Court where the appellant was represented by counsel, of the eight grounds of appeal, no issue was raised regarding the application of **section 74 A**. We are however satisfied that this being a matter of law it can properly be taken up for the first time in this second appeal. It is of utmost importance that procedure contained in the substantive provisions of the law be observed and followed with extreme diligence and scrupulous care. Although complex as we have noted, the procedure laid down in **section 74 A** must be

strictly followed.

After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like *"Where practicable"* and "*if any*" convey the meaning that the procedure is not mandatory but directory and the use of the word *"shall"* must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure. On the other hand failure to comply with a mandatory provision must carry and result in a fatal consequence or vitiate the entire proceedings depending on the language of the statute. To appreciate the appellant's complaint we must understand the import of **section 74 A** and to do so calls for the construction of the section**. Halsbury's Laws of England**, 4th Edition (Re-issue), 1995,Vol.44 (1) para.1372 provides us with the necessary guide in this regard. It states;

> ***"The object of interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context."***

The construction of **section 74 A,** which was introduced by the Statute Law (Misc. Amendment) Act No.2 of 2002 will depend on the intention of Parliament in bringing the amendment at the time, making reference to the words used, the aim and purpose, and bearing in mind the other relevant provisions of the statute. To understand the intention of Parliament regarding the introduction of **section 74 A**, the **Hansard** record of Parliament of 6th December 2000 is key to the thinking at the time. The Attorney-General (Amos Wako) in moving the motion for amendment is recorded to have provided the mischief targeted as follows;

> ***"We have noticed many instances where narcotic drugs and psychotropic substances are found and then persons are charged in court, then we discover that part of or substantial portion of the exhibits have somehow <u>disappeared</u> and that of course destroys evidence. There would be great <u>temptation</u> on those officers who are involved to <u>interfere</u> with the exhibits,***
>
> ***Particularly if what has been hauled in by the police is <u>big</u>. This is because of the money that it may attract, which can lead to its <u>disappearance</u> from custody. Therefore we are saying that we should remove the <u>temptations</u> for these substances disappearing from custody by enacting a law which will in the course of investigations avoid such occurrence."****(Emphasis ours)*

Clearly the intention of Parliament was to ensure that the drugs or substance once recovered are not interfered with before the trial. That is why after ascertaining the nature and weight of the drug and obtaining the certificate of the analyst the rest of the drugs are to be destroyed immediately and only a sample and a certificate are presented as exhibits at the trial. The provision, in our view will be more relevant where a large haul of drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible.

The matter before us involved only 23 sachets carried in the appellant's trouser pocket and whose value according to the charge sheet was only Kshs.2,300/=. Although that may be immaterial we find, for the purpose of **section 74A**that it would not have been priacticable to subject the drugs recovered from the appellant to that complex procedure involving a magistrate, prosecutor, two analysts and an advocate. We come to the conclusion that **section 74 A** was not violated.

The appellant also alleged that his defence was ignored. That contention has no substance in view of the detailed consideration of the appellant's sworn defence. That ground is rejected.

What has, however concerned us is the sentence. Mr.Yamina, learned counsel for the respondent readily

conceded and rightly so in our view that the two courts below misdirected themselves in importing mandatory language into **section 4(a)** of the Act, yet the section has conclusively been interpreted as discretionary by this Court in **Kabibi Kalume Katsui** v **R** Msa Criminal Appeal No.90 of 2014. With respect, we agree that the imposition of life sentence in addition to a fine of Kshs.1,000,000/= was in error. The learned Judge (Meoli, J) too fell into that error even, after appreciating that this Court had departed from the holding in **Chukwu** v **R**, Criminal Appeal No.257 of 2007 in its subsequent decisions in **Daniel Kyalo Muema** v **R** Cr. Appeal No.479 of 2007 and **Gathara** v **R** (2005) 2 KLR 58.

For these reasons the appeal on conviction fails and is dismissed. However we allow the appeal on sentence by setting aside the life imprisonment and a fine of Kshs.1,000,000/= and in their place substitute, respectively ten (10) years imprisonment and a fine of Kshs.10,000/= and in default three (3) months imprisonment. It is so ordered.

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