IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 111 OF 2014

BETWEEN

ALEX NJUGUNA KIMANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Mombasa (Kasango, J.) dated 31st March 2014

in

H.C.CR.A. No. 65 of 2012)

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JUDGMENT OF THE COURT

By judgments dated 16th March 2012 and 31st March 2014, the Chief Magistrate's Court at Mombasa and the High Court at Mombasa, respectively, made concurrent findings of fact that on 1st March 2011, ***the appellant, Alex Njuguna Kimani*** was selling heroin at Mtwapa, Kilifi County. What is before us is the appellant's second appeal, which by dint of the provisions of section ***361*** of the ***Criminal Procedure Code*** must be restricted to matters of law only. Regarding the jurisdiction of this Court in a second appeal, the Court expressed itself as follows in ***Boniface Kamande & 2 Others v. Republic, Cr. App. No. 166 of 2004:***

> ***"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it."***

Subject to the above caveat, the appellant's appeal challenges both his conviction and the sentences of Kshs 1 million fine and life imprisonment meted out by the High Court. Section 361 of the Criminal Procedure Code further provides that severity of sentence is a question of fact and therefore is not an issue to be addressed in a second appeal. However, this Court has jurisdiction, in a second appeal, to

entertain an appeal against sentence, if what is challenged is the legality, as opposed to the severity of the sentence.

Before the Chief Magistrate's Court at Mombasa, the appellant faced the charge of trafficking in narcotic drugs contrary to ***section 4(a)*** of the ***Narcotic Drugs and Psychotropic Substances Control Act*** (the Act). The particulars of the offence were that on 1st March 2011, he was found at Mtwapa area trafficking narcotic drugs by selling 150 sachets of heroin with a street value of Kshs 30,000.

Four witnesses, namely the two police officers who arrested the appellant at the *locus in quo* (PW1 and PW2), the investigating officer (PW3), and the Chief Chemist at Government Chemist, Mombasa (PW4) adduced the evidence upon which the trial court convicted the appellant. In brief that evidence was that on the material day between 5.00 and 6.00 pm, PW1 and PW2 were on patrol at Shanzu, Mombasa when they received information from an informant regarding a suspect who was in the habit of selling narcotic drugs at Mtwapa. The information was that the suspect used to ride a motorcycle from Shanzu to Mtwapa, where he sold the illicit drugs. Shortly thereafter, the appellant appeared as a pillion passenger on a motorcycle, and the informant pointed him out to PW1 and PW2 as the suspect.

PW1 and PW2 hired a taxi at Shanzu and followed the motorcycle on which the appellant was riding, to Mtwapa. The appellant alighted at Kenol Petrol Station as the motorcycle zoomed off. Soon he was surrounded by a group of people to whom he started distributing "some substances" and collecting money from them in return. PW1 and PW2 pounced and arrested the appellant as the people who had surrounded him scampered and evaded arrest.

Upon searching the appellant, PW1 and PW2 recovered in his possession 150 sachets of a substance that they suspected to be narcotic drugs, and Kshs 3,350. PW4 subsequently examined the substance and found it to be ***Diacetylmorphine***, commonly known as heroine, which is a narcotic drug under the First Schedule of the Act. On his part, PW3 testified that the he had dealt with drug cases before and that the street value of the recovered drug was Kshs 30,000/-.

When he was put on his defence, the appellant elected to make an unsworn statement and called no witness. The gist of his defence was that on the material day he travelled from Shanzu to Mtwapa at about 1.00 pm to pay his rent. He found his landlord's offices closed and on his way back, he was stopped by 5 people who asked him to kneel down and produce his identity card, which he did not have with him. They searched him and took away Kshs 6,000/- before introducing themselves as policemen. He was bundled into a waiting vehicle and joined other arrested person. They were driven round until 9.00 pm when the appellant was locked up at Bamburi Police Station. The following day he was produced in court and charged with the offence which he knew nothing about.

The trial court, being satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to 20 years imprisonment. The appellant was aggrieved and preferred a first appeal in the High Court. That appeal was not only dismissed, but the High Court, convinced that the sentence imposed by the trial court was illegal, set it aside and instead sentenced the appellant to a fine of 1 million shillings and imprisonment for life. Further aggrieved by the judgment of the High Court, the appellant lodged the second appeal now before us.

The appeal is premised on three grounds. The first ground is that the charge was not proved because there was no evidence to prove that the appellant was selling narcotic drugs. It was submitted by his learned counsel, ***Mr. Ngumbao***, that the evidence on record indicate only that the appellant was collecting money from the people who had surrounded him and that therefore a conviction under section 4(a) of the Act was unsafe because selling was not proved.

Secondly, it was submitted that the prosecution had violated section 74(A) of the Act regarding the procedure upon seizure of narcotic drugs, which the appellant contended must be complied with strictly. In support of that proposition the appellant relied on the decisions of this Court in ***Moses Banda Daniel v. Republic, Cr. App. No. 62 0f 2015*** and ***Mohammed Famau Bakari v. Republic, Cr App. No. 64 of 2015.***

Lastly, the appellant submitted that the sentence imposed by the High Court was illegal because the first appellate court proceeded on the erroneous assumption that the sentence that it imposed was mandatory. In addition, the appellant submitted, neither had the prosecution appealed against the sentence meted by the trial court, nor did the High Court warn him that it intended to enhance his sentence. It was also submitted that the appellant was not afforded an opportunity to mitigate before he was sentenced and that both the trial and first appellate courts erred by ignoring the fact that the appellant was a first offender.

Mr. Yamina, Principal Prosecution Counsel opposed the appeal against conviction, but conceded the appeal against sentence. As regards conviction, counsel submitted that the prosecution had adduced evidence to prove beyond reasonable doubt that the appellant was arrested while selling narcotic drugs. Further, counsel argued, immediately upon arrest the appellant was found in possession of a large amount of narcotic drugs and money, which he had collected from the people to whom he was selling the illicit drugs. It was further urged that the two courts below made concurrent findings that the appellant was arrested while he was selling drugs and that there was no basis established by the appellant to warrant interference with that finding.

On sentence, Mr. Yamina agreed that the trial court had discretion while sentencing the appellant and that the prescribed sentences in the Act were not mandatory as stated by the High Court. He nevertheless urges us to consider that the quantity of drugs recovered from the appellant was not small and was intended to be consumed by many people.

As we stated at the beginning of this judgment, the two courts below made concurrent findings of fact that the appellant was arrested at Mtwapa while selling narcotic drugs to a group of people. We are satisfied that indeed the evidence of PW1 And PW2 taken together establishes that the appellant was distributing the drugs and receiving money in return. When the police arrested the appellant, the people to whom he was distributing the drugs and from whom he was collecting money fled, clearly indicating that they were not at the *locus in quo* for an innocent purpose. Immediately upon arrest the police recovered 150 sachets of drugs from the appellant, together with some money, all of which were produced in Court as exhibits. The substance, which was recovered from the appellant, was subsequently certified to be heroin, a narcotic drug under the Act. We find no basis upon which we can disagree with the concurrent findings of fact by the two courts below.

The first issue of law raised in the appeal is whether selling of narcotic drugs constitutes trafficking as defined in the Act. The particulars of the charge against the appellant, as amended stated that:

> ***"On the 1st day of March, 2011 at Mtwapa are in Kilifi District within Coast Province, (the appellant) was found trafficking narcotic drugs by selling 150 sachets of heroine with a street value of Kshs 30,000 in contravention of the (Narcotics Drugs and Psychotropic Substances (Control) Act)."*** (Emphasis added).

Section 2 of the Act defines trafficking as follows:

> ***"trafficking" means the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof, but does not include—***
>
> ***(a) the importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefor under this Act in accordance with the licence;***
>
> ***(b) the manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefor under this Act in accordance with the licence; or***

(c) the selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or 10 Narcotic Drugs and Psychotropic CAP. 245 Substances (Control) [Rev. 2010

(d) the selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist."

From the above definition, there can be no doubt that selling or giving or distributing a narcotic drug constitutes trafficking. The evidence on record does not afford the appellant any of the exceptions or defences specified in paragraphs (a) to (d) under which the selling, giving or distribution of narcotic drugs is not a criminal offence under the Act.

The second issue of law regards the alleged failure to comply with section 74A of the Act, which we are satisfied is a question of law. In ***Moses Banda Daniel v. Republic, (supra)*** this Court considered section 74A of the Act in detail and noted that it provides a very elaborate and complex procedure to be adopted upon seizure of narcotic drugs which are intended to be used as exhibits in any trial and further that it is of utmost importance that the procedure prescribed in the section be observed and followed with extreme diligence and scrupulous care. Nevertheless the Court also made a pertinent observation as follows:

"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."

The Court concluded that depending on the circumstances of the case and taking into account pertinent considerations such as the quantities of drugs involved, sometimes it may not be practicable to subject drugs recovered from a suspect to the complex procedure involving a magistrate, prosecutor, two analysts and an advocate.

In this appeal, the High Court rejected the ground of appeal founded on violation of section 74A of the Act after finding that the appellant had not established the manner in which the section was violated. We agree with the High Court that on the basis of the record, no violation of section 74A, leading to the appellant's prejudice, has been established.

The last question of law relates to the legality of the sentence. As we have already stated, the trial judge set aside the sentence of 20 years imprisonment imposed upon the appellant by the trial court, and substituted therefor a fine of Kshs 1 million and life imprisonment. In arriving at that decision, the learned judge quoted the judgment of this Court in ***Kingsley Chukwu v. Republic, Cr. App. No. 259 of 2007*** and concluded that section 4(a) of the Act prescribes a mandatory sentence of a fine of Kshs 1 million or three times the value of the drug, which ever is greater, in addition to imprisonment for life.

We are satisfied that the respondent's concession of the appeal as regards sentence is well founded. In***, Caroline Auma Majabu v. Republic, Cr. App. No 65 of 2015,*** this Court departed from the holding in ***Kingsley Chukwu v. Republic (supra)*** and concluded that section 4 (a) of the Act does not prescribe mandatory sentence, that it prescribes the maximum sentence and that therefore the court has discretion to award a sentence less than the maximum. (See also ***Kabibi Kalume Katsui v Republic, Cr App. No. 90 of 2014; Daniel Kyalo Muema v. Republic, Cr App. No. 479 0f 2007***; ***Moses Banda Daniel v. Republic, (supra)*** and ***Mohammed Famau Bakari v. Republic (supra).***

The appellant's complaint that he was not afforded an opportunity to mitigate has no merit. The record is clear enough that upon being convicted by the trial court, he was offered an opportunity to mitigate, but answered thus:

"I have nothing to say."

Nevertheless, there is merit in the complaint that the two courts below did not consider the fact that the appellant was a first offender. Although the prosecutor informed the trial court that the appellant had no previous record, the trial court somehow concluded that the appellant was a major drug dealer. It is trite that the court is under a duty to consider all matters in favour of and against the accused person. (See ***Felix Nthiwa Munyao v. Republic, Cr. App. No. 187 of 2000.***

Ultimately we find that the appeal against conviction has no merit and is hereby dismissed. The appeal against sentence, on the other hand, has merit and is hereby allowed. We accordingly set aside the sentence of fine of Kshs 1 million and imprisonment for life and substitute therefor a sentence of imprisonment for ten (10) years and a fine of Kshs 10,000/- and in default three (3) months imprisonment. It is so ordered.

Dated and delivered at Malindi this 1st day of July 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