IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 133 OF 2012

BETWEEN

JOSHUA ATULA ATULA.....1ST APPELLANT

BERNARD ONYANGO ODHIAMBO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Nakuru (Hon. Lady Justice R.P.V Wendoh)

dated 4th May 2012)

in

H.C. CR. APPEAL NO.254 OF 2010)

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JUDGMENT OF THE COURT

1. The appellants, **Joshua Atula Atula** (the first appellant) and **Bernard Onyango Odhiambo** (the second appellant) were charged jointly before the Senior Principal Magistrate Court at Naivasha in Criminal Case No.696 of 2010 with the offence of trafficking in narcotic drugs contrary to **Section 4(a)** as read with **Section 3** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars of the offence were that on 31st day of March 2010 along Naivasha – Maai Mahiu Road in Naivasha District of the Rift Valley Province, they jointly were found conveying in a motor vehicle registration number KBJ 502M Toyota Caldina 2,200 stones of *Canabis Sativa* with a street value of Kshs.440,000/- which was not in medicinal preparation form. They denied the offence and were tried before the learned Senior Principal Magistrate (T.W.C. Wamae) who in a judgment delivered on 29th July 2010 convicted them and imposed a fine of Kshs. 1,320,000/= on each of the appellants, in default to serve 12 months imprisonment and in addition each appellant was sentenced to serve a further term of 15 years.

2. The appellants were aggrieved by the conviction and sentence by the trial court and appealed to the High Court of Kenya at Nakuru in Criminal Appeal Nos.253 and 254 of 2010 respectively. These appeals were consolidated when they came for hearing before the learned Judge R.P.V. Wendo. The learned Judge after hearing the appeal found the same to have no merit and upheld the conviction. The learned judge however, appreciating that the value of the drugs was not ascertained reduced the fine imposed by the trial court to Shs.1,000,000 in default 12 months imprisonment in accordance with the **Narcotic Drugs and Psychotropic Substances Control Act**. This provoked this appeal.

3. Being a second appeal our duty is to consider only issues of law and not to consider matters of fact which have been considered by the two courts below. This is indeed the essence of **Section 361 (1) (a) Criminal Procedure Code** which limits our jurisdiction in respect of second appeals. This limited jurisdiction has been reiterated in several occasions by this Court. One such instance is the case of **Thiongo v R [2004] 1 EA 333** where it was held:-

> *"**On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."***

4. Accordingly, we have examined the record of appeal and the memorandum of appeal to see whether, and, if so, which issues of law are raised calling for our determination. The appeal was also argued before us in which the appellants appeared in person whilst the State was represented by Miss Nelly Ngovi, Prosecution Counsel.

5. The first appellant filed his amended grounds of appeal which doubled up as submissions from the way they have been drafted and presented before us. In his arguments and following the line adopted in the amended grounds of appeal, the appellant's appeal does not relate to the conviction but rather appeals for a reduction of sentence. In effect the 1st appellant is mitigating before the Court for a consideration and reduction of the sentence.

6. The notice of appeal filed by the second appellant does not specify whether the appeal is against conviction or sentence in terms of **rule 59** of this Court's rules. The said notice also did not state the complaint against the conviction or sentence. Be that as it may, the second appellant filed supplementary grounds of appeal raising 5 issues of appeal. These are:

> ***"a) The learned judge erred by upholding the sentence of 15 years imprisonment and imposing a fine of Kshs.1,000,000/- in default 12 months imprisonment without complying with section 86 of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and section 4(a) of the said Act;***
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> *b. **The learned judge erred in law by upholding the conviction on a defective charge contrary to the provisions of section 137C of the CPC;***
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> *c. **The learned judge erroneously relied on circumstantial evidence based on suspicion to sustain the conviction without observing that the same cannot hold water due to several co-existing circumstances which weaken the inference of guilt;***
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> *d. **The first appellate court judge erred in law by failing to find that the prosecution case was not established beyond shadow of doubt hence was below the required standards of proof;***
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> *e. **The learned judge equally erred in law by failing to find that the defense statement by the appellant was not given due consideration yet the same was not rebutted by the prosecution and was capable of having the appellant acquitted."***

7. The second appellant also filed written submissions on the above grounds in which he merged grounds (c) and (d). In his submissions before us, the second appellant reiterated and highlighted the written submissions. Thus, the second appellant opposes the conviction on the grounds that the weight of the

cannabis was not indicated; the ignition key which the appellant was alleged to have been arrested with was not brought as an exhibit before the High Court and the motor vehicle was not dusted for the appellant's fingerprints, the registered owner of the motor vehicle having denied granting the vehicle to the second appellant. The second appellant submitted that there was a contradiction in evidence in so far as the officer who allegedly chased and arrested him is also alleged to have gone to Longonot police station to seek reinforcement. The second appellant finally mitigated that he is the breadwinner of his family and should be released.

8. Miss Ngovi, for the State submitted in response to each of the appellant's submissions. Regarding the first appellant, learned counsel pointed out that the first appellant does not challenge the conviction but only the sentence. She however argued that no point of law had been raised on the sentence and the appeal should be dismissed for lacking in merit.

9. In respect to the second appellant's appeal, learned counsel opposed the same too. Counsel submitted that the second appellant had been held to be the driver of the motor vehicle KBJ 502M as corroborated by the evidence of PW1,2,3 and 5 and that there had been a concurrent finding of this fact by the trial court and the High Court as a first appellate court. As regards the submission as to the defective charge, counsel submitted that the particulars were in conformity with the provisions of **section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act** as the market value of the cannabis was given and that is what was important. Counsel submitted that the second appellant had not challenged conviction but only mitigated.

10. We now consider the first appellant's case. It is evident that he is not contesting the conviction. The appellant did not challenge the sentence but only focused on mitigation with the hope that we are persuaded to reduce the sentence. As the prosecution counsel rightly pointed out, the appellant did not raise any issue of law but rather one of fact. There is no allegation that the sentence is unlawful. We have perused the record and note that the first appellant was allowed to mitigate before the trial court which considered the same in its sentencing. We reiterate this Court's decision in **David Munyao Mulela & another v Republic [2013] eKLR** where it was held:-

> ***"The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact."***

Without need to say more, the first appellant's appeal fails on this ground.

Additionally, mitigating on a second appeal is alien and we have no jurisdiction to consider the same. The first appellant's appeal must totally fail.

11. Turning to the second appellant, we note that he challenges both the conviction and the sentence. Of his grounds, we pick out two main grounds that raise points of law worthy of consideration by this Court. First, whether the charge was defective and contrary to the provisions of **section 137** of the Criminal Procedure Code and second, whether the sentence was in conformity with the provisions of **section 86 and 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**.

12. The other grounds of appeal set out by the second appellant largely revolve around the discrepancies that allegedly arose out of the witness testimonies presented before the trial court. This Court has previously ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so a first appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. (See **Vincent Kasyula Kingo versus Republic, Nairobi Criminal Appeal No.98 of 2014).** Where discrepancies in the evidence do not affect an otherwise proved case against an accused, a court is entitled to ignore those discrepancies (see **Njuki & 4 others versus Republic [2002] 1KLR 771**) as guided by the provisions of **section 382** of the **Criminal Procedure Code**. Our perusal of the record indicates that the High Court as an appellate court of the first instance did appraise and re-evaluate the evidence and still came to the same conclusion as the trial court. We disagree with the second appellant and point out that the duty to re-evaluate the evidence

does not lie with us in this instance when we are sitting as a second appellate court.

13. In considering the second appellant's first point on law on the defective charge, it was his contention that the weight of the alleged drugs was not indicated in the charge as framed. This issue was also raised by the second appellant before the High Court whereat the appellant contended that the sampling as required under **section 74A** of the **Narcotic Drugs and Psychotropic Substances Control Act** was not done in his presence. The full effect and tenor of this provision was discussed by this Court in **Moses Banda Daniel v Republic [2016] eKLR** where it was held as follows:-

> ***"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"***

Accordingly, the objective of this **provision74A** was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of *cannabis sativa*. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances.

14. The second appellant referred us to the case of **Evans Masese Mose v Republic [2006] eKLR** to support his argument that **section 137** of the **Criminal Procedure Code** sets out the mandatory rules for framing of charge and information failure of which is fatal to the entire charge and subsequent conviction and sentence. That may be so but unfortunately, that case being a High Court decision does not bind this Court as we hear and determine appeals from the High Court and furthermore it is not relevant to the matter before us; to which extent therefore it is not persuasive. This Court has previously considered the said **section 137** of the **Criminal Procedure Code**. In **Antony Mbithi Kasyula v Republic [2015] eKLR,** it was held:-

> ***"It is evident that the intention of the legislature was that the particulars of the charge are couched in a language that is simple enough to enable an accused person to understand the offence and hence be able to prepare their defence."***

This Court went on further in **Eunice Kalama Jabu v Republic [2010] eKLR** to state:-

> ***"However, perusing the charge thoroughly and the provisions of the law as stated above, we find it difficult to appreciate the appellant's claim as stated in this ground of appeal. The particulars of the drugs she was found with is stated; the street value of these drugs is stated; the place where she was found with the drugs is stated and the manner in which she was trafficking on the drugs which was that she was storing them is also stated. We do agree with Mr. Ondari that the charge was properly drawn and we see no reason to interfere with the subordinate court's decision and the superior court's decision on this score."***

15. Relating the above to the present case, it did not come out before the trial court, the High Court or even before us that the second appellant did not understand the charge to be able to prepare for his defence properly. Like in the **Eunice Kalama case** (supra), the particulars of offence stated indicated the particulars of the drugs being cannabis sativa, the street value, the place where he was found with it, and the manner in which he was trafficking. In the circumstances, we do not find merit on this ground of appeal.

16. The second appellant also raised a further point of law relating to the sentencing. It is the appellant's position that the sentence did not conform to the provisions of **section 86 and section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**. In his submission, the second appellant

argued that it was imperative that the value of the drugs be ascertained properly where a fine is imposed based on the market value.

17. **Section 86(1)** of the **Narcotic Drugs and Psychotropic Substances Control Act** provides:-

> ***"Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof."***
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> **Section 4(a)** on the other hand provides for the penalty in trafficking in narcotic drugs. It provides:-
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> ***"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.***

It is clear that the above **section 4(a)** deals with sentence. The particular sentence affected by this provision of the law is the additional sentence of fine of Kshs.1 million in default 12 months imprisonment as meted out by the High Court. The trial magistrate had placed a fine of Shs.1,320,000/= in default 12 months imprisonment.

18. As we have discussed above, though no proper valuation may have been carried out on the drugs, a street value was placed at Shs.440,000/=. This was not however fatal to the charge of trafficking as the drugs were indicated sufficiently to be 2200 stones. The Judge of the High Court faulted the trial magistrate for adopting the fine which was three times the indicated street value and instead reduced the fine to Kshs.1 million. A literal reading of that provision indicates that there are two components of the sentence to wit, a fine of one million shillings or three times the market value which component is alternate and in addition, imprisonment for life. From the foregoing, it comes out that failure to properly ascertain the value of the drug as was the case herein results in a default fine of Shs.1 million. The value of the narcotic drugs only becomes imperative if the fine imposed is beyond the sum of Shs. 1 million. In this case, the fine imposed was the minimum of Kshs.1 million and therefore the failure to ascertain the value of the narcotic drugs did not cause any prejudice to the appellant. (See **Antony Mbithi case (supra))**. In the circumstances, we see no need to interfere with this sentence. The second appellant has in any event not addressed any other challenges on the sentence imposed and his appeal fails too in this respect.

19. For these reasons as guided by the law with regard to our limited jurisdiction as an appellate court of the second instance, we hold that the decision by the High Court was made on sound law and it stands. The appeals are unmerited and are dismissed accordingly.

Dated and delivered at Nakuru this 2nd day of August, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR