IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), NAMBUYE & OUKO, JJ.A)

CRIMINAL APPEAL NO. 645 OF 2010

BETWEEN

HENRY O. EDWIN…….....APPELLANT

AND

REPUBLIC……...…….....….RESPONDENT

(*Being an appeal from the judgment of the High Court of Kenya at Nairobi (**Omondi, J.**) dated 13th March 2009*

in

H.C. Cr. A No 111 of 2007)

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JUDGMENT OF THE COURT

1. **Henry O. Edwin**, the appellant herein, was charged with the offence of trafficking in Narcotic drugs contrary to **section 5 (b)** of the **Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994**. The particulars of that offence were that:

   "On the 21st day of February 2007 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, trafficked by conveying 135.5 grammes of narcotic drugs namely cocaine with an estimated market value of Kshs 3,545,600.00 in contravention of the provision of the said Act."

2. The appellant was arraigned before the Chief Magistrate's Court at Kibera on the 26th February 2007. When the plea was read to him, he answered:

   "it is true I trafficked in cocaine."

3. As is the norm, the prosecutor read out the facts of the offence. In the narration of the facts, the prosecutor indicated that the weight of the drugs found on the appellant was 886.4 grammes which had a street value of Kshs 8,650,000.00. After the narration, the appellant responded:

    "***facts are true."***

    After which the court recorded that:

    "Accused convicted on own plea of guilty"

4. The trial magistrate then asked the appellant to offer mitigation, and after considering it, sentenced him to serve thirty years imprisonment and pay a fine of Kshs 10,000,000.00. The court further ordered that should the appellant fail to pay the fine, then he would serve an additional five years imprisonment.

5. The appellant filed an appeal to the High Court in which he faulted the judgment of the trial magistrate. He contended that the conviction was erroneous as there was no expert report from the Government Chemist submitted in court to confirm that the substance was a narcotic drug; that the charge as drawn did not disclose an offence; and that the sentence meted out on him was illegal.

6. That appeal was heard by **Omondi, J**. In her analysis of the grounds of appeal proffered by the appellant, The learned Judge held that **section 5(b)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** suggested that ***'having the analyst report may not be necessary where the person accused does not dispute the nature of the substance alleged to be a narcotic drug.'*** In addition, the learned Judge found no merit in the appellant's assertion that the charge sheet was defective, holding that it was properly drawn and that the appellant clearly knew the case against him. However, the learned Judge agreed with the appellant that a portion of the sentence meted out on him was unlawful. In this regard, she rendered herself in the following manner:

    "The value of the drug is given as Kshs 3,545,600.00 and so the fine which ought to have been imposed ought to be three times the sum, that is about ten million shillings – which was proper but in default. The Act is silent – so one would then fall back on section 28 of the Penal Code on sentencing principles and I concur that in default the sentence ought to have been 12 months – to that extent, I set aside the imprisonment term imposed of 5 years and substitute it with a 12 months sentence to take effect from the date of conviction. The 30 years sentence is within the provisions of the law as the offence carried a life imprisonment term I uphold it."

    (sic)

7. The appellant is still aggrieved and has now filed this second appeal in which he challenges the decision of the first appellate court. He relied on the supplementary memorandum of appeal dated 26th September 2014. These submissions were argued by **Mr. Wandugi,** learned counsel, on behalf of the appellant.

8. Learned counsel for the appellant submitted that the charge sheet was incurably defective. This is because the charge sheet alleges a breach of section 5 (b) of the Narcotic Drugs and Psychotropic Substances (Control) Act, yet that section does not provide for the offence of trafficking. Counsel submitted that the proper section that the appellant ought to have been charged under was **section 4** of the Act which refers to trafficking. Counsel further submitted that the charge sheet did not accord with the facts as it indicated that the appellant '*conveyed*' 135.5 grammes yet the narration by the prosecutor was that he conveyed 886 grammes.

9. Learned counsel for the appellant also contended that there was no certificate of analysis as required by **section 67** of the Act. He submitted that this was irregular, and relied on the decision of this Court in ***Hamayun Khan v Republic***

(Criminal Appeal No 159 of 2000) to buttress his point.

10. Mr. Wandugi also took issue with the value the trial magistrate assigned to the drugs. Counsel argued that the trial court should not have accepted that the value of the drugs was what had been mentioned in the charge sheet. Instead, the drugs in question ought to have been valued in accordance with **section 86** of the Act. In addition, counsel for the appellant took issue with the value assigned to the drugs by the trial court. He contended that the Act requires that the trial magistrate impose punishment after taking into account the market value and not the street value as was done in the present appeal. For these reasons, Mr. Wandugi argued that the sentence imposed on the appellant was illegal.
11. Mr. Wandugi also faulted the trial magistrate for convicting the appellant on his plea of guilt since it was not unequivocal, and stated that in the circumstances, there ought to have been a full trial.
12. **Mr. Wahoro**, Senior Assistant Director of Public Prosecutions, appearing on behalf of the State conceded the appeal on the grounds set forth by Mr. Wandugi. Be that as it may, even with the concession of the State, this Court is still duty bound to reassess the matter and make its determination as to the propriety of the conviction and sentence appealed from. We have stated this before in ***Norman Ambich Miero & Another v Republic [2012] eKLR (Criminal Appeal No. 279 of 2005)*** in which it was held that:

> ***"We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants."***

13. We therefore, will embark on our duty to hear and determine this appeal, reminding ourselves that, as a second appellate court our jurisdiction is limited by **section 361** of the Criminal Procedure Code to the consideration of issues of law. In ***Dzombo Mataza v Republic [2014] eKLR (Criminal Appeal No 22 of 2013)*** this duty was restated in the following manner:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court…. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

14. The first issue which arises for our determination is the appellant's contention that the plea was not unequivocal. The predecessor to this Court in ***Hando s/o Akunaay v Rex [1951] 18 EACA 307 (Criminal Appeal No 220 of 1951),*** warned that there is need for the greatest care being taken where the plea of an accused person appears to amount to a guilty plea. The Court stated that:

> ***"…before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent."***

15. The procedure for taking plea follows a well beaten path. This procedure was well enunciated in ***Adan vs Republic [1973] EA 445*** where the Court held that:

> ***"When a person is charged, the charge and the particulars should be read to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate***

should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts, if the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial."

16. In the appeal before us, we have set out what happened when the appellant was called upon to plead to the charge. After the narration of facts the appellant stated that:

"facts are not true"

17. In *order to* sustain a conviction on *an accused person's own plea of guilt, that plea must be unequivocal; the accused must admit not only to the charge, but to the particulars of the charge as well as to the facts that will be presented by the prosecution. In the appeal before us, there was no unequivocal plea, and the proper procedure that the trial court ought to have followed was to proceed to full trial. In* ***John Muendo Musau v Republic [2013] eKLR (Criminal Appeal No. 365 of 2011)*** this Court held that:

"… if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence."*(emphasis ours)*

18. The trial magistrate was wrong to *proceed to convict the appellant on his own plea, as the plea of guilt ought to have been changed to one of not guilty once the appellant negated the facts as had been narrated by the prosecution. As matters stand, the conviction cannot stand. This would be enough to dispose of the appeal, but we shall nonetheless consider the other grounds of appeal presented by the appellant.*

19. It has been contended by the appellant that the charge sheet was defective, not only because he was charged under the wrong provision of law, but also because the particulars of the charge did not accord with the facts read out by the prosecutor. It cannot be gainsaid that an accused person is to be informed of the charge against him with sufficient clarity. The offence of '*trafficking in narcotic drugs*' is contained in section 4 of the Act. That section reads as follows:

"4. Penalty for trafficking in narcotic drugs, etc.

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; or***

b. ***in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years."***

20. It is trite law that an accused person must be charged with an offence that is known in law. Particularising the charge enables the accused person know the offence with which he is charged, and the likely sentence that he would get should he be convicted. This is information that enables the accused person to adequately prepare his defence. We adopt with approval the sentiments of the High Court in ***Sigilani v Republic [2004] 2 KLR 480***, where it was held that:-

"The principle of the law governing charge sheets is that an accused should be charged

with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

21. We have looked at the Act. Section 5, the section under which the appellant was charged, provides for "***penalty for other acts connected to narcotic drugs, etc."***

There is no section 5(b). The appellant was therefore charged under a non-existent provision of law. This renders the charge sheet fatally defective.

22. The other matter of law that we must deal with is the violations of the provisions of the Act that were made by the trial magistrate. The first of this is an apparent failure of the prosecution to produce a certificate of analysis at the trial of the appellant. Section 74A of the Act requires that once drugs are seized by the police, then a government analyst must take and weigh a sample of the narcotic drug and thereafter, take such samples for the purpose of analysing and identifying the samples. The relevant portion of that section reads as follows:

"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."

23. After analysis, the certificate of analysis must be submitted to the court and produced at the trial of the accused person. This is contained in section 74A(2) which provides that:

"After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person"

24. This procedure was clearly not adhered to in the present appeal, and in the circumstances, this creates doubt as to whether or not the drugs seized from the appellant were indeed cocaine as alleged by the prosecution. This leads us to the issue of the valuation of the drugs. Section 86 (1) of the Act provides for valuation of goods for the purpose of imposing a penalty to an accused person. That section reads as follows:

"(1) Where in any prosecution under this Act any fine is to be determined by <u>the market value</u> of any narcotic drug, psychotropic substance or prohibited plant, <u>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</u>.*(emphasis ours)*

25. As we have alluded to above, there were glaring inconsistencies in the weight and value of the drugs. In the charge sheet, the drugs are described as weighing 135.5 grammes and having a market value of Kshs 3,545,600.00 whereas in the particulars read out to the appellant, it was stated that the appellant emitted 886.4 grammes of cocaine which had a street value of the drugs was Kshs 8,650,000.00. These glaring inconsistencies are significant. They directly affect the tenor of the evidence against the appellant, and the trial court erred in convicting the appellant in the face of such inconsistencies.

26. From Section 86 above, it is clear that the value that ought to be relied upon by the trial magistrate in imposing a penalty is the market value of the drug, and as it were, there is no evidence as to what the proper market value of the drugs is. Needless to say, the trial magistrate fell into grave error in relying on the street value of the drugs when he sentenced the appellant. The High Court too, in upholding that sentence.

27. We think we have said enough to demonstrate that the conviction of the appellant is untenable in law. We therefore hereby order that he be released forthwith, unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 20th day of March, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR