



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
(CORAM: OKWENGU, MAKHANDIA & SICHAL
CRIMINAL APPEAL NO. 134 OF 2012

BETWEEN

ANTONY MBITHI KASYULA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Mombasa (Nzioka, J.) dated 18th May, 2012

In

H.C.CRA. No. 60 of 2011)

JUDGMENT OF THE COURT

[1] This is a second appeal lodged by **Anthony Mbithi Kasyula**, (the appellant) who is dissatisfied with the judgment of the High Court (**Nzioka, J.**) delivered on 18th May, 2012. The appellant and one **Alois Wambua Maungu** (hereinafter referred to as co-accused) were originally jointly charged before the Chief Magistrate's Court in Mombasa with the offense of trafficking in narcotic drugs contrary to **section 4(a)** of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 ("**The Act**"). The appellant and his co-accused were tried and convicted by the Senior Resident Magistrate's Court at Mombasa. They were each sentenced to serve seven years imprisonment and in addition to pay a fine of Kshs.one million.

[2] Being dissatisfied with the judgment of the trial court, the appellant appealed to the High Court against his conviction and sentence. His appeal against conviction was dismissed by the High Court (**Nzioka, J.**). The High Court dismissed the appeal against sentence but found the sentence of seven years imposed irregular as in its opinion the appellant ought to have been sentenced to life imprisonment. The High Court therefore substituted the sentence of seven years imposed upon the appellant with the sentence of life imprisonment in addition to the fine of Kshs.one million.

[3] The appellant was not deterred but instead lodged the present appeal in which he raised five grounds.

In short, the appellant contended that the learned Judge of the High Court erred: in failing to note that the charge against the appellant was defective; in failing to analyse or appreciate the evidence on record; in basing her findings not on evidence but personal experience and or perception; in holding that the sentence provided under **section 4** of the Act was a mandatory sentence and enhancing the appellant's sentence on that ground.

[4] During the trial, five witnesses testified for the prosecution. Briefly their evidence were as follows: On 19th July 2009 at around 3a.m, police officers from the Highway Patrol including **PC Fredrick Nyamvula Oudia (PW1)** and **Inspector Hassan Elema (PW3)**, were on duty between Samburu and Taru area when they saw a motor vehicle registration No. KAP 583V heading towards Mombasa. They stopped the vehicle and asked the occupants of the vehicle who were three men to come out. The three persons came out and immediately, one of them bolted and ran into the nearby bush. Inspector Elema Shot in the air and the officers managed to arrest the remaining two, one of them being the appellant herein. Upon opening the boot of the motor vehicle, the officers found four sacks of cannabis sativa or "bhang". The two suspects together with the four sacks of bhang were then taken to Mariakani Police Station where the sacks were weighed and found to be 60 kilogrammes. Officers from the Anti-Narcotics division were contacted and **PC Joseph Wainaina (PW4)** who is attached to the Anti-Narcotic Unit together with **Sgt, Langat** and **Jackson Sweire** proceeded to Mariakani where the four sacks containing green plant material was handed over to them. They took samples from each sack and prepared an Exhibit Memo Form which they forwarded together with the samples to the Government Analyst for examination.

[5] The samples were examined by **John Njenga**, a Government Analyst who prepared a report which was produced in evidence confirming that the plant material was bhang. **Samuel Nyamweya Ouma (PW2)** a teacher and principal of JCC High School Bamburi was the owner of motor vehicle KAP 583V, a Toyota sprinter. On the 18th July, 2009, one Wambua who was a person he had known for about two years, borrowed his car explaining that he needed to take a patient to hospital. He gave Wambua the vehicle on the understanding that Wambua was to return it the same day. Wambua did not return the vehicle and PW2 was shocked when he called him the next day to learn that he was at Mariakani. PW2 directed Wambua to return his vehicle but the vehicle was not returned and he could not reach Wambua on phone. PW2 therefore went to Mariakani Police station to inquire about his vehicle. It was then that he learnt that his vehicle had been intercepted while carrying four sacks of bhang. PW2 identified Wambua to whom he gave the vehicle as the appellant's co-accused.

[6] When put on his defence, the appellant gave a sworn statement while his co-accused gave an unsworn statement. The appellant stated that on 18th July 2009, he was at his place of work at Oil Libya Petrol Station in Kongowea where he repairs tire punctures. The co-accused who was driving a motor vehicle registration No. KAP 583V came to the Petrol Station and asked the appellant to inflate the motor vehicle tires. Since it was his time to get off work, the appellant asked the co-accused for a lift to Kisauni. Upon reaching Kisauni, the co-accused stopped and talked to another person for a few minutes. That person then asked the co-accused (driver) if the appellant would accompany them. The co-accused then fueled the vehicle and then proceeded without telling the appellant where they were going. The appellant did not know Mombasa well, so he kept quiet. They went up to a house where a woman placed four sacks inside the boot of the motor vehicle. As they were driving back into the main road, the vehicle had a puncture. It was thereafter that police on patrol stopped, talked to the driver and then fired gunshots. They were arrested, beaten and taken back to the house where they had gotten the sacks from. The woman was also arrested but she was later released. The police demanded money from the appellant to secure his release but the appellant could not raise any money and so he was charged. The appellant maintained that he did not know the contents of the sacks found in the boot of the motor vehicle. Needless to say, the learned trial magistrate found the appellant's defense unbelievable and convicted the appellant of the offence charged.

[7] During the appellant's appeal in the High Court, learned counsel for the defense submitted that the sentence imposed on the appellant of seven years imprisonment and a fine of Kshs.one million was irregular as it had no default clause and was therefore illegal and prejudicial to the appellant. He submitted that the sentence against the appellant was harsh and excessive. Counsel also argued that the

charge sheet was defective as a charge of trafficking “*by transporting*” is not an offence known under the Act. Further, that the particulars of the charge sheet referred to trafficking by transporting yet the Act refers to “*conveying*” which was not in the particulars of the charge sheet.

[8] In her judgment, the learned Judge of the High Court, (Nzioka, J.) noted that **section 137** of the Criminal Procedure Code requires the particulars of a charge sheet to be simple and clear and therefore the use of the word “transporting” rather than “conveying” was clearer and the appellant was not prejudiced; that the **Concise Oxford English Dictionary, 12th Edition**, defines “convey” as “*to transport or to carry to a place*”; and that although the appellant was throughout represented by a competent counsel who fully participated in the trial, the issue of the defective charge sheet was never raised before the trial magistrate. The learned Judge therefore rejected that ground of appeal. After analyzing and re-evaluating the evidence, the learned Judge came to the conclusion that there was sufficient evidence that the appellant knew or ought to have known what the motor vehicle was ferrying and was aware of the mission in Samburu. He therefore rejected the appellant’s defence. Upon further considering submissions on the issue of sentence, the learned Judge set aside the sentence that was imposed by the trial magistrate and enhanced the prison term to a sentence of life imprisonment in addition to a fine of Kshs.one million.

[9] During the hearing of the appeal before us, **Mr. Jared Magolo**, learned counsel for the appellant argued three of the four grounds contained in the Memorandum of Appeal. These were: defective charge sheet, failure of the learned judge to re-evaluate and re-analyse the evidence so as to reach her own conclusions and illegality of the sentence imposed.

[10] Counsel submitted that the particulars on the charge sheet referred to “*transporting*” rather than “*conveying*” as provided in the Act; that the *actus reus* as defined in the Act does not include “*transporting*”; that in defining “illicit trafficking”, conveyance and transportation are identified as specific acts which would amount to the offence of trafficking; that in the present case, the appellant was charged with transportation while evidence was tendered to prove conveyance; that the particulars of the offence needed to be clear on conveyance by way of transporting in a specific motor vehicle; and that the charge was therefore fatally defective.

[11] As regards re-evaluation of the evidence Mr. Magolo submitted that the samples taken by the Government Analyst for analysis were a vital piece of evidence which ought to have been produced in evidence at the trial; that the prosecution did not produce the samples that were taken to the Government Analyst for examination but only produced the Exhibit Memo Form; that without the samples being produced, the court could not conclude that the samples were established to be narcotic drugs; and that this failure was therefore fatal to the charge.

[12] Finally, on the alleged illegality of sentence, counsel stated that the appellant was sentenced by the trial court to pay a fine of Kshs.one million and seven years imprisonment; that during the appeal in the High Court, there was no cross appeal by the State but the court moved *suo moto* and asked the parties to address it on sentence; that this was done after the hearing of the appeal had been concluded and without the appellant having been warned of the possibility of enhancement of the sentence or given a chance to withdraw his appeal and this was prejudicial to the appellant.

[13] According to Mr. Magolo, the learned judge misconstrued **section 4(1)** of the Act on sentencing by concluding that the sentence was mandatory. Counsel cited the case of **Daniel Kyalo Muema v Republic [2009] eKLR** where the court considered such a sentence and ruled that the sentence provided under **section 4** of the Act was not mandatory. In addition, counsel pointed out that the value of the narcotic drugs was not proved and that the enhancement of the sentence was unnecessary and illegal. He therefore urged the Court to allow the appeal.

[14] Learned Principal Prosecution Counsel, **Mr. Jami Yamina**, who appeared for the State opposed the appeal. He argued that there was no defect in the charge sheet as a reading of the interpretation section in **section 2** of the Act left no doubt as to the meaning of conveyancing; that there was no miscarriage of justice or failure to evaluate the evidence; that PW3 produced the four sacks of cannabis sativa and a

sampling certificate signed by all the parties; that the appellant had the opportunity to cross examine the witnesses and so the evidence of the sampling was conclusive; that PW5 confirmed that the samples were forwarded to him and that he examined them and prepared a report which he produced in evidence.

[15] In regard to the illegality of the sentence, counsel relied on *Kingsley Chukwu v Republic [2010] eKLR* and submitted that the sentence imposed by the High Court was the mandatory sentence as it was the intention of the legislature to deter such offences. On the issue of proof of the value of the drugs Mr. Yamina, stated that the only known value of the drugs was the street value which was availed by the Anti-Narcotics officers. He conceded that there was no certificate produced regarding the valuation, but nonetheless urged the court to dismiss the appeal.

[16] This being a second appeal, our mandate is limited under **section 361(1)** of the Criminal Procedure Code to considering issues of law only. As was held in *M'Riungu v Republic [1983] KLR 55*:

***“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings – The times of March 30, 1983).*”**

[17] With the above in mind, we have considered this appeal and the submissions made before us. Three issues arise for our determination. First whether the charge was defective, secondly whether the learned Judge of the High Court failed to reevaluate the evidence so as to reach her own conclusion and thirdly whether the sentence as enhanced by the learned Judge was legal.

[18] On the issue of the charge sheet, the appellant was charged with the offence of trafficking under **Section 4(a)** of the Act. Trafficking is defined under **section 2** of the Act as follows:

***“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...”*”**

[19] The particulars of the charge against the appellant and his co-accused as contained in the charge sheet were as follows:

***“On 19th day of July 2009 at Mariakani area in Kaloleni District within Coast Province, jointly with others not before Court trafficked in narcotic drugs by transporting 60 kilogrammes of cannabis with a market value of Kshs.120,000/- in a motor vehicle registration No. KAP 583V Toyota Corolla in contravention of the said Act.”*”**

[20] Counsel for the appellant took issue with the reference in the charge sheet to “*transporting*” rather than “*conveying*” as in his view, the two constituted specific acts which would amount to an offence under the Act and yet the evidence tendered against the appellant was that of conveyance. While we agree that “*trafficking*” as defined in the afore-quoted **section 2** of the Act does not refer to “*transporting*” which is the word used in the charge sheet, the word “*transportation*” has been used in the definition of “*illicit traffic*” in **section 2** of the Act which defines illicit traffic in relation to narcotic drugs and psychotropic substance, to mean “*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.*”

[21] We concur with the learned Judge that the word “*transporting*” as used in the charge sheet simply means the same thing as the word “*conveying*”. This is not only clear from the dictionary definition of the two words as referred to by the trial Judge, but is also clear from the definition of Black’s Law Dictionary, 9th Edition, that defines “*convey*” as to transfer or deliver something such as a right or

property to another and “transport” as to carry or convey from one place to another.

[22] Further, the learned Judge of the High Court rightly made reference to **section 137(a)(iii)** of the Criminal Procedure Code which requires particulars of the charge to be in *ordinary language*. The section is couched in mandatory terms that states as follows:

“After the statement of offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary.”

[23] 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. The use of the word “transporting” rather than “conveying” achieves this purpose particularly when reference is made to the vehicle. In our view, the word transporting is simple to understand than the word “conveying” although they have similar meaning. We find that no prejudice was caused to the appellant. We note that the appellant who was represented by an able competent counsel throughout the trial did not raise any issue regarding the alleged defective charge sheet. No doubt both the appellant and his counsel understood the charge and no prejudice was therefore caused to the appellant.

[24] From the evidence that was adduced in the trial court, it is apparent that the samples that were taken to the Government Analyst for examination were not produced in court, although the report of the Government Analyst was produced. In our view, it was not necessary to produce the physical samples at the trial as there was sufficient evidence before the court that the samples were taken to the Government Analyst and that the Government Analyst examined the samples and produced a report. The samples were indeed taken in the presence of the appellant and his co-accused and both appended their signature to the certificate which was produced in court. Moreover, the question whether the samples examined were from the four sacks is one of fact. We pay homage to the concurrent findings of the two lower courts and therefore nothing turns on that ground.

[25] Indeed, the facts of this case were substantially not in dispute. The appellant did not deny that he was arrested from the vehicle from which the cannabis sativa was recovered. His defence was simply that he did not know what was contained in the sacks or what the mission of his co-accused was. However, this defence was appropriately considered and rejected by the two lower courts. On our part, we find no reason to depart from the concurrent findings of the two courts in this regard. The learned Judge of the High Court properly re-evaluated the evidence and made her own findings which cannot be faulted. Accordingly, we find no substance in the appeal against conviction.

[26] As regards sentence, **section 361(1)** of the Criminal Procedure Code provides that severity of sentence is a matter of fact; and that the court can only consider an appeal on this ground either where the subordinate court had no powers to pass the sentence or where the sentence was enhanced by the High Court. In this case an issue has arisen regarding the legality of the sentence that was imposed by the trial magistrate. An issue has also arisen regarding the enhancement of the sentence by the learned Judge. This gives this Court the jurisdiction to interrogate the legality of the sentence.

[27] In her judgment, the learned Judge made extensive reference to, and applied ***Kingsley Chukwu v R Criminal Appeal No. 259 of 2006***, a decision of this Court (differently constituted) in which the court held that the sentence as provided under **section 4(a)** of the Act is mandatory. In ***Caroline Auma Majabu v R [2014] eKLR***, this Court (as presently constituted) addressed itself at length on the question whether **section 4(a)** of the Act provides a mandatory sentence that must be imposed upon conviction. In that case the appellant was tried and convicted by the Chief Magistrate at Malindi for the offence of trafficking in narcotic drugs contrary to **section 4(a)** of the Act. She was sentenced to pay a fine of Kshs.one million, and in addition to serve life imprisonment. Her appeal to the High Court was dismissed. On second appeal to this Court, we departed from the *Kingsley Chukwu v R* (supra) and held that **section 4(a)** of the Act does not provide mandatory sentence rendering ourselves as follows:

“...the use of the word “liable” in section 4 (a) of the Narcotic Drugs and Psychotropic Substances

(Control) Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise this discretion, and are the exception rather than the rule., thus where applicable a mandatory sentence must be expressed in clear and ambiguous terms...

In the case of section 4(a) of the Narcotic Drugs & Psychotropic Substance (Control) Act the provision does not contain such clear and ambiguous language with regard to the mandatory sentence. In our view this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion.”

[28] Needless to state that we are still of the same view and do therefore find that the learned Judge erred in enhancing the sentence on the basis that the sentence provided in the Act is mandatory.

[29] In his appeal before the High Court, the appellant took issue with the failure of the trial magistrate to impose a default sentence. In considering the arguments of the counsel which were reiterated before us the absurdity of interpreting the sentence provided under **section 4(a)** of the Act as mandatory is evident. If an offender is sentenced to life imprisonment in addition to a fine of Kshs.one million or more, what motivation is there for the offender to pay the fine? And if as was submitted by the appellant’s advocate in the High Court, **section 28** of the Penal Code is to be applied as a default sentence, how would the prison term imposed in default of the fine take effect? Obviously it cannot take effect after the offender has served the life term. In our view, the maximum sentence providing for a fine in addition to the life imprisonment was intended as a deterrence for drug barons and serious drug dealers in respect of whom assets acquired from the illegal trade could be traced and where necessary distress levied to recover any fine imposed as the offender serves sentence.

[30] In this case, the trial court having noted that the quantity of bhang of which the appellant was found in possession of was substantial, and having also taken into account the drug menace, sentenced the appellant to pay a fine of Kshs.one million and in addition to serve a sentence of seven years imprisonment. In our view, the learned magistrate did not properly exercise his discretion as it was evident from the quantity of the drugs that the appellant was a serious drug dealer and therefore deserved the maximum sentence provided by law.

[31] The appellant also took issue with the failure of the court to warn him before the hearing of the appeal on the possibility of enhancement of the sentence. However, it is evident that one of the grounds of appeal before the learned Judge was that the sentence was manifestly excessive and harsh. The learned Judge interpreted this ground to encompass the legality of the sentence and the power of the High Court under **section 354(3) (a) & (b)** of the Criminal Procedure Code to review the sentence. It is on this basis that the learned Judge found the sentence imposed on the appellant by the trial magistrate illegal and proceeded to impose what in her view was the legal sentence. The appellant having opened up the sentence imposed upon him for scrutiny, he cannot turn round and blame the learned Judge for failing to warn him of the consequences. Indeed, the appellant was represented by an advocate of long experience and therefore, it must be presumed that they were alive to the risk. The appellant having questioned the legality of the sentence, the issue of his being cautioned by the court on the possibility of his sentence being enhanced was desirable, however it was not mandatory as the learned Judge was under an obligation to ensure that the sentence is legal. In any case the learned Judge invited further submissions on the issue of sentencing stating that the issue of enhancement may arise. At that stage the appellant still had the opportunity to reconsider his position with regard to the appeal as it was evident that enhancement was a possible outcome. We therefore find that the appellant did not suffer any prejudice.

[32] In ***Macharia v Republic [2003] EA 559*** this Court held that an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellate court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial judge unless the Judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive. As we have already stated the trial magistrate failed to consider a material factor, and we would for this reason confirm the sentence of life

imprisonment in addition to the fine of Kshs.one million.

[33] Finally, the appellant took issue with the failure by the prosecution to prove the value of the cannabis sativa. Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under **section 4(a)** of the Act, the value of the drugs do not constitute the ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs to wit:

“A fine of Kshs.one million or three times the market value of the narcotic drugs or psychotropic substance whichever is the greater...”

[34] Therefore, the minimum fine is one million and proof of the value of the narcotic drugs only becomes imperative if the fine imposed is beyond the sum of Kshs.one million. In this case, the fine imposed was the minimum of Kshs.one million and therefore the failure to prove the value of the narcotic drugs did not cause any prejudice to the appellant.

[35] The upshot of the above is that this appeal fails. We dismiss the appeal against both conviction and sentence.

Dated and delivered at Mombasa this 12th day of March, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR