IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MARAGA & MAKHANDIA, JJ.A.)

CRIMINAL APPEAL NO. 90 OF 2014

BETWEEN

KABIBI KALUME KATSUI……. APPELLANT

AND

REPUBLIC ……RESPONDENT

Being an appeal against the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 20th December, 2013

in

H.C.Cr.A. No.38 of 2011)

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JUDGMENT OF THE COURT

The appellant having been charged under **Narcotic Drugs and Psychotropic Substances (control) Act,** with the offence of trafficking in narcotic drugs contrary to **section 4(a**) of the Act was arraigned in court, tried, convicted and sentenced to life imprisonment in addition to a fine of Kshs.1,000,000/-. Dissatisfied with the trial court's findings and sentence meted out, she appealed to the High Court which upheld the conviction and sentence, hence this 2nd and perhaps last appeal to this Court.

The appellant filed 8 grounds of appeal. At the hearing, however, **Mr. Ngumbau,** learned counsel who appeared for the appellant elected to urge only grounds 1 and 2 and abandon the remaining 6 grounds.

The said 2 grounds are:-

"1. That both trial court magistrate and the first appellant(sic) failure to comply with

the definition of the word "trafficking" as is defined the (sic) OXFORD ENGLISH DICTIONARY renders the charge-sheet defective and invariance given that:-

(ii) There was no transportation done by road, sea, train, land

aeroplane that there was contravention of section 214, 134 (I) A of the C.P.C

2. *That the trial magistrate and the first appellant (sic) court judge erred in law by not considering that I was denied my constitutional right of fair trial as is stipulated in Article 50(2)K of the Constitution (sic)*

It was the appellant's submission that, as he had been charged with Trafficking by Storing 187 sachets of heroin the prosecution ought to have proved that the appellant was keeping the drugs for purposes of aiding or facilitating the trade. That they failed in this aspect and instead led evidence suggesting trafficking by selling.

On the second ground he submitted that the proceedings in the High Court were a nullity as they were conducted by a single judge in place of two judges contrary to **section 359** of the Criminal Procedure Code. He relied on the authorities cited by the respondent and prayed that the appeal be allowed.

The State on the other hand was represented by **Mr V. S. Monda** Assistant Director of Public Prosecutions. He submitted that the evidence led proved the charge of trafficking by storing. Further, the evidence of PW1 &2 showed that they went to the appellant's house, conducted a search and came across the sachets which were confirmed to be heroin and that there are concurrent findings on record that the appellant was found in possession thereof.

On the issue of jurisdiction, he submitted that it is incumbent upon the appellant to prove that the judicial officer lacked jurisdiction and referred to **section 359(1)** of the Criminal Procedure Code. He emphasised that the judge had the requisite mandate as a single judge to preside over the appeal. That in practice, 2 judge benches are constituted to hear only appeals arising from capital offences whereas other appeals are heard by single judges on the authority of the Chief Justice. For all these propositions counsel relied on the following authorities, **Remicus Ligavo Muharia v Republic [2006] eKLR, Kihiko v Republic [2004] eKLR, Bernard Wanjala v Republic [2007] eKLR, Anguko v Republic [1985] KLR 755.** On sentence, Mr Monda submitted that this court had since held that life imprisonment was not mandatory upon conviction for offence of trafficking in Narcotic drugs. That the Court still retained discretion to impose any other lawful sentence. He accordingly elected to leave the issue to court.

Before we delve into merits of the appeal, we need to set out, albeit briefly, the facts of the case. On 25th July, 2009 APC Shadrack Opondo (PW1) and CPL Peter Ouma (PW2), CPL Titus Munyalo (PW4) in the company of other Anti Narcotic Unit police officers received a tip off whilst in Mtangani area that a certain lady was in the business of trafficking in narcotic drugs. They raided her house and found her therein. On the table near her were an assortment of cigarette wrappings in which they recovered 187 sachets of suspected heroin. They also found Kshs.490/- on her as well as her national identity card. PW2 then prepared a search certificate which was duly signed by the appellant whereupon the appellant was arrested. Thereafter PW4 prepared the exhibit memo and forwarded the suspected narcotic drugs to John Njenga (PW3), government analyst, who upon examination confirmed that they consisted of heroin. She was then arraigned before the Chief Magistrate's court at Malindi and charged with the said offence.

Upon being put on her defence, the appellant elected to make a sworn statement and called no witnesses. She conceded that she was a resident of Mtangani. On the material day she was in her house when at about 11 a.m. she heard and saw people running helter skelter. Soon thereafter she encountered police officers who entered her house claiming that those who had escaped had run into her house. A boy arrested from the neighbour's house was brought into her house and together they were taken to the police station where they were interrogated. The boy was subsequently released while she was arraigned before court. She denied that the police recovered any narcotic drugs from her house but confirmed that Kshs.490/- was retrieved from her. This then was the evidence upon which the trial court convicted and sentenced the appellant whereas the 1st appellate court dismissed her appeal.

This Court is now invited to sit in its appellate jurisdiction as a second appeal and is bound to

entertain only matters of the law as per **section 361** of the Criminal Procedure Code and as it pronounced itself in ***Kaingo v Republic*** *[1982] KLR 213.*

As jurisdiction is everything, did the High Court have the jurisdiction to hear the appeal when presided over by a single judge**? Mr Mutua** raised this issue basing his argument on **section 359** of the Criminal Procedure Code. He submitted that the record did not indicate that the appeal was to be heard by a single judge. We did call for the original High Court record file to verify the claim and as we are a Court of record we would have been hard pressed and presumptuous to hold that the High Court Judge lacked the said authority. Indeed tacked away somewhere in the record is a loose paper with Judge's admission notes on the appeal. The appeal was admitted for hearing before a single Judge. Accordingly, the Judge who heard the appeal had jurisdiction to do so. In any event the appellant was represented by an able counsel during the hearing of the appeal who never raised the issue before the High Court. We would add as a matter of caution though that the directions relating to the admission of appeals and the hearing thereof whether before a single or two judge bench be included in records to obviate such unnecessary anxieties.

Now moving on to ground 1**, t**he definition of "*trafficking"* is attacked on the grounds of not being in line with the English meaning of the same such that it rendered "*the charge-sheet defective and invariance*." The learned counsel did not submit on this bit but pointed out that the prosecution led evidence of a different offence other than that which the appellant was charged with and in particular trafficking by selling.

The offence of trafficking is created under **section 4** of the Act. The term "*trafficking*" is given a statutory definition by the same Act under **section 2** which provides *interalia* that "*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 ..." (own emphasis).*

It is clear from this definition that trafficking includes storing**.** The English Dictionary definition must as a result yield to the legal definition as the statute creating the offence has given the definition and specifics of that offence and what it constitutes and there is no doubt therein. Consequently, the appellant's quarrel with the definition of trafficking is laid to rest. However, to avoid doubt, **section 134** of the Criminal Procedure Act provides that

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*

The charge-sheet in this case indicated that the appellant had been charged with "*Trafficking in Narcotic Drugs contrary to section 4(a) of Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994"* The particulars were that the appellant "*...was found trafficking in narcotic drugs to wit (187)* one *hundred and eighty seven sarchets* (**sic**) *of heroin valued at Kshs.18,700/- by storing in contravention to the said Act.*"

The charge-sheet did disclose the offence and the particulars indicated revealed the nature of the offence being charged. The issue the learned counsel seeks to address is that the evidence led to a different offence other than that charged. The trial court and the superior court made concurrent findings on the facts and found that the offence of trafficking by storing had been established. This is a second appeal and as this Court held in ***Kaingo*** *(supra):*

> "*A second appeal must be confined to points of l aw and this* Court w*ill not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court*

could find as it did."

We have perused the record before us and concluded that the testimony by PW1, Pw2 and Pw4 led to the same conclusion that a powdery product that was later analysed by the Government Chemist and confirmed to be heroin was found in the appellant's house. The appellant was arrested in her house and an identity card belonging to her was also recovered from that house. It is also true that they recovered some money which they erroneously treated as proceeds from sale which however the appellant discounted as money obtained from her handbag. Amongst the items seized included empty packets of cigarette that PW4, who was at the material time stationed at the Anti-narcotic Unit Malindi, stated that they are "*used to wrap narcotic drugs*". The trial magistrate concluded thus:

> "*The evidence of PW1, PW2 and PW4 was corroborative and I accept it as being truthful. They maintained that they were on drug detection duties at Mtangani when they proceeded to the accused person's house. They recovered exhibit 1,2,3, and 5 in the search certificate (exhibit 4) which was the accused person...signed and which was prepared by PW2 confirming that the exhibits were recovered from the accused person's house ...I have no reason whatsoever to doubt that the officers recovered 187 satchets of heroine* ***(sic)***, cigarette packets and cash Kshs.490/="

Therefore, was it that the prosecution proved trafficking by storing or by selling? The Concise English Dictionary, 12th ed. defines to:-

"*store*" as to:

-keep or accumulate for future use.

-a quantity or supply kept for use as needed

"sell" to:

-Handover (something) in exchange for money

Black's law Dictionary, 9th ed. defines the same terms as:

"*store*" :

-keep (goods etc) in safekeeping for future delivery in an unchanged condition".

"sell" -to transfer (property) by sale

"sale"- transfer of property or title for a price

We would opine that as PW1, PW2 and PW4 conducted a physical search of the house and recovered the heroin from that house and which the appellant did not satisfy the court that it was for her own use, the inference of trafficking by storing was established. The Trial Magistrate's finding of the money as proceeds of sale did not affect the nature of the offence the appellant was charged with as she had already established storage. Hence the trial court concluded that "*I am satisfied that the charge against her have (sic) been proved beyond reasonable doubt. I find that the element of trafficking of drugs was proved.*"
We too would have reached a similar conclusion. There was no evidence of a sale transaction going on when the police officers raided the appellant's house and recovered the drugs. The drugs were wrapped away meaning that they were meant to be sold or used in future in which case they had been stored for that purpose. The fact that small amount of money was recovered from her does not distract from the fact that nobody was found buying the drugs from the appellant. Consequently, she could not have been charged with trafficking by selling. The money recovered from her could as well have been genuinely earned.

The respondent also raised a legal issue touching on sentencing which though the appellant did not

address, merits redress in this forum. This court has had opportunity on different occasions to discuss the '*mandatory*' nature of the sentence provided in the ***Narcotic*** Drugs and Psychotropic Substances (Control) Act. In **Carolyne Auma Majabu v Republic [2014] eKLR** we held that:-

> *"[12] Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, sets out the penalty for trafficking in the following terms ...*
>
> > *...Any person who trafficks in any 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 …, and in addition, to imprisonment for life"*
>
> *[13] In our view, the word "shall" is used in relation to the guilt offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as*
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> i. *Responsible by law, legally answerable, (liable to) Subject by law to;*
>
> *(ii) (Liable to do something) likely to do something*
>
> *(iii) (Liable to) likely to experience (something undesirable) Black's law Dictionary defines "liable" as Responsible or answerable in law; legally obligated Subject to or likely to incur (a fine, penalty etc.)*
>
> *[14] Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance 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 that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms..."*

This Court followed the same reasoning in **Mombasa Criminal Appeal No.59 of 2014 (U.R).** Our attention has not been drawn to any contrary view or opinion. In the premises, we shall state without tiring, that under the **Narcotic Drugs and Psychotropic Substances (Control) Act,** sentence is still discretionary. We are of course in no way suggesting that under this Act this Court or the High Court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. See ***Wanjema v Republic*** [1971] EA 493 and **Diego v Republic [1985] KLR 621.** The trial court and High Court meted out a life imprisonment sentence inclusive of a one million fine, on the premise that such sentence was mandatory hence they misdirected themselves. That misdirection calls for our intervention. In arriving at the appropriate sentence that we should substitute we are bound to consider the quantity of the drugs, its value, the mitigation canvassed by the appellant and her antecedents if at all relating to the same offence. It was established that the appellant was found storing 187 sachets of heroin valued at a street-value of Kshs.187,000.00. The *Narcotic Drugs* and *Psychotropic Substance Control Act* refers to market-value and not street-value. This should not split any hairs as it is fundamentally one and the same thing as both terms refer to a situation of a willing seller-willing buyer even though the thing traded in is illicit. This Court differently constituted in the case of **Priscilla Jemutai Kolongei v Republic [2005] eKLR** ironed out the doubt in the use of these terminologies. It held:-

> *"We do not find any definition of "market value" in the Act as contended by Mr. Obuo, although those are the words used in the relevant section. In common parlance it connotes the price which an item ought reasonably to be expected to fetch on a sale in the open market that is between a*

willing seller and a willing buyer. When the market is legal, formal, free and aboveboard, no questions would of course arise. It is however a matter of notoriety, and we take judicial notice of it, that prohibited or illegal transactions would normally be carried out in the "black market" or the 'street market.' There would still be a willing seller and a willing buyer there and it is no less a 'market' in that sense. The illegal item would have its 'market value' there."

The argument before us has a familiar ring to it in Bryne v Low [1972] 3 All ER 526. In that case, the prohibited goods imported into Britain were indecent magazines and cinema films. The accused was convicted and sentenced to a fine by the trial magistrate. On appeal to the quarter sessions, the fine was reduced on the ground that since the importation of the articles was prohibited, there would be no "*open market*" for them within the relevant section by which to fix the value of the goods. On a reference to the High Court on that issue, Lord Widgery C.J stated, and the other members of the court agreed, that:

"It is contended before us today, and I think clearly the contention is correct, that in deciding what is the open market value of goods of this kind, one is not restricted by the distinction between the so-called black market and white market. What is being sought is the price which a willing seller would accept from a willing buyer for these goods as landed at the port or airport at which they were originally landed. If we can ascertain what is the price which would be paid by a willing buyer to a willing seller at the port of entry, then that is the open market value of the goods for present purposes, and the penalty accordingly can be put up to a maximum of three times the value."

It further held that:

*"In **Byrne v Low** (Supra) which is relied on by Mr. Obuo, the court followed the common sense approach proposed by Birket L Jin Rolex Watch Co. Ltd vs. Corms of Customs and Excise [19567] 2 All ER 589:*

> *"If there is a sole concessionary, ipso facto the free open market vanishes, and one must do the best one can, taking a notional open market, and considering all the factors bearing on the question of price."*

The solution therefore in our view, where the trial court is faced with scanty material on valuation, is not to throw up ones hands and dismiss the valuation, but to do their best to find the willing seller willing-buyer price, or simply the market value."

Moving on along to the case at hand, the Narcotic and Psychotropic Substances Control Act, provides that a valuation certificate prepared by a "*proper officer*" is taken to be *prima facie* evidence of the value of the drugs. It provides under **section 86:**

> *"(1***)** *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.*
>
> *(2) In this section "proper officer" means the officer authorized by the Minister by notification in the Gazette for the purposes of this section***."**

PW4 stated in cross-examination that:-

"The value of the drugs was stated as Kshs.187,000/- That was the street-value. The officer drafting the charge-sheet gave this value. We did not prepare a valuation certificate for the drugs. We only gave the street-value of the recovered drug."

There was therefore no real basis for ascertaining the value of the drugs so as to justify the sentence

imposed. The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that PW4 and PW2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks.

In mitigation the appellant stated that she was a mother of 4 minors and was remorseful and prayed for a non-custodial sentence. It is indeed a disservice for the minor for their mother to be incarcerated, however, there is a bigger evil facing the society and in particular the rampant drug abuse by youth and other persons that have rendered many a burden to the same society. Handing down a non-custodial sentence would in a sense be a case of robbing Peter to pay Paul and putting doubt as to the severity of the offence of this illegal and destructive trade. Before reviewing the sentence there are certain aspects we have come across in this appeal that we need to address. They do not however affect the weight of the appellant's appeal or prejudice her in anyway.

In particular, the police must take great care in drawing the charge-sheet concerning the offences created under the Act whilst appreciating that these are strict offences. They should endeavor to tailor make trafficking of the mode of the drugs without confusing any of the modes. We further add that they together with the Government Chemist and any other person concerned, should be very meticulous in handling and

labeling exhibits and/or evidence that is handed over for analysis. We in addition emphasis that the police should as much as possible produce valuation certificate on the value of the illicit drugs to help guide the court as to the sentence to be imposed. The law is clear on the offence of trafficking, the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself.

This said, we uphold the conviction of the appellant and taking into account the mitigating factors and the 4 years already served by the appellant, we would set aside the sentence of life imprisonment and fine of Kshs1,000,000/- imposed and substitute therefore a term of 10 years' imprisonment effective from the date of conviction and sentence in the trial court.

Dated and delivered at Malindi this 30th day of April, 2015.

H. M. OKWENGU

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR