



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, KARANJA & MWERA, JJA

CRIMINAL APPEAL NO. 86 OF 2013

BETWEEN

ISMAIL MZEE ISMAIL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Nairobi

(Ochieng, J.) dated 5th July, 2012

in

H.C. CR. A. NO. 343 OF 2010)

JUDGMENT OF THE COURT

Ismail Mzee Ismail (the appellant), a Tanzanian national, was travelling to Tanzania from Iran, through Dubai and Nairobi on 30th June 2007 aboard Emirates flight No. EK721. After disembarking from the aircraft at the Jomo Kenyatta International Airport, as he was going through immigration, he was stopped by some police officers on duty among them **Cpl. Bernard Leboo (PW1)**, **P. C. David Loisengere, (PW2)**, **CPL Jama Fazel (PW5)** and **P.C. Eyatta**.

He was taken to their offices at the airport for a thorough search as he was travelling from what they referred to as a “drug source” country. He was detained in the facility for observation. According to the police officers who kept watch, among them PW1 and PW5, the appellant emitted a total of 121 pellets on different occasions within a span of three days. The three officers who had witnessed the emission of the pellets completed the observation sheets as required by law.

All the pellets were then weighed and handed over to **Chief Inspector John Koikai (PW6)**, who told the court that he received a total of 121 pellets which were suspected to contain drugs. It was CIP. Koikai’s evidence that the pellets were weighed in his presence, that of the appellant, and also the Government Analyst. He testified that the total weight from the 121 pellets was 1,844.7 grammes.

After testing the pellets, the Government Analyst (PW4) confirmed that they contained ‘diacelymorphane’ commonly known as heroin, a substance classified as a narcotic drug under the Narcotic Drugs and

Psychotropic Substances Control Act.

Chief Inspector Irungu, (PW7), a proper officer under the said Act weighed the drugs and ascribed to them the market value before issuing a certificate to that effect. He valued them at Kshs 1,844,700/= which would translate to Kshs. 1,000/= per gramme. After investigations, the appellant was charged with the offence of trafficking in Narcotic Drugs contrary to **Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. (Narcotics Act)** Particulars being that;

“On the 30th day of June, 2007 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, he trafficked by conveying 1,844.7 grammes of Narcotic Drugs namely heroin with an estimated market value at Kshs. 1,844,700.00.”

He was arraigned before the Chief Magistrate Kibera Court whereupon the charges being read over to him, he pleaded not guilty.

The matter, therefore, proceeded to hearing where the evidence as summarized above was adduced. When placed on his defence, the appellant testified on oath, and called no witnesses. He denied having been found with any drugs. It was his evidence that after the police officers searched his bags and recovered nothing, they locked him up in a room where he was detained for four days and later charged with being in possession of narcotic drugs. He denied that the pellets containing the drugs were emitted from his body.

After considering the evidence adduced before the court, the learned magistrate found the appellant guilty as charged, convicted him and after taking into account the address in mitigation, sentenced him to imprisonment for life. She also imposed a fine of Kshs. 5,534,100 with a default sentence of one year imprisonment.

Aggrieved by the conviction and sentence, the appellant moved to the High Court on appeal, raising the following grounds of appeal, as paraphrased by the learned Judge:-

“(1) His constitutional rights were violated when he was not taken to court within 24 hours of arrest. Secondly, because the trial lasted for three years, the appellant says that he was not tried within a reasonable time, especially considering that he remained in custody during the trial.

2. The trial was illegal as it was conducted at Kibera Law Courts, instead of the Makadara Law Courts. He contended that pursuant to Section 71 of the Criminal Procedure Code. Makadara Law Court were the courts within which the Jomo Kenyatta International Airport fall under. He argued that an illegal process could not produce a legitimate result.

3. That the provisions of Section 77 of the Narcotic Drugs and Psychotropic Substance Control Act were violated, when the seizure notice was not issued by the officer who actually seized the drugs in issue.

4. The production of the documentary evidence was irregular because they were not produced by the makers thereof.

5. The trial was a nullity because the trial court did not expressly stipulate, after the prosecution had closed its case, that it had complied with Section 211 of the Criminal Procedure Code.

6. The prosecution did not prove its case beyond any reasonable doubt. For instance, they did not prove that it is the appellant who had either signed or thumb-printed the observation sheets.

The prosecution is also said to have failed to prove that the drugs which were analysed by the Government Chemist were those that had been emitted by the appellant.

7. The appellant asserted that he cannot have been trafficking or conveying drugs when a search

on the appellant did not reveal that the appellant was in possession of any drugs.

8. The drugs, if any, were not emitted by the appellant but by one, JUMA HASSAN, whose name was recorded in the observation sheets. That name was then cancelled, and it was replaced by appellant's name.

As the appellant did not witness the cancelation of the name of the presumed owner of the property, he submitted that the credibility of the observation sheets was doubtful.

9. The defence was not accorded due consideration by the learned trial Magistrate. The appellant submitted that the said defence ought only to have been rejected if the trial court had cogent reasons for so doing. In this case, the trial court is said to have given no cogent reasons for rejecting the defence.

10. The sentence of life imprisonment was said to be too harsh. In handing down the said sentence, the trial court is said to have ignored the appellant's mitigation.

The 3 children of the appellant will be adversely affected by the sentence considering that their mother was deceased. The appellant asked for leniency, saying that he was very remorseful.

The High Court (Ochieng', J) re-evaluated the evidence adduced before the trial court and after considering all the grounds of appeal raised by the appellant, gave detailed reasons for dismissing each of the said grounds and ultimately the entire appeal.

The most significant finding by the learned judge which actually forms the gravamen of this appeal, is the ground on the weight of the narcotic drugs said to have been recovered from the appellant. The learned judge made a finding to the effect that since the alteration in the observation sheet marked exhibit15 had not been countersigned by the appellant, then it ought not to have been admitted in evidence. It was the learned judge's finding that the admission of evidence in respect of three pellets which were the subject of that observation sheet may have prejudiced the appellant. He made a finding to the effect that the total weight of the pellets after excluding the 185.7 which ought to have been excluded, would have been reduced to 1,659.0 grammes.

The learned judge, nonetheless, went on to find that "*the reduction in weight did not in any way weaken the case against the appellant*". The Court consequently dismissed the appeal and upheld both conviction and sentence. That decision provoked the appeal now before us, in which the appellant has proffered the following grounds of appeal:-

1. That the Honourable Mr. Justice Ochieng' failed to consider or to consider adequately the fact that the prosecution had not proved the case beyond reasonable doubt.

2. That there was gross and unjustifiable violation of the provision of s. 359 of the Criminal Procedure Code which fact prejudiced the appellant.

3. That the Honourable Judge having found that the weight of the substance was wrong erred in not making the further finding that such was fatal to the prosecution case.

4. That the finding of the Honourable Judge was that the weight difference did not prejudice the appellant was erroneous in that weight was an essential ingredient of the offence and the failure to prove this was fatal to the prosecution case.

5. That having found that there was a difference in weight; the Honourable Judge erred in law and in fact in failing to consider the effect of the same on the burden of proof.

6. That the differences in weight ought to have persuaded the court that essential ingredients of the offence were not proven.

7. That further the Honourable Mr. Justice Ochieng' failed to consider or to consider adequately the fact the variation in the weight substantially affected the valuation of the alleged drugs which was also an important ingredient of the offence.

8. That due to the anomalies confirmed by the Honourable Mr. Justice Ochieng' it is abundantly clear that the conviction and sentencing of the appellant was not properly founded. ”

Mr. Wandugi, learned counsel, urged the appeal before us on behalf of the appellant. His thrust was on the issue of the weight of the drugs said to have been recovered from the appellant. This issue is covered in grounds 1, 3, 4, 5, 6, 7 and 8. He argued that although the appellant was charged with being in possession of 1884.7 grams, it transpired in court that some of the pellets recorded were from another person. It was learned counsel's submission that since the weight of the drugs attributed to the appellant was wrong, as found by the learned judge, then the burden of proof had not been discharged as mandated in law, and the appellant was therefore entitled to an acquittal. He further argued that the fine to be imposed upon conviction on the charges under the **Narcotics Act** is determined by the value of the narcotics. The reduction of the quantity and the value would therefore inexorably affect the fine.

He therefore faulted the learned judge for finding that the reduction of the weight could not affect the sentence. He relied on the case **Joseph Leboi Toroke v. Republic**, Criminal Appeal No. 204 of 1987 and **Hamayun Khan v. Republic**, Criminal Appeal No. 159 of 2000.

The former relates to a charge of robbery with violence, where the court held that medical evidence must be adduced to prove the element of assault. Learned counsel was, nonetheless, not able to illustrate to us how this case was relevant to the appeal before us.

The latter case was relevant but we note that the appeal was allowed principally on the basis of paucity of incriminating evidence before the court and not on account of the weight of the drugs not having been ascertained. The Court did, however, mention that the value of the drugs had not been proved and that the sentence passed “*in this respect was invalid*”, meaning the aspect of the fine which must have been based on the unascertained value of the drugs. This case bears some relevance to this appeal but we shall revert to that issue later.

Second, learned counsel submitted that section 74 of the Narcotics Act was not complied with. He argued that the appellant was informed of his right to have his analyst after the weighing had already been done. In addition, he claimed that the seizure notice was given by the wrong officer. He contended that it should have been issued by the person who recovered the drugs. We were told that although the issue was raised before the High Court, it was not covered sufficiently.

Third, he contended that the appeal before High Court was improperly admitted since **section 359(1) Criminal Procedure Code** provides that an appeal should be conducted by two judges unless the Chief Justice gives his authority in writing. Learned counsel conceded that this issue was not raised before the High Court. We reminded learned counsel that this issue has been raised severally before, and this court has always held that the said authority is issued to all judges of the High Court on appointment, and had this issue been raised before the High Court, then the learned judge would have been in a position to confirm that position. That ground was therefore settled at that stage.

In conclusion he urged the court to quash the conviction and set aside the sentence. On his part, learned counsel Mr. Omondi, Senior Assistant Director of Public Prosecutions, in opposing the appeal urged the Court to support the conviction and sentence. He submitted that the case was proved beyond reasonable doubt. He argued that the reduction of the weight of the drugs did not affect the evidence as rightly found by the judge. The charge was proved since the appellant had flown from Iran with the drugs. He asserted that there was conveyance of the drugs by the appellant regardless of the weight. In addition, with regard to section 74, learned counsel submitted that the section provides that the right is to be exercised where practicable and it is therefore not mandatory. He urged that **PW6** had explained to the appellant that he had a right to have his personal analyst but he had none. He submitted that in any event, the appellant was not prejudiced since he did not raise any issue even after he was so informed.

On the issue of the seizure notice under **section 77 of the Narcotics Act**, counsel stated that the learned judge made a finding that **PW6** who issued the notice is the person who received and retained the pellets. Moreover, the appellant was not prejudiced, submitted counsel. He urged the Court to find that the appellant was not prejudiced and that this did not materially affect the evidence on record.

In reply the learned counsel Mr. Wandugi, stated that the issue of weight is important and statutory compliance of **section 77 of the Narcotics Act** was crucial and mandatory. He urged the Court to allow the appeal.

This being the second appeal, we remind ourselves that we are confined to dealing with matters of law only by dint of **section 361(1) of the Criminal Procedure Act**.

In **Dzombo Mataza v Republic [2014] eKLR** (Criminal Appeal No 22 of 2013) this duty was restated as follows:

“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.”

After considering the record and submissions before us, we narrow down the issues falling for our determination as follows:-

Whether the seizure of the drugs complied with the law; whether the difference in weight and value tallies with the fine thus affecting the conviction and sentence and lastly whether the case was proved beyond reasonable doubt.

On the issue of seizure with regard to substances under the **Narcotics Act**, the same is provided for under section **74, 74A** and **77** of the **Narcotics Act**. The learned judge, in his judgment, found that the witnesses conceded that the notice of seizure ought to have been issued by the officer who had actually seized the various pellets. He however, sustained the process as legal by concluding that the appellant was not prejudiced by the failure to strictly comply with section **77** of the **Act**. We, nonetheless, hold a different view from the learned judge who appears to have adopted a literal interpretation of this provision.

In the case of **Kolongei v. Republic [2005] eKLR** (Criminal Appeal 84 of 2004), which related to similar charges, this court held that the use of strict construction in the provisions of penal statutes has evolved to that of purposive approach. We can also borrow a leaf from Cross on **Statutory interpretation 3rd Edition** at page173, where the author states:-

“The courts nowadays generally adopt a purposive approach even to the construction of penal statutes. For the most part they seek the interpretation which makes sense of the statute and its purpose and the presumption of strict construction is merely an ancillary aid for resolving difficult cases.”

Let us have a look at these provisions.

Section 74 of the Act provides that:-

“74. Subject to this Act, all articles and things, including any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance, that are liable to forfeiture under any provision of this Act may be seized and detained by any police officer or any other person authorized in writing by the Commissioner of Police for the purposes of this Act.”(emphasis supplied)

Section 77 of the Act on the other hand provides that;

“77. (1) Where any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing liable for forfeiture is seized under this Act, notice of the seizure shall be given by the person seizing the same as soon as possible to the owner or to the person in charge thereof if such person is not the owner. (emphasis supplied)

Section 74 is quite broad and allows any police officer, and not necessarily the one who recovers the drugs to issue the seizure notice.

Section 77 on the other hand seems to suggest that the seizure notice should be issued by the person who actually seizes the drugs. If we were to give a literal interpretation to the latter section, it would mean that the officer who recovers the pellets as they get emitted would be the one to issue the seizure notice. This would mean issuing different seizure notices for the same suspect, since the pellets are emitted during the watch of different officers. This would definitely lead to absurdity. The reasonable thing to do would be to handover all the pellets to the investigating officer, who would in turn issue one seizure notice once all the pellets have been recovered. We hold the view therefore, that the seizure notice was properly issued.

That ground must therefore fail.

On the issue as to whether the different weight and subsequent value of the drugs would affect the conviction and sentence, we agree as found by the learned judge, that the admissible evidence with regard to the weight of the drugs supported a weight lower than that on the charge sheet. The learned judge made the following finding;

“However, because the appellant was never called by the police to counter-sign the correction, he may have been prejudiced by that particular exhibit. I therefore find that Exhibit 15 should not have been admitted in evidence. In effect, a total of 185.7 grammes of heroin may not have been recovered from the appellant. That would therefore imply that the total weight of the drugs which the appellant emitted was 1,659.0 grammes instead of 1, 844.7 grammes. The reduction in total weight did not in any way weaken the case against the appellant.”(Emphasis supplied)

Having found that indeed the fine imposed was pegged on the incorrect weight, the question we need to address next is whether that aspect of the sentence is sustainable or legal. It was the learned Judge’s finding that the appellant was not prejudiced. As stated earlier, this Court’s judgment in the **Hamayun Khan** case (*supra*) seems to suggest otherwise. In that case, the Court held that that aspect of the sentence that was predicated on unproven value of the drugs was invalid.

In this case however, there was concurrence by the two Courts below to the effect that the appellant was conveying narcotic drugs whose weight was established to be 1,659.0 grammes. This discrepancy in the weight only occurred after the learned judge expunged Exhibit 15 from the record and recalculated the weight. It cannot therefore be said that there existed a contradiction in the weight in the charge sheet and the one given in evidence when the witnesses testified. This difference does not in our view affect the elements of the offence provided for under **section 4(a)** of the **Narcotic Act** that were otherwise proved.

We are satisfied from the evidence adduced before the trial court, and as upheld by the High Court that the charge against the appellant was proved beyond reasonable doubt. The appellant was properly convicted, and the conviction was properly upheld by the High Court. There is therefore no basis for us to interfere with the conviction.

On the issue of sentence our analysis above shows that the fine was based on the wrong weight of the drugs. It cannot be said that the appellant was not prejudiced by the miscalculation. Our finding is that he did suffer prejudice because the fine imposed was heavier than allowed under the Act and was therefore unlawful.

In the circumstances, and drawing from this Court’s decision in **Hamayan** (*supra*), that aspect of the

sentence is invalid and cannot be allowed to stand. In the circumstances, the same is set aside. In its place we substitute the fine that would result from the re-calculation based on the adjusted weight of the drugs.

The sentencing provision in the Narcotics Act under Section 4 (a) provides that:-

4. Any person who traffics 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 (Emphasis by underline)

The provision of section 4(a) graduates the issue of fine in the sentence from merely an issue of fact to a matter of law. It is proven in this case that the weight of the drugs was 1, 659.0 grammes and the market value at the time was Kshs. 1,000/= per gramme. The correct amount of the fine as recalculated in accordance with the above provision would therefore be 1,659.0 multiplied by 1,000 multiplied by 3 which equals Kshs. 4, 977, 000.00The High Court was supposed to adjust the fine from the original Kshs. 5, 534,100/- to Ksh. 4,977, 000 /- which would reflect the adjusted weight.

In all, the appeal against conviction is hereby dismissed. We set aside the fine of Ksh.5, 534,100/- and substitute thereof one of Kshs. 4, 977, 000.00/-, in default one year imprisonment in addition to the life imprisonment. Both prison sentences to run concurrently.

Dated and delivered at Nairobi this 22nd day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

