IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 65 OF 2014

BETWEEN

CAROLINE AUMA MAJABU………..APPELLANT

AND

REPUBLIC …...RESPONDENT

(Appeal from the judgment of High Court of Kenya at Malindi (Omondi, J.) dated 10th June, 2011

in

H.C.Cr.A. No. 85 of 2010)

****

JUDGMENT OF THE COURT

[1] ***Carolyne Auma Majabu,*** who is now the appellant before us, was tried and convicted by the Chief Magistrate at Malindi for the offence of trafficking in narcotics drugs contrary to ***section 4(a)*** of Narcotic Drug and Psychotropic Substance Control Act No. 4 of 1994. She was sentenced to pay a fine of Kshs.1,000,000/- in addition to serving life imprisonment. Being dissatisfied, she appealed to the High Court against her conviction and sentence. The High Court (***Omondi, J.)*** dismissed the appeal in its entirety. Not deterred, the appellant lodged the appeal before us raising five grounds as per the memorandum of appeal which she has filed in person.

[2] In a nutshell the appellant is aggrieved that she was convicted of a charge which was incurably defective; that the evidence did not support the charge; that her defence was not considered; and that the sentence imposed upon her was manifestly excessive. The appellant also filed written submissions in which she reiterated her contention that the charge of trafficking brought against her was defective as no evidence was adduced to prove any of the essential elements of trafficking. She maintained that the two lower courts failed to apply ***section 107*** and ***108*** of the Evidence Act, as it failed to find that the prosecution did not discharge its burden of proof.

[3] ***Section 361(1)*** of the Criminal Procedure Code states as follows:-

361.

1. ***A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***

a. ***on a matter of fact, and severity of sentence is a matter of fact; or***

b. ***against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

[4] Thus, our jurisdiction in hearing this second appeal is limited to considering matters of law only. Further, we have an obligation to pay homage to the findings of fact by the lower courts and only interfere if such finding of fact is based on no evidence or a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching those finding. (See **Chemangong v Republic [1984] KLR 611**).

[5] The particulars of the charge against the appellant were as follows:

> ***Carolyne Auma Majabu: On the 14th day of May, 2009 at about 1730 at Serena Kisumu-Ndogo Area, Malindi Location within Malindi District of the Coast Province was found trafficking in Narcotic Drugs to wit seven sachets of heroine valued kshs.700/- by selling in contravention to the said Act.***

[6] The two lower courts made concurrent findings of fact that two officers ***PC John Keter*** (PW1) and ***PC Geoffrey Effayo*** (PW2) together with one ***PC Wambua*** and members of a vigilante anti -drug group known as *Maaarufu,* were directed by an informer to the house of the appellant. They found the appellant standing at the door. She was holding a small plastic bottle for lotion. She was also holding some money with her right hand. The officers took possession of the bottle and upon opening it, found seven sachets of a brown whitish powder which they suspected to be heroine. The money the appellant was holding was Kshs.2,100/- which the officers concluded were proceeds from the sale of heroine. The appellant was arrested and the brown whitish powder forwarded to the Government Chemist where it was analyzed by ***John Njenga*** (PW3) who confirmed that the powder was heroine.

[7] Both Courts rejected the defence of the appellant which was that the police went to her house with a man who had the drugs, and who alleged that she had sold the drugs to him. That notwithstanding her denial, and the fact that the police searched her house and recovered nothing, she was arrested and charged. We find no reason to fault the concurrent findings of the lower court as it is clear that the appellant was found in possession of the seven sachets which were confirmed to contain heroine. As regards the charge, the learned Judge rendered herself as follows:-

> *"'**Trafficking**' under **section 2** of Act No. 4 of 1994 means:*
>
> ***'The importation,exportation, manufacture, buying, sale, giving, storing, administering, conveyance, delivery or distribution by any person of a narcotic or psychotropic substance.'***
>
> ***The offence of being in possession of the drug is limited to situations where the court is satisfied that the substance was intended solely for the offenders own consumption.***
>
> ***Trafficking encompasses being in possession, storing, and conveyancing, distributing and even delivering. It is thus not limited to actual physical possession. In this instance the two police officers testified that appellant was not in actual physical possession of the substance BUT circumstances surrounding her conduct persuaded them to conclude that she did not just have the substance for her own use, but was selling the same…***
>
> ***The issue is whether the recovery demonstrated one involved in sale of the same, in the***

absence of a buyer and whether failure to call the police informer as a witness was fatal. There was nothing to suggest to the trial court that the appellant had the seven sachets for her own use. While there is nothing wrong in one having money, here the circumstances suggests that the money had a direct relation with the drugs. She had the same in one hand while holding the drugs in the other hand, standing at the door. The irresistible inference one can draw from that scenario is that she was selling the same and had either just concluded a deal or was waiting for more buyers."

[8] We have anxiously, considered whether the evidence that was established was sufficient as found by the learned Judge to lead to a conclusion that the appellant had the narcotic drugs for purposes of sale. The conclusion by the learned Judge that because the appellant was holding the money with one hand and the drugs with another, she was selling the drugs appears rather inadequate as the explanation may well be that she was at the door as she had just bought the drugs and had just come in. Nonetheless, ***section 3*** of the Narcotic Drugs and Psychotropic Substance Control Act which deals with possession states as follows:

3. ***Penalty for possession of narcotic drugs, etc.***
    1. ***Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.***

2. ***A person guilty of an offence under subsection (1)***

shall be liable—

(a) …

(b) in respect of a narcotic drug or psychotropic

substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

[9] Therefore, the prosecution discharged the burden of proof by establishing possession, and it was upon the appellant to satisfy the Court that the narcotic drugs were intended for her own consumption and not for sale as alleged by the prosecution. This the appellant failed to do and the court was right in inferring from the circumstances that she had the narcotic drugs for purposes of selling. In the circumstances, the appellant's conviction cannot be faulted.

[10] As regards the appeal against sentence under ***section 361(1)(a)*** of the Penal Code, referred to above, severity of sentence is a matter of fact which cannot be considered on second appeal unless an issue of law arises therefrom. In sentencing the appellant, the trial magistrate stated as follows:

> ***"I note that this offence is very serious and also very prevalent. A sentence to discourage it is called for. Section 4 (a) of the Narcotic Drugs and Psychotropic Substance Control Act is mandatory. I sentence the accused to pay a fine of Kshs.1,000,000/- and in addition serve life imprisonment"***

[11] On her part, the learned Judge of the High Court followed **Kingsley Chukwu v R Criminal Appeal No. 69 of 2010** (actually Criminal Appeal No. 257 of 2007 cited as **Kingsley Chukwu v R 2010 eKLR**), where the Court differently constituted held that a person convicted for an offence under ***Section 4(a)*** of the Act shall be fined Kshs.1000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life. With respect, that is not the purport of ***section 4(a).*** We find it appropriate to revisit the question whether ***section 4(a)*** of the Narcotic Drugs and Psychotropic Substance

Control Act states provides for a mandatory sentence.

[12] ***Section 4(a)*** of the Narcotic Drugs and Psychotropic Substance Control Act, sets out the penalty for trafficking in the following terms:-

> ***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"***

[13] In our view, the word "*shall*" is used in relation to the guilt of the offender and the word used in relation to the sentence is "*liable*". The *Concise Oxford English Dictionary 12th Edition* defines the word "*liable"* as

"(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

i. *Responsible or answerable in law; legally obligated,*
ii. *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. The following examples from the Penal Code provides such mandatory sentences expressly and concisely as follows:

> ***204. Any person convicted of murder shall be sentenced to death.***
>
> ***296(2)*** which provides capital punishment for the offence of robbery provides as follows:
>
> ***"if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other person (s) or of at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person he shall be sentenced to death"***

[15] The Sexual Offences Act, is another legislation which provides for a mandatory sentence. ***Section 3*** of that Act which provides the penalty for the offence of rape provides as follows:

> ***(3) A person guilty of an offence under this section is liable***
>
> > ***upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.***

Although the word used in ***section 3*** of the Sexual Offences Act is "*liable*", the provision is clear that the sentence provided is minimum by use of the words "*shall not be less than*", thus giving allowance for discretion on the upper limit and not the lower limit. In the case of ***section 4(a)*** of the Narcotic Drugs and Psychotropic Substance Control Act, the provisions does not contain such clear and unambiguous language with regard to 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. With respect, we must depart from the finding in **Kingsley Chukwu v R** (supra) as the same was made per in curium. Both the trial magistrate and the learned Judge misdirected themselves in holding that the sentence was mandatory, and failing to exercise their discretion by addressing the appellant's mitigating circumstances. An error of law was thereby committed which justifies the intervention of this Court.

[16] Further, the appellant was sentenced to pay a fine of Kshs.1,000,000/- in addition to a life sentence for possession of seven sachets of heroin worth Kshs.700/-. We are somewhat disturbed by the apparent disparity in the sentencing given the minimal amount of the narcotic drugs which the appellant was found in possession of. Given the gravity of the sentence provided for trafficking, it would appear to us that the sentence for trafficking was a maximum sentence intended for drug barons and serious drug dealers dealing with drug worth thousands if not millions of shillings, and not small timers such as the appellant found in possession of a few sachets of heroin worth a few shillings. While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders.

[17] The appellant has pleaded with us that she has health problems being H.I.V positive. In her mitigation before the trial magistrate, she also pleaded that she had two children. Having taken into account her mitigating factors and also taken into account that she has been serving sentence for the last four years, we find that the order that commends itself to us is an order for a conditional discharge under ***section 35(1)*** of the Penal Code.

[18] Accordingly, we dismiss the appeal against conviction but allow the appeal against sentence. We set aside the sentence of life imprisonment and the fine of Kshs.1,000,000/- and substitute thereof an order for the appellant to be discharged forthwith under ***section 35(1)*** of the Penal Code on condition that she does not commit any offence for the next one year.

Dated and delivered at Malindi this 9th day of October, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

…..............................

JUDGE OF APPEAL

F. SICHALE

…...............................

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR