IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 138 & 139 OF 2011

BETWEEN

REHEMA KAHINDI KALUME

KADZE KAHINDI KALUME.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction, Judgement of the High Court of Kenya at Malindi (Omondi J.) dated 16th Nov. 2010

in

H.C.CR.A. No. 100 & 101 of 2010)

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JUDGMENT OF THE COURT

The two appeals have been consolidated.

The two appellants were jointly charged in the Senior Principal Magistrate's court Malindi with the offence of Trafficking in Narcotic Drugs contrary to section 4(1) of the Narcotic Drugs and And Psychotropic Substances (Control) Act No. 4 of 1994 (Act). They were alleged to have been jointly trafficking in 11 sachets of Heroin and 30 tablets of Rohypnol (flunitrazeparn) by storing them and valued at Kshs. 2000/=.

They were convicted after trial and each sentenced to a fine of Kshs. 1,000,000/=, and, in addition, to life imprisonment. Their respective appeals to the High Court were dismissed.

The prosecution case was dependent on the evidence of three police officers, Apc ***Jairus Kinoni (Pw1), Cpc Ali Mzara (Pw2) Wellington Wambua (Pw3)*** and of the Government Analyst ***John Njenga (Pw4)***.

The first two ***Apc Jairus*** and ***Cpl Ali*** were the key witnesses. Their evidence was briefly as follows:-

On 9th May 2009 they were instructed to accompany community policing members to a house where

narcotic drugs were allegedly being sold. They were led by the members of public to a permanent house. They found the two appellants seated outside. The house was not locked. It had a sitting room and about 4 bedrooms. They introduced themselves to the two appellants and entered into the house in the company of the appellants. They found a match box under a jerrican in the corridor of the house which they opened. It had 11 sachets of brownish powderly substance which they suspected to be heroine. The appellants refused to enter one bedroom for a search but they were forced in. In the bed room they found a polythene paper bag placed under a cupboard. They tore up the paper bag and found 30 greenish tablets of Rohypnol.

The appellant were arrested and taken to the police station. The substances were analysed by the Government Analyst. He identified the 11 sachets of brownish powder to be diazelyl morphine commonly called heroine and the 30 greenish tablets to be Flunitrazeparn commonly known as Rohypnol. The appellants were then charged with the offence.

The appellant made similar unsworn statements in their defense. They claimed to be employees of the owner of the house. They further stated that eight people had on the preceding night searched the same house but they did not recover anything and that on the following morning the same eight people came and asked for the owner of the house and arrested the appellants after searching the house.

The trial Magistrate made a finding that the charge was proved

> *"as drugs were recovered from the house which they were occupants and it is mere denial that they were employees of an imaginary person who they did not name in their defence."*

The appeal to the High Court was heard by ***Omondi J*** who dismissed the appeal saying that the drugs were recovered from the house and that the appellant were *"the single lawful occupants."*

The appellants have filed similar grounds of appeal and similar written submissions in this Court. The principal ground of appeal is that the High Court erred in law in upholding the convictions of each appellant when the prosecution had failed to demonstrate that each appellant had exclusive possession and control of the premises where the drugs were recovered from. In addition, the appellants have submitted that the drugs were never recovered in their possession or anywhere inside the house.

The appellants were charged with the offence of trafficking in narcotic drugs and not with the offence of possession of narcotic drugs under s. 3(1) of the Act. The two offences are quite distinct.

According to the definition of trafficking in s.2(1) of the Act.

> *trafficking* means:
>
> *".....the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person....."*

There are specified exceptions to the offence. The mode of trafficking specified in the charge sheet is ***storing***.

The important legal point raised by appellants in this appeal is whether or not they were in possession of the narcotic drugs.

Although the appellants do not claim in their grounds of appeal that the offence of trafficking in narcotic drugs by *storing* was not proved, it is in the interest of justice that we should find out if the offence was infact proved.

The Act does not define storing.

However according to ***Black's Law Dictionary*** 9th Edition P. 1556 to store is to:

"Keep (goods etc) in a safe keeping for future delivery in unchanged condition."

A *store* is defined at p. 1555 of the same Dictionary as including a place where goods are deposited for purchase or sale or future use – a warehouse. When the word storing in the definition of ***Trafficking*** is read ***ujusdem generis*** with the preceding modes of trafficking, it connotes, in our view, having in store fairly large quantities of narcotic drugs for purposes of sale in the premises or for distribution. That explains whey the penalty for trafficking in narcotic drugs is so severe – a heavy fine, and, in addition imprisonment for life.

In our view, keeping 11 sachets of heroine in a match box and 30 tablets of Lohypanol in a private house all valued Kshs.2000/=, as the charge sheet states, does not amount to *storing* within the intendemnt of the Act.

That finding should dispose of the appeal. However the question of *possession* is an important one. The offence of trafficking by storing could only arise if the appellants were in possession of the narcotic drugs. The Act does not define *possession*. We adopt the meaning of possession in section 4 of the Penal Code, that being in posse or having possession includes

> *"not only having in one's own personal possession; but also knowingly having anything in the actual possession or custody of any other person, or having anything in a place (whether belonging to or occupied by one self or not) for the use or benefit of oneself or of any other person"*

The definition continues:

> *"if there are two or more persons and anyone or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken of be in custody and possession, of each and all of them."*

The two material witness, Apc Jairus and Cpl Ali were led to the permanent house by members of public. Apc Jairus said in cross-examination by 1st appellant, that it was said that a woman who was away was the owner of the house and that he learnt that the 1st appellant was a child of the owner of the house. Cpl Ali on his part, said that he did not know the owner of the house. The two appellants claimed that they were employees of the woman who was the owner. From the evidence of Apc Jairus and Cpl Ali the drugs were hidden.

The two appellants appear to be simple, unsophistacated young rural girls. It is evident that the house did not belong to them. Their evidence that they were employees was credible. There was no evidence to show that they had knowledge that the drugs were in the house or that they would have benefited from the drugs. In the circumstances, the evidence did not prove possession by the appellants. It is apparent that the two courts below misdirected themselves by finding the appellants liable merely because they lived in the same house. This, with due respect, was not an offence of strict liability.

Lastly, it seem that the trial Magistrate considered the sentence of life imprisonment to be mandatory. Otherwise it is not rational to impose a sentence of life imprisonment for *storing* narcotic drugs worth Kshs.2000/=.

By **s.4(a)** of the Act, person who trafficks in narcotic drugs or psychotropc substances

> *"Shall be guilty of an offence and liable"*

to a fine of one million shillings or three times the market value of the narcotic drugs or psychotropic substance whichever is greater, and, in addition, to imprisonment for life.

The section deos not use the word, shall be liable, in reference to the sentence.

Even if **s.4(a)** of the Act is construed thus the words shall be liable are not mandatory, and the court may give any appropriate sentence other than life imprisonment. (see Opoya V Uganda [1967] EA 752 at p. 755 para F).

For the foregoing reasons we allow the appeal of each appellant, quash the conviction and set aside the respective sentences. Each appellant shall be at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 21st day of June 2013.

E.M.GITHINJI

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JUDGE OF APPAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F.SICHALE

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JUDGE OF APPEAL