



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 257 OF 2007**

**BETWEEN**

**KINGSLEY CHUKWU ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang, J) dated 16<sup>th</sup> July, 2007*

**in**

**H. C. CR. A. No. 599 of 2004)**

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**JUDGMENT OF THE COURT**

This is a second and final appeal, and by dint of **section 361** of the Criminal Procedure Code we can only deal with points of law.

The appellant, **Kingsley Chukwu**, was charged before the Chief Magistrate's Court (Muchelule, C.M., as he then was) with trafficking in narcotic drugs contrary to **section 4 (a)** of Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 ("the Act"), the particulars of which were as follows:

***"On the 24<sup>th</sup> day of October, 2003 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area trafficked in 9.605 Kgs. of Narcotic drugs namely DIAACETYLMORPHINE commonly known as Heroin valued at Kshs.9,605,000/= in contravention of the provisions of the said Act."***

He pleaded not guilty. After a full trial, in which the prosecution presented six witnesses, the trial court found the appellant guilty of the offence, convicted him and sentenced him to imprisonment for 15 years. In doing so, the learned Magistrate (as he then was) stated in pertinent part of the judgment as follows:

***"The accused is a Nigeria (sic) national. On 24.13.03(sic) in the morning a Kenya Airways flight***

*number KQ 311 landed FROM (sic) Dubai on its way to Lagos. The accused was on this flight and was going back home from India. He was not allowed to proceed to Lagos but instead was arrested. Anti narcotics police officers had information there were narcotics (sic) drugs on the flight. The drugs were in the luggage compartment of the Aircraft. Because looking for accused removing the luggage from the Aircraft was going to delay the flight to Lagos police agreed with the captain (JOHN KINITI PW 5) who was doing the Lagos section to proceed and have the bags returned to Nairobi. On return the 3 black bags in question were identified by their bags (sic) as follows:-*

*0176-EK-656302*

*(Exhibit-16) 0176-KE-656303*

*(Exhibit-17) and 0176-EK-656304 (exhibit 180).*

*Each tag had name CHUKWU/KING but the numbers on the tags corresponded with the Kenya Airways Computers printout. (Exhibit-15) showing that passenger CHUKWU KINGSLEY was the one who had checked in these luggages. The Kenya Airways passenger manifest (exhibit 22) shows that on the flight was passenger CHUKWU KINGSLEY. The others (sic) passengers with names new (sic) this were CHUKWU EDWIN and CHUKWU ANTONY. The accused's passport (Exhibit 12) shows he is CHUKWU KINGSLEY. He agrees in sworn evidence that he was on this flight but denies he had any checked in luggage. He told court that all that he had was hand luggage. It is for the prosecution to establish beyond doubt that the accused CHUKWU KINGLEY is the same as CHUKWU KINGSLEY on exhibit 15 and 22 and that the name CHUKWU/KING on the tags refers to him and therefore that he was the owner of the luggages. It is quite clear to me that exhibits 12, 15, 16, 17, 18 and 22 all taken together confirm that these luggages were checked in by the accused."*

Aggrieved by that judgment, the appellant appealed to the superior court. However, the appeal was dismissed. The learned Judge of the superior court (Ojwang, J) stated, among other things, as follows:

**"It follows, as this Court finds, that the three pieces of luggage which came to Nairobi on Kenya Airways Flight KQ 311, then were flown to Lagos on Kenya Airways Flight KQ 432 and back to Nairobi on Kenya Airways Flight KQ 433, and which were found to contain narcotic drugs, were in the possession of the appellant, and he was responsible for the content of those pieces of luggage.**

**I have considered the several other objections to the appellant's conviction made on his behalf by learned counsel: that the conviction was based on unreliable circumstantial evidence; that conviction was based on sheer suspicion; that there were doubts in the evidence which should have been resolved in favour of the appellant; that proof-beyond-reasonable doubt had not been achieved; that the narcotic drugs the subject of the charge should have been preserved; that the testimonies of certain witnesses had not been consistent; and that the charge-sheet was defective.**

**The point about the charge-sheet being defective was adequately dealt with by the learned Chief Magistrate, who found the alleged shortfall to be not only marginal, but one which had occasioned no prejudice to the appellant. I hold the trial Court's decision on the question to be one of merit.**

**As regards the other objections, I have considered them anxiously, but found them not to negative the substantive finding of the trial Court, founded upon cogent evidence. I must, in the circumstances, dismiss the appeal against conviction."**

With regard to sentence, the learned Judge disagreed with the trial court, set aside the sentence of 15 years imprisonment imposed by that court, and ordered as follows:

**"1. The appellant's appeal against conviction is dismissed, and the conviction is upheld.**

**2. The appellant shall pay a fine of Kenya Shillings Twenty-Eight Million Eight Hundred Thousand (Kshs.28,800,000/=), and in default, he shall serve a term of Twelve (12) years in jail.**

**3. In addition, the appellant shall serve a prison term of Three-and-a-half (3½) years – this period to be counted from the date of the Judgment of the trial Court.”**

Still dissatisfied, the appellant has now come before us in this final appeal. As we indicated before, under **section 361** of the Criminal Procedure Code, only matters of law may be raised for consideration as this Court will rarely interfere with concurrent findings of fact by the courts below unless those findings are based on no evidence at all, or are based on a perversion of the evidence on record, which is the same thing as saying the decision is bad in law. See ***Kaingo vs Republic (1982) KLR 213***.

The appellant prepared and filed a home-made memorandum of appeal on 20<sup>th</sup> July, 2007 raising the following eight grounds of appeal:

- “1. The prosecution lied to the court that luggages were hanged together while transferring from flight KQ 311 from Dubai to flight KQ 432 going to Lagos thus violated mandatory point of law in section 26 of the CPC and section 72 (2) of narcotic act. (sic)**
- 2. The existence of bags were (sic) not established as nobody agreed that he brought the bags from Lagos and no correspondent from Nigerian authority as required by law in section 59 and 60 or narcotics act. (sic)**
- 3. The charge sheet was defective, fatal and contravened the rule of law.**
- 4. The prosecution midirected the court to destroy the exhibit without knowing the content before the evidence of government analyst and before the trial of the case.**
- 5. The alleged computer print out was not free from error and was produced contrary to the law in section 66B of the evidence act. (sic)**
- 6. The learned trial magistrate erred in law and fact by convicting I (sic) the appellant on mere suspicion on circumstantial evidence and when the prosecution failed to proof (sic) their case beyond reasonable doubt as required by law.**
- 7. The superior court did not adequately evaluate the evidence on record and while the lower court refused to impose fine on I (sic) the appellant.**
- 8. That it is on record that the weighing certificate was not signed thus not proved to be original.”**

Thereafter, he filed a supplementary memorandum of appeal on 1<sup>st</sup> February, 2010 raising the following five additional grounds:

- “1. The superior court erred in law by failing to re-evaluate the entire evidence and draw up its own conclusion according to the law.**
- 2. The superior court erred in law by failing to resolve that the trial court was not independent and impartial within the meaning of section 77 (1) of the constitution.**
- 3. The superior court erred in law by not resolving the discriminatory remark made by the trial court that contravened section 82 (2) of the constitution.**
- 4. The prosecution failed to call witnesses, at least KQ ground staff or who brought the bags from Nigeria that contravened section 150 of CPC.**
- 5. The superior court erred in law by imposing a sentence on a fine manifestly excessive even when the prosecution failed to meet legal requirement according to section 86 of Narcotics Act.”**

The appellant chose to argue the appeal himself, although initially he had indicated that he would

be represented by counsel. Before we discuss his grounds of appeal, let us recapitulate the facts of the case that were before the trial court based on the record before us.

The appellant, a Nigerian citizen, flew into Nairobi by a Kenya Airways flight No. KQ 311 on 24<sup>th</sup> October, 2003, en route to Lagos. Before he could take his connecting flight (No. KQ 432) to Lagos, he was arrested by Anti-Narcotic Police Officers acting on a tip that he was carrying narcotic drugs in his luggage. The three pieces of luggage that were identified as belonging to him had already been loaded onto his connecting flight KQ 432, then ready to depart for Lagos. The police officers were unable to retrieve these bags from the flight at that time, and following discussions with the flight Captain, it was agreed that the flight would proceed to Lagos with the luggage, but that the same would not be released in Lagos, and that all the pieces would be returned to Nairobi, and surrendered to the police. The flight Captain did exactly that, and upon its return to Nairobi, the three bags were opened in the presence of the appellant and heroin worth approximately Kshs.9.6 million, weighing 9.6 kg was found in the bags. Although the appellant denied ownership of these bags, they were positively identified through computerized passenger manifest as bags that had been checked in by the appellant and whose name also appeared on the luggage tags affixed to the bags at the initial point of departure. These were the concurrent findings of the two courts below.

The appellant, for his part, made a sworn statement in his defence. He denied ownership of the three bags in which the drugs were found, and denied having checked-in any luggage at all. He stated that all he had were three carry-on bags which were all in his possession. Both the courts below rejected this defence.

The above are, in brief, the facts that were before the trial court and upon which both the trial court and the superior court reached concurrent findings leading to the appellant being found guilty of the offence charged.

In urging his appeal, the appellant raised several matters, most of which related to facts, and not law. We shall consider here only points of law. His complaints were that the superior court had failed to re-evaluate the entire evidence and to draw its own conclusions according to the law; that the superior court did not give adequate reasons for its judgment; that the superior court failed to find that the trial court had not acted independently and impartially when it made racial and derogatory remarks, and when it advanced its own theories without any evidential basis; that crucial witnesses had not been called to testify at trial; that the charge sheet was defective in that it did not indicate in what manner the appellant was trafficking the drugs; and finally that the sentences imposed by both the courts below were illegal under **section 4** of the Act.

Ms. T. Ouya, learned Assistant Deputy Director of Public Prosecutions opposed the appeal, arguing essentially that the concurrent findings of facts by the two courts below pointed to the guilt of the appellant; that both courts had given proper reasons for their judgments; and that the negative racial comments made by the trial court were made at the time of sentencing and after conviction, and at best would affect sentence only. Ms. Ouya conceded, however, that the sentence imposed was indeed illegal under **section 4** of the Act.

We have considered the appeal, which is a second and final appeal as we have stated. We have considered the evidence that was before the trial court, and the superior court as a first appellate court. We have considered the judgments of both the courts below, and we have taken into account the submissions made before us.

The first complaint relates to the superior court's failure to re-evaluate the entire evidence and to come to its own conclusions. There is absolutely no basis to this submission. The superior court's 36-page judgment is well considered and well reasoned on every point of appeal before it.

With regard to the complaint that the trial court had not acted impartially and independently, and had made certain racial and derogatory statements, we would deplore the trial court's remarks that "... *the people responsible for the bad name and image (of Kenya) are foreigners, especially Nigerians*". That

statement, although *obiter dictum*, has no place in a judgment, and should not have been made. It is unfortunate and unnecessary. However, we would observe, as did the learned Judge of the superior court, that the offending statement was made after conviction, and before sentence, and could be associated more with sentence, rather than conviction. As we will point out later, this has caused no prejudice to the appellant on the conviction. The appellant's argument that the courts below were not impartial has its roots in some statements made in the course of the judgment of the two courts below:

The superior court in taking judicial notice on a matter of general notoriety pursuant to **section 60 (1) (o)** of the Evidence Act, stated:

***“I believe such a position, taking into account the current sophistications in air-travel, and in the adoption of standard procedures by airlines, merits the cover of a recognized presumption of law: omnia praesumuntur rite et solemniter esse acta – all acts are presumed to have been done rightly and regularly.”***

And the trial court, in dismissing the appellant's defence that the bags containing the drugs were not his, and that he had no baggage tags, stated, in its judgment that:

**“But it is reasonable that if someone is carrying illicit drugs on an aircraft he would not at all want to be identified with them”.**

We would reject the appellant's contention that these statements, if not taken in isolation, and out of context, as the appellant appears to do here, would be tantamount to the courts' impartiality and lack of independence. In the first aspect, the superior court was invoking the principle of judicial presumption or judicial notice based on a matter of general notoriety, and in the other aspect the trial court was attempting to explain the appellant's behavior, denial, or disassociation with the luggage tags.

With regard to the appellant's argument that crucial witnesses had not been called to testify, especially the ground staff who had handled the bags, there is no obligation on the prosecution to call any more witnesses than is necessary to prove its case (see **section 143 Evidence Act**), and failure to call any particular witnesses is not necessarily prejudicial to the appellant who was at liberty to call any witnesses he wished.

As for the complaint that the charge was defective because of failure to indicate the manner in which the appellant was alleged to have trafficked in drugs, we uphold Ms. Ouya's submission that it was obvious to the appellant who was represented at trial by an experienced counsel, that the drugs had been conveyed by air on an aircraft, and that this omission was not prejudicial, and that it was curable under **section 382** of Criminal Procedure Code.

Accordingly, and for all those reasons the appeal against conviction fails.

Finally, with regard to sentence, we are of the view that the sentences imposed by both the courts below contravened **section 4** of the Act. Here is what that section says:

**“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.”**

The above section is clear as it relates to sentence. A person convicted for an offence under **section 4 (a)** of the Act, such as the appellant before us, shall be fined Kshs. One million, or three times the value of the drug (whichever is greater) **AND** in addition to imprisonment for life.

Both the lower courts were wrong in the sentence meted out – the trial court for imposing a jail-term of 15 years, without a fine; and the superior court for imposing first a jail term of 12 years **in default** of the fine, and then in addition imposing a jail term of 3½ years. The Act does not permit either of those – that is a **default** jail term; and a jail-term of 3½ years. Accordingly, we must interfere with the sentence under **section 361 (1) (b)** of the Criminal Procedure Code and correct the same.

In the result, we find no merit in the appeal against conviction and uphold the conviction of the appellant. However, we set aside the sentence imposed by the superior court and, in its place, order that the appellant be and is hereby sentenced as follows:

- 1. The appellant shall pay a fine of Kshs.28,800,000/= (Kenya Shillings Twenty-Eight Million, Eight Hundred Thousand) AND, in addition**
- 2. The appellant shall be imprisoned for life.**

Those shall be the orders of this Court.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of April, 2010.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**