REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GITHINJI, WAKI, & ONYANGO OTIENO, JJ.A.)
CRIMINAL APPEAL NO. 84 OF 2004
BETWEEN

PRISCILLA JEMUTAI KOLONGEI ……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a judgment & conviction of the High Court

of Kenya at Nairobi (Kubo, J.) dated 15 th December, 2003
in
H.C.CR.A. NO. 1304 OF 2002)
****

JUDGMENT OF THE COURT

This appeal raises some novel issues on a relatively new Act of Parliament which came into operation in August 1994 – **The Narcotic Drugs and Psychotropic Substances (Control) Act** , Act No. 4 of 1994 as read with Legal Notice No. 291/94 (hereinafter "the Act".) Its import was to:

> **"make provision with respect to the control or the possession of, and trafficking in, narcotic drugs and psychotropic substances and cultivation of certain plants; to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances and for connected purposes."**

Priscilla Jemutai Kolongei (hereinafter "the appellant") is currently serving a term of imprisonment of 18 years at the Langata Women's Prison. The term was imposed by Mrs. Karanja Senior Principal Magistrate (as she then was) in **Kibera Cr.C. No. 2545/2002** on 06.11.02. Over and above the prison sentence a fine of Shs.10 million was imposed and in default of payment of the fine the appellant was to serve another 12 months imprisonment. The charge which attracted that sentence was this:

> **"TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT NO. 4 OF 1994"**

And the particulars:

> **"PRISCILLA JEMUTAI KOLONGEI: On the 25th day of March 2002, at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, trafficked in 27.8Kgs of Narcotic drugs namely Diacetylmorphine commonly known as Heroin with a street value of shs.27,800,000/= in contravention of the said Act."**

The appellant pleaded not guilty to that charge and a full trial was carried out. It was proved beyond doubt through 12 prosecution witnesses that the appellant who was a stewardess with the National Carrier, Kenya Airways, was on the morning of 25.3.02 travelling from Mumbai, India, on flight KQ 201 as an ordinary passenger. The flight touched down at 7.15 a.m. at the Jomo Kenyatta International Airport, Nairobi and the appellant went to the baggage hall where she collected one suitcase and a travelling bag. She put them on a trolley and wheeled them to the Customs desk for necessary checks. On being asked what she was carrying in the bags, the appellant responded that it was bedwww. sheets. The Customs Officer insisted on checking the bags as the appellant was reluctant to open them and when they were opened and searched some strange smell oozed out. The officer insisted on a more thorough check as the appellant tried to coax him not to. At the verification room it was confirmed that some brownish powder was wrapped in polythene paper and concealed in jeans trousers. The baggage tag was tallied with the appellant's Air ticket and passport. The appellant also confirmed the luggage was hers and that she had packed them. An inventory of the items found, which included 33 packages and 2 sachets of the brownish substance, was taken and the appellant countersigned it. A seizure notice in respect of the drugs was also issued and countersigned by the appellant who was present when they were weighed and samples taken to the Government Chemist. They weighed 27.8 Kilograms.

At the Government Chemist it was confirmed that all the sachets contained diacetylmorphine which is commonly known as heroine.

In her self-recorded statement to the police on the day of arrest, which was retracted but admitted in evidence after trial-within-trial, the appellant admitted that the drugs were found with her but said she was carrying them for someone else on a promise of being paid some 2000 US dollars on delivery of the drugs. She denied in court that she had known that she was carrying heroine. It was nevertheless found that she had been informed by persons who approached her in Mumbai that she was to carry "prohibited merchandise" even before it was packed into her baggage. It was not the first time she had been used for such an assignment as she had previously been paid 900 US dollars for a similar mission. Her conduct at the airport and all surrounding circumstances as carefully analysed by the trial court corroborated her statement that she knew she was carrying the drugs and did not use reasonable care and precautions to ensure that she was not importing illegal drugs into this country. In the end the appellant was convicted and the sentence stated above was imposed.

At first the appellant was dissatisfied with the conviction and sentence and so preferred an appeal to the High Court against both. At the hearing of the appeal before Kubo, J, however, the appellant, who was represented by Counsel, abandoned the appeal against conviction and proceeded to urge the appeal against sentence only. In a considered judgment delivered on 15.12.03 on that issue, Kubo, J. dismissed the appeal against the term of imprisonment of 18 years. However, on the issue of the fine, he made the following finding:

> **"On the question of fine, the law provides for a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater. In my respectful view, the law is clear and categorical: the convict is either fined one million shillings if the street value of the drug or psychotropic substance is less than that amount or the convict is fined three times the street value of the drug or psychotropic substance if its value is greater than one million shillings. The court has no discretion in the matter and the learned trial magistrate misdirected herself in law by holding that she had discretion in the matter. It follows that, in my respectful view, the sentence of Kshs.10 million awarded by the magistrate is unauthorized by law and I must interfere with it in order to bring it within the law. The fine of Kshs.10 million passed against the appellant for the offence of trafficking in narcotic drugs or psychotropic substances, contrary to section 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act, 1994 is hereby set aside and substituted with a fine of Kshs.83.4 million, being three times the street value of the drugs or psychotropic substances in compliance with the law. The default sentence of 12 months imprisonment is the maximum permissible in law by virtue of section 28(2) of the Penal code and the same is hereby upheld."**

This is a second appeal whose parameters are set under ***Section 361(1)*** of the Criminal Procedure Code as follows:-

> **"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."**

Subsection (8) and Section 7 are not relevant. So that, the severity of the term of imprisonment imposed and confirmed by the two lower courts at 18 years is not appealable as such since it is a matter of fact. Learned counsel for the appellant Mr. Obuo however stated that the appeal was not against severity of sentence but the legality of it. He also stated that the superior court had enhanced one limb of the sentence that brought the appeal squarely under section 361(1)(b) above.

The Memorandum of Appeal filed by Mr. Obuo contains the following 14 grounds:

> **"1. The learned judge erred in not finding that the sentence was based on a fatally defective charge as the charge stated the street value and not the market value as required by Section 4(a) of the Narcotic drugs and Psychotropic Substance (Control) Act 4 of 1994.**
>
> **2. The learned judge erred in law failing to hold that a sentence based on a value not known to the law was patently illegal.**
>
> **3. The learned judge erred in law in failing to re-evaluate the evidence upon which the value of the drugs in question was arrived at.**
>
> **4. The learned judge erred in law in failing to find that what the prosecution allegedly proved was the street value and not the market value as required by the law.**
>
> **5. Without prejudice to the foregoing, the learned judge erred in law in failing to hold that the so-called street value was never established satisfactorily as to be the basis of the staggering fine.**
>
> **6. The learned judge erred in law in failing to hold that PW 12's evidence as to the value of the drugs could not be relied upon as he was the investigating officer and hence could not be impartial.**
>
> **7. The learned judge erred in law in failing to hold that the evidence of PW 12 just like any other expert was not binding on the court and the court was bound to analyse that evidence and arrive at its own independent conclusion.**
>
> **8. The learned judge erred in law in not finding that the manner in which the prosecution arrived at the value of drugs was arbitrary, capricious, oppressive and utterly without any basis in law.**
>
> **9. The learned judge erred in law when he failed to find that the appellant's constitutional right to a fair trial before an independent and impartial tribunal established by law was violated when the lower court accepted the evidence of PW**
>
> **12 as to the value of the drugs at face value and upon which the amount of fine was**

based. 10. The learned judge erred in law when he failed to find that the charge having provided for street value rather than market value as by law required, violated the principle of legality.

11. The learned judge erred in law in not finding that the evidence of PW9 was highly prejudicial to the appellant and had not probative value whatsoever.

12. The learned judge erred in law in failing to hold that the entire proceedings in the lower court was highly prejudicial and tainted with illegality.

13. The learned judge erred in not finding that conviction and sentence were inextricably intertwined in this matter and one could not be dealt with without the other.

14. The learned judge erred in law when he enhanced the original fine of Kshs.10 million to Kshs.83.4 million on his own motion and without any notice to the appellant."

Ground 13 was abandoned before the appeal was argued as it obviously referred to **"conviction"** when the appeal had nothing to do with conviction. It appears however that it was a tactical retreat, since in the end, in a dexterous move, Mr. Obuo urged us to nullify the conviction anyway. We shall come to that shortly. He argued grounds 1,2,4 and 10 together, grounds 3 and 5 together and the rest of the grounds singularly. We may summarise his arguments:

The first set of grounds attacks the basis upon which the sentence of a fine was made. Mr. Obuo referred to the relevant provisions of the law under which the appellant was convicted and sentenced that is ***Section 4(a)*** which states:

"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 substances, whichever is the greater, and, in addition, to imprisonment for life**;- (emphasis supplied).

He submitted that the only lawful sentence that may be imposed on an offender under that section was based on the **market value** of the drug if that is the option available to the trial court. Market value underpins the penalty and it is defined in the Act. In thiscase however, there was nowhere "market value" was referred to. The charge sheet referred to "street value", the evidence referred to "street value" and both the trial and first appellate courts referred to "street value'. They were all references to non-existent provisions of the law and therefore it was illegal to pass sentence on the appellant on that basis. As criminal law is about clarity and precision and the law here uses one term and not the other, it is not possible that the two terms are interchangeable. The entire sentence should therefore be set aside.

In response to that issue, learned state counsel Mr. Kaigai submitted that the two words mean one and the same thing. There was no complaint at any stage that the appellant did not understand the charge. On the contrary, she knew the case was about an illegal drug which has no legal market. Nothing therefore turns on the failure in the charge sheet, or in the evidence, or references by the two courts below to "street value."

As we stated on the outset this is one of the novel arguments the Act has given birth to since its enactment. We perceive the argument advanced by Mr. Obuo to be an exposition of the age-old presumption, in common law jurisdictions, against unclear changes, particularly in criminal law, that if they were capable of two meanings, however unreasonable one of those meanings be, it was applied favourably to the accused. So too the presumption in favour of strict construction of penal statutes that, in

the words of Lord Esher in ***Tuck & Sons v Priester (1887) 19 QBD 629 :***

> **"If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for construction of penal sections."**

Such presumptions have however been moulded and modified by changing times and circumstances and the approach now as stated by Cross on **Statutory interpretation 3rd Edition** at page 173 is that:

> **"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."**

Lord Denning was even more blunt in rebuking strict constructionists in **Nothman v Barnet Council** [1978] 1WLR 220 when he said:

> **"It is the voice of the strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach" ….. In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision.. It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind".**

- See "interpretation of statutes" in **"The Discipline of Law"** at page 16.

The voice rebuked was from an Appeals Tribunal lamenting thus:

> **"Clearly someone has a duty to do something about this absurd and unjust situation. It may well be however that there is nothing we can do about it. We are bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament ….."**

We find no ambiguity which we have to resolve in the statute before us. On the other hand the sense and purpose of the statute is clear as reproduced in the preamble to the Act above. The gravity of the mischief intended to be prevented and punished, and the social conditions giving rise to the Act are also not lost to us and therefore the interpretation that commends itself to us is one that will not bring the law into disrepute and undermine public confidence in the administration of justice by setting the guilty free.

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 wiling 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 cine 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."**

In this case we see no fundamental difference in reference to "street value" instead of "market value". At all events, as correctly submitted by learned state counsel, there was no prejudice caused to the appellant in adopting such terminology during the trial. That ground of appeal fails.

The more difficult part is the second set of grounds of appeal taken by Mr. Obuo. He submitted that even if "street value" could be understood to be "market value", such value was not proved and it could not therefore form the basis of the fine imposed. He referred to the decision of this Court in ***Hamayun Khan v R Cr. A. 159/00 (UR)*** where the appeal was allowed on grounds, inter alia, that: -

> **"there was no evidence at all at the trial as to the value of the heroine and upon which sentence of Kshs.39 million or in default, 1 year imprisonment could be based. The value of heroin as given in the charge sheet, is by itself, no evidence as to the value of the heroin."**

The sentence was declared invalid. Reference was also made to a persuasive decision from Trinidad and Tobago, ***Buelvas V. Pierre & Anthony (1985) LRC (Crim). 462.*** It was a case relating to the Customs Ordinance there which had a penal section on importation of prohibited goods and a punishment provision that the offender shall "incur a penalty of $500 or treble the value of the goods at the election of the Comptroller of Customs." The Customs officer testifying in respect of the value of the goods, on which the sentence was based, did not indicate the basis upon which he valued the prohibited goods but merely said:

> **"On 13.8.1983, the value of Cannabis Sativa for Customs purposes we (sic) arrived at $400. From my knowledge of (sic) experience, I can value the Cannabis Sativa"**

and in cross-examination

> **"Over a length of time one gathers the experience. I was not involved in the purchase on (sic) sale of Marijuana"**

The Court of Appeal in an opinion expressed obiter, said such evidence was unacceptable and they would have quashed the sentence even if the conviction would stand.

In the case before us the entire evidence on value came from Chief Inspector ***John Kemboi*** (PW12), the officer in-charge of the Anti-narcotics Unit at Jomo Kenyatta International Airport. He stated:

> **"(1) The street value of 27.8 Kgs of heroine is 27M.800 (27,800,000). I am the proper officer to give value of the heroin. I am gazetted vide Kenya gazette No. 3669 dated 21.5.01 (MF1 68).**

In accordance to that gazette, I prepared and signed my certificate of valuation of the said narcotics. – valuation certificate marked MF1 – 69. When I was taking over the exhibits from Mr. Ndegwa, I signed the register."

In cross examination,

"The heroine was worth 27.8 million. We get the street value from intelligence – from the addicts etc. 1 gm of heroine on the street goes for Kshs.1000. I am a gazetted officer to value drugs"

And in re-examination:

"I have experience having been in anti-narcotics for 2 ½ years. We interact with addicts and also have our intelligence network. That is how we know the value. The business is illegal and so that is why we call it "Street Value."

Apart from being attacked as insufficient, that evidence was branded as worthless because it should have come from an expert and CIP Kemboi was not one. Citing *Mutonyi V. R (1982) KLR 203*, Mr. Obuo submitted that:

"Expert evidence is given by a person skilled and experienced in some profession or special sphere of knowledge from facts reported to him or discovered by him by tests, measurements and the like."

For his part Mr. Kaigai for the State submitted that the valuation was proper as it was given by a competent officer gazetted for that purpose. The officer's source of information was intelligence sources for there was no open market for illegal drugs. At all events there was no expert evidence tendered to rebut that *prima facie* value given by CIP Kemboi.

We have anxiously considered this ground of appeal and have come to the conclusion that it too has to fail.

In the first place the authorities cited in aid by the appellant are all distinguishable. What irked the court in the ***Hamayun Shah*** case is that there was no attempt at all to provide any evidence on the value of the drug. Only the charge sheet mentioned it. That is not the case here as there was oral evidence which was available for evaluation by the court. The ***Trinidad and Tobago*** case was an opinion expressed in *obiter dicta* The statute under consideration there was the Customs Ordinance under which the penalty was provided and there was a specific provision on the basis for valuing the prohibited goods and therefore the punishment to be meted out. The witness in that case did not refer to that provision as the basis for his valuation nor was a certificate under the hand of the Comptroller of Customs of the value of such goods produced as provide d for under the Ordinance. In contrast, there is no express provision in the case before us on the basis to be used for calculation of the value of prohibited drugs under the Act. The only express provision is in Section 86 of the Act which was complied with. It states:

"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.

In this section "proper officer" means the officer authorized by the Minister by notification in the Gazette for the purposes of this section."

We think the enactment of that section was an obvious recognition of the difficulty in the availability of first hand knowledge of what a willing seller would accept from a willing buyer for goods such as narcotic drugs which are illegal. The certificate remains *prima facie* evidence which may be challenged

by other evidence, in the absence of which it is the only evidence to be relied upon in addition to any other evidence on record.

The ***Mutonyi*** case is also distinguishable. It was on the Prevention of Corruption Act and the evidence in issue there clearly required an expert as it involved the use of "APQ" powder on the appellant's hands and shirt which was a matter of forensic science. In terms of Section 48 of the Evidence Act, it was an opinion on a point of "science or art or as to identity or genuineness of handwriting or finger or other impressions". The superintendent of Police who dusted the appellants in that case gave no details of his skill and experience in that forensic science. All he said was that he examined the appellant "with alleviated radiation in a dark non-contaminated room and found fluorescent specks on the hands." Swabs taken from the same hands however showed no presence of "APQ" powder, and it was not possible therefore to resolve the conflict. The court was right to disregard such evidence as the opinion of the police officer was unreliable.

In this case the source of the opinion given by CIP Kemboi on the value of the drug was intelligence gathered by him from drug addicts he has interacted with in the 2 ½ years he headed the Anti-Narcotics Squad and from other intelligence networks. He was a gazetted officer for valuation of drugs and that was not challenged. Once again we must appreciate the difficulty in obtaining authenticated values in such circumstances but in the absence of any other evidence to challenge CIP Kemboi, the trial court was right to believe him. In *Byrne v Low* (Supra) which is relied on by Mr. Obuo, the court followed the common sense approach proposed by Birket L J in ***Rolex Watch Co. Ltd vs. Comrs 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.

We think in this case the material on record was sufficient to support the valuation of the drug weighting 27.8 kg at Kshs.27.8 million. It follows therefore that the use of that valuation as a basis for determining the sentence was not enhancement of sentence as contended under ground 14 above but a legalisation of it.

The remaining grounds may be considered under the one ground which Mr. Obuo argued with considerable ingenuity. It is this:

The value of the drug and therefore the punishment meted out to the appellant was determined by the Police which is part of the executive branch of Government. That therefore questions the constitutionality of the whole trial and calls for nullification of both the conviction and the sentence. That is because under the Constitution, there is a clear separation of powers and it is only the Judiciary that has the constitutional power to punish individual offenders. It is for the Court to call independent witnesses on severity of sentence. The Act here, however, surrenders the powers of punishment to the Police officer who certifies the value of the drug which the Court accepts as the basis for punishment.

To buttress that argument, Mr. Obuo referred to two Privy Council decisions: ***Browne v. R [1999] 3LRC 440*** and ***Mohamed Muktar Ali vs. The Queen [1992] 2 WLR 357.***

In the latter case, the Constitution of Mauritius gave the Director of Public Prosecutions the power to institute Criminal proceedings in any Court. The ***Dangerous Drugs Act 1982*** created offences which were triable either before a Court with or without a jury. In one option the accused would on conviction be sentenced to a fine and a term of penal servitude. In the other, a mandatory sentence of death. It was the view of the Privy Council that the Director by his decision about the Court of trial was in effect selecting the death penalty and declared that provision of the Dangerous Drugs Act invalid since it

infringed on the principle of separation of Legislative, Executive and Judicial powers implied in the Constitution.

The **Browne Case** involved a provision in **the Offences against the Person Act 1873** (the Act) of the Islands of St. Christopher & Nevis, whose Constitution followed the Westminster model and was based on the principle of separation of legislative, executive and judicial powers. There was a Governor General who was part of the executive but a proviso to the Act bound the Court to "***detain a convicted young offender at the Governor General's pleasure"*** . A 15 year old boy was convicted of murder and was accordingly detained during the Governor General's pleasure in accordance with the Act. The Privy Council held that the sentencing of individual offenders was an integral part of the administration of justice and could not validly be committed to the Governor General who was an executive; not a judicial officer. It was therefore unlawful for parliament to transfer from the Judiciary to the executive body a discretion to determine severity of the punishment to be inflicted upon an individual member of a particular class of offenders. The sentence was declared unlawful.

With respect, we think those persuasive authorities have been applied to the case before us out of context. The principle of separation of powers is venerated in all commonwealth jurisdictions and there is every virtue in the Courts jealously protecting the checks and balances implicit in that governance philosophy. We do not challenge the conclusions reached by the Privy Council on the decisions cited before us as they are justified on the facts and law under consideration there. We do not however see the infringement of our constitution by the provisions of Section 4(a) or ***section 86*** of our Act. Parliament has the powers to prescribe a fixed punishment or range of punishments applicable to all offenders found guilty of a specified offence. It has done so in ***Section 4(a)*** of the Act by giving to the Court several options in sentencing for trafficking narcotic drugs.*Section 86* is not a mandatory provision on sentencing but evidential aid, again for the benefit of the Court, in the valuation of goods for penalty. In an appropriate case, the Court is at liberty to reject the certificate from a gazetted officer if there is cogent evidence in rebuttal thereof. In both sections, the executive does not usurp the powers of the Judiciary, and it is our view therefore that the objection taken on the Constitutionality of those provisions is lacking in merit. That ground of appeal fails too.

On the whole, this appeal, which is wholly on the legality of sentence, is without merit. As Shakespeare would put it, it was full of sound and fury, signifying nothing. We dismiss it.

Dated and delivered at NAIROBI th is 14th day of January, 2005.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR