REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 37 OF 2012

RICHARD STEPHEN BATTIN……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence contained in the judgment of Hon. Adwera Onginjo (Chief Magistrate) in the Chief Magistrate's Court at Kibera Criminal Case No. 3554 of 2013 delivered on 13th February, 2015)

JUDGMENT

The Appellant was charged alongside two others, namely; Jamal Mohamed Abdi and Latifa Marie Antoinette Onezime with the offence of trafficking in narcotics contrary to Section 4(a) of the Narcotics and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on 1st August 2012, at Jomo Kenyatta International Airport in Nairobi, within Nairobi County, jointly trafficked by conveying in a black travelling handbag and a diplomatic duty free paper bag a narcotic drug namely, heroin weighing 3,730.7 grams with a market value of Kshs. 6,716,260 in contravention of the provisions of the said Act.

The prosecution called six witnesses in support of its case. The Appellant's co-accused were acquitted under Section 210 of the Criminal Procedure Code for lack of evidence.

Aggrieved by the trial court's decision, the Appellant filed this appeal in which he relied on the following grounds as contained in the amended Petition of Appeal: firstly, that there was no sufficient evidence to prove the charges; secondly, the crucial ingredients of the charges were not established; thirdly, the case against the Appellant lacked essential corroborating evidence to support a conviction; fourthly, the trial court relied on its own views and failed to comply with mandatory provisions of the law thereby arriving at a wrong decision; fifthly, that crucial witnesses were not called to testify; sixthly, that the weighing certificate containing the results of the drug examination was not substantiated or corroborated and that the sentence was manifestly excessive.

Submissions

Both parties filed their respective submissions. The appeal was heard before me on 25th November 2015. Learned counsel, Mr. Kang'ahi for the Appellant submitted that the trial court failed to comply with

section 200 of the Criminal Procedure Code. Furthermore, the charges could not be fully established when the question of the weight, identity and purity of the suspected drugs was in doubt.

Counsel also faulted the trial court for making presumptions in its judgment as to the identification of the bags that were found to contain the drugs. Counsel further alluded to the differing descriptions of the drugs that were allegedly recovered, which was an indication that the samples in issue were different.

Counsel further submitted that there were material contradictions in the evidence. He pointed out anomalies as to the dates of the inventories prepared and as to the identity of the substance as cocaine and heroin by PW1 and PW4 respectively. A further contradiction was noted in the evidence of PW1 who indicated that the bag in question was not tagged while PW4 indicated that the bags were tagged. Moreover, none of these two witnesses were present when a spot-test of the contents of the sachets was allegedly done, despite both making reference to it. Counsel also submitted that PW4 contradicted herself in her testimony, adding that this witness further contradicted the account by PW6 regarding exhibits said to have been destroyed in a fire. It was further submitted that failure to call one Corporal Gichina who was present at the time the Appellant was arrested was fatal to the prosecution's case. Counsel urged the court to allow the appeal and set aside the sentence.

The appeal was opposed. Ms. Nyauncho for the respondent submitted that Section 200 of the Criminal Procedure Code was complied with when defence counsel confirmed that the matter should proceed from where it had reached. Counsel submitted that the Appellant was arrested by PW1 with a hand luggage which contained a polythene bag from where the drugs were found. She added that PW4 was present at the time of the arrest. He testified that the luggage had been checked in using the Appellant's name. Counsel submitted that the contradictions about the identity of the bag were immaterial as they could be resolved under section 382 of the Criminal Procedure Code. Moreover, the substance examined by the government chemist had been found to contain heroin. Ms. Nyauncho pointed out that the examination of the exhibits was done on 1st August 2012, while the fire at the Jomo Kenyatta International Airport (JKIA) broke out on 7th August 2013, as evidenced by a fire report which was produced in court. She urged the court to dismiss the appeal.

The Evidence

This being the first appellate court its duty is to re-evaluate the evidence and draw its own conclusions. The court must however bear in mind that it has neither seen nor heard the witnesses and give room for that. See **Okeno v Republic (1972) EA, 32.**

The background to the case is that on the 31st July, 2012, **PW1, Police Constable Justus Adenya** of Police Anti-Narcotics Unit was at Jomo Kenyatta International Airport (JKIA) with Senior Sergeant Jane Njage, Corporal Mwanzia and Corporal Teddy. They received the information in the evening that there were suspicious persons who had checked in at gate 12. They proceeded to the passengers lounge and on surveying singled out two male adults and a single lady who had a child. They introduced themselves and requested for their passports and air tickets. Upon confirming that they had legal passes asked them to accompany them to the Kenya Airways Airline terminus. One of the persons was the Appellant herein. He retrieved his bag from Kenya Airways Airline. He was escorted to the police office with his retrieved travel bags. A search was conducted in a small hand bag which contained 73 sachets of what was suspected to be narcotic drugs in a polythene paper. In addition, there were 15 pieces of assorted chocolate sweets in a container, a transparent duty polythene bag with a rectangular box with yellow handles containing 40 sachets of suspected drugs. Inside the yellow box were 22 chocolate sweets together with suspected drug sachets. The arch container had 15 sweets and a hectagon Roy Mix container. In the container were 82 sachets inside a polythene.

The 2nd suspect was one Jamal Abdi Mohamed from whom personal effects were found. PW1 prepared an inventory in his respect. Senior Sergeant Jane Njage who was a lady conducted the search on the female adult.

According to PW1 an inventory of the items recovered from the Appellant was done by a Corporal Teddy. PW1 however identified it as MF3. As at the time of the arrest, the Appellant had already been issued with a boarding pass dated 31st July, 2012. That applied to Jamal Abdi Mohamed and the female suspect.

PW2, Corporal Frank Anunda testified that on the 1st August, 2012 he was summoned by Corporal Omondi of Police Anti-Narcotics Unit for purposes of weighing the suspected narcotic drugs recovered from the Appellant. He was a scene of crime officer. He conducted the weighing and prepared a report in that respect. He also took photographs of all the items that had been recovered.

PW3, William Kailo Munyoki was a Government Analyst based at government chemists in Nairobi. He was charged with the duty of conducting a laboratory analysis of the substances contained in the sachets. He did a sampling of the same and thereafter a chemical analysis. The exhibits had been escorted to the government chemist by a Corporal Munolo. The powder was analyzed as brownish in colour and found to contain diacethyne morphine commonly referred to as heroine. It was classified under the 1st Schedule of Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994. He prepared a report in that respect.

PW4, Senior Sergeant Jane Njage corroborated the evidence of PW1. She confirmed that the female adult arrested alongside the Appellant was Latifa Maria who was carrying a female child. She recovered nothing suspicious from the said Latifa Maria.

PW5, Corporal Joshua Okalo then an instructor at CID Training School formerly worked with Police Anti-Narcotics Unit. He was a gazetted drugs valuer. On the 31st of August, 2012 while at JKIA was requested by Corporal Paul Omondi to do a valuation of some substances recovered and was suspected to be narcotic drugs. The total sum of the substance was 3730 grams and each gram was valued at Kshs. 1800/= thus giving the total value at Ksh. 6,715,260/=. He prepared a certificated in that regard.

PW6, Corporal Paul Omondi worked for the Police Anti-Narcotics Unit at JKIA. He was assigned to investigate the case on 1st August, 2012. He summed up the evidence of all the prosecution witnesses. He found all the 3 suspects culpable and charged them accordingly.

The Appellant was placed in his defence. He denied any involvement in the offence. In his sworn testimony in court, the Appellant stated that he did not see the bags alleged to have contained the drugs. He stated that when the police searched their bags at the airport, nothing was recovered. He stated that he was only shown photographs of the bags in court. The said photos were not taken in his presence. At the end of the trial, he was found guilty and sentenced to pay a fine of three times of Ksh. 6,716,260 which was the value of the narcotic drug and in addition, serve life imprisonment.

Analysis and Determination

The main issue for consideration is whether the prosecution proved the charges against the Appellant beyond all doubts, and in particular, whether the drugs recovered were sufficiently linked to the Appellant.

On a matter of law it was challenged that the trial court did not comply with Section 200(3) of the

Criminal Procedure Code when there was a changeover of the presiding magistrate. Mr. Kang'ahi while faulting the court advanced the view that the duty to explain the right under Section 200(3) was to the Appellant and not to his advocate. He relied on the cases of ***Evans Amenya Karindo v Republic*** **Cr. Appeal No. 264 of 2011 (2014) eKLR** and ***Rebecca Mwikali Nabutola v Republic*** **Misc. Cr. Appeal No. 445, 448 & 452 of 2012 (2012) eKLR.**

Section 200(3) provides that:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witnesses be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

In the case of ***Rebecca Mwikali Nabutola v Republic*** also cited with approval in the case of Evans ***Amenya Karindo v Republic*****,** the court stated:

"The record of the trial court must of necessity contain the fact that the trial court, in this case the succeeding magistrate, has informed the accused person of the right to recall or hear any witness. The reply by the accused person must also be placed on the record and the order relating thereto should be signed by the succeeding magistrate. It is not enough for counsel to state that they have taken instructions because as the Court of Appeal has said the duty of the court is to the accused person and not the advocate."

The decision of the Court of Appeal in the case of ***Bob Ayub v Republic*** **Cr. Appeal No. 106 of 2009 [2010] eKLR** was relied on in the above cited case. The court reasoned thus:

"The record before us, the relevant part of which we have reproduced above, clearly shows that Musinga J. did not comply as was required of him, with the provisions of section 200(3) of the Criminal Procedure Code which as per section 201 (2) was to apply mutatis mutandis in this case. He did not explain to the Appellant his right to demand the recall and rehearsing of any witness as was required under that provision. Miss Oundo counters that by saying the Appellant was represented by an advocate and so there was no need for that. Our short answer to that is that it was the Appellant who was on trial and the duty of the court was to the Appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that section 200 was complied with is hollow without any evidence from the record."

The record of the proceedings shows that the matter was initially presided over by Hon. Kwena who heard the evidence of PW1. Hon. Onginjo took over thereafter. At this stage, the record shows that the court informed the accused of their rights under section 200(3) as follows:

'Court: Accused persons informed of provisions of section 200(3) Criminal Procedure Code which provides that may apply for recall of witnesses.

Mr. Swaka: We wish to proceed from where matter reached.

Court: decision taken that matter to proceed from where it reached.'

The record as cited shows that the trial court indeed complied with the provisions of the law. The context herein differs with the Court of Appeal case of ***Bob Ayub v Republic*** (supra). In that case, the trial court did not comply with the provision of the law and simply declared that the case would proceed from where

the previous trial judge had reached. That is not the case here. The fact that the response was given by counsel who had authority of the Appellant, does not negate the fact that the trial court fulfilled its duty to the Appellant as enjoined by the law. It is trite that once a party engages an advocate to represent him, the advocate becomes his mouth piece and whatever he tells the court is taken as a representation of the accused person's wish. The advocate speaks for the accused. This ground therefore, lacks merit.

On the questions of the evidence, the Appellant has challenged that the prosecution did not establish the charges against him. He cited the identification of the polythene bag and the black bag which were found to contain the drugs. He also challenged the credibility of the results of analysis of the recovered substances.

The arrest of the Appellant and the resulting recoveries took place at the JKIA, as they were about to travel. This was done by PW1, **No. 466482 PC Justus Adenya** and **PW4, Sgt. Jane Njenge** and another officer, all of whom were attached to the JKIA Anti-Narcotics Unit. From the prosecution testimonies, 215 sachets, suspected to be narcotic drugs were recovered from the Appellant. **PW2, No. 44491 Cpl. Frank Aununda**, a gazette scenes-of-crime officer weighed the recovered samples on 1st August 2012. He took photos of the process, and found that the total weight of the whole consignment was 3,730.0 grams. He produced in court the photos, a report and the accompanying certificate.**PW5, No. 232341 Cl. Joshua Okalo**, an officer gazetted to give value of drugs pursuant to Section 86 of the Narcotics and Psychotropic Substances Control Act advised **PW6, (No. 65892 Cpl. Paul Omondi)**, the investigating officer in this case, on the value of the drugs. He produced in court a certificate of the valuation of the recovered drugs. based on the market value of Ksh. 1,800/- per gram, thus, a total value of Ks. 6,715,260/-.

PW1 and PW4 testified that a spot-test revealed that the substances were drugs. This was confirmed by the testimony of **PW3 William Kailo Munywoki**, the government chemist analyst. PW3 testified that he took the 215 sachets for analysis. He found that the powder in all the sachets contained diacethyne morphine, commonly referred to as heroin. He produced a report and the sampling certificate detailing his findings. His report is dated 6th August, 2012 which showed that 30% of the substance was heroin.

The exhibits which ought to have been produced in court by PW6, the investigating officer were however, not produced on account that they were destroyed in a fire at the JKIA. The Respondent urged the court to observe that the examination of the exhibits was done on 1st August 2012, while the fire broke out at the JKIA on 7th August 2013. PW6 testified that he escorted the exhibits to the government analyst for examination on 3rd August 2012. The report containing the government analyst's findings is dated 6th August 2012. Certainly, the analysis of the substances took place before the fire broke out.

PW6 stated in his evidence that the physical sachets got burnt when the fire broke out at the JKIA. While this may be a plausible ground for non-production of the exhibits, I observe that when PW1 testified on 25th March 2014, he produced some of the sachets which were then marked for identification, and a physical count of the sachets was done in court. This was certainly after the fire of 7th August 2013 when it is alleged the exhibits were destroyed. PW1 stated in part in his evidence:

'I have here with me 127 sachets of the drugs. They were all opened and sampled.'

The trial court further noted:

The sachets in court physically counted by the court clerk…The number mentioned may be the wrong number…physical count reveals 149 sachets…'

Some of the samples produced in court by PW1 were partially burnt. Indeed, as PW1 stated during cross-examination, some of the sachets were consumed in the fire. Yet, when PW6 referred to the photographs of the 215 sachets produced in court, he stated that the physical exhibits were destroyed in the fire. This account therefore, renders it unbelievable that none of the physical exhibits could be produced in court since they had been destroyed. PW6 ought to have produced the exhibits that were salvaged as indicated by PW1. The occurrence of the fire at the airport is not disputable, since it was a matter in the public domain reported by the media across board. What is in dispute is whether all the exhibits were destroyed in that fire as alleged by PW6. From PW1's evidence, that could not have been the case.

What is also materially in issue is the identity of the bags from which the drugs were recovered. According to PW1, the Appellant was carrying a hand luggage, a black bag, at the time the police intercepted them. PW1 testified that he searched the Appellant and the bag and retrieved the following: a heptagon-shaped container which had 73 sachets suspected to contain drugs and 15 pieces of assorted chocolate sweets; a transparent duty-free polythene bag containing a rectangular box with yellow handles inside of which were 40 sachets of drugs and 22 chocolate sweets with the drug sachets; an ark-shaped container which contained 11 sachets and 15 assorted sweets and a *Roymix* container which contained 81 sachets inside a polythene paper and assorted sweets.

PW1 added that he did not prepare an inventory in respect of the Appellant. According to him, the inventory in respect of the Appellant was prepared by Cpl. Teddy in PW1's presence. PW1 further stated that he issued a notice of seizure to the three suspects which he produced in court.

In cross-examination by Mr. Kang'ahi, PW1 stated that the hand luggage that was carried by the Appellant was not tagged, while the travel bags had tags which were however, not produced. He further testified that the inventory in respect of the Appellant was dated 1st August, 2012, which he acknowledged was outside normal practice since an inventory ought to have been prepared at the time a recovery is made.

When the Appellant was intercepted together with the others, they were also required to retrieve their checked-in luggage. According to PW4, nothing incriminating was found on the checked-in luggage, thus the question as to the tagging of the travel bags is immaterial.

From PW4's account, when the police intercepted the suspects, they had two black bags and a transparent duty-free bag. The police asked each of them to identify the hand luggage and it was found to belong to the Appellant and Jamal, one of the co-accused in the case, who was in the company of the Appellant. PW4 stated that the bags were tagged with their respective names. She stated that the black handbag and the transparent duty free paper bag had been checked-in in the name of the Appellant. The second black bag contained a laptop and a child's clothes.

PW4 on the other hand maintained in her evidence that the bags were tagged. Her testimony reads in part:

'Earlier when we intercepted them from departures they had two black bags and transparent duty free bags. When we confirmed checked in luggages (sic) had nothing, we requested them to identify to whom the small bags belonged. The 2 black bags belonged to Jamal and Batini respectively. The first bag which belonged to Batini. The bags had tags with names of the owners.'

This account cannot be so since no such evidence was produced in court. Furthermore, in her own

testimony, PW4 indicated that the suspects themselves pointed out the bags belonging to them. There are contradictions in this respect between the account of PW1 and that of PW4. PW1 was clear in his testimony that the black bag in question was not tagged with any name. According to PW1, the Appellant was arrested on account of the fact that he was the one carrying the bag that contained the drugs. Yet, PW4 testified that when the police found the suspects, they were seated and the bags were down.

This contradiction is not one that can be cured by Section 382 of the Criminal Procedure Code as this court was urged to find by the Respondent. This provision applies to errors, omissions, or irregularities in the complaint, summons, warrant, charge, order, judgment or other proceedings during a trial. The errors referred to therein must not materially affect the substance of the case. They must not twist the facts of the case. But in the present case, the contradiction in this question is a matter of fact that can only be addressed through evidence.

In this respect, the evidence of the inventory of what was recovered would have been crucial to confirm the accounts of PW1 and PW4. PW1 stated that the inventory was prepared by one Corporal Teddy in PW1's presence. This witness was not called to testify and therefore, the proper account as to what was recovered from the accused was not verified.

The prosecution is under no duty to call a certain number of witnesses, a fact recognized under **Section 143** of the Evidence Act. That being the case, in such a case as this, where there are contradictions, a witness such as Corporal Teddy was crucial to seal the gaps. There is no explanation as to why this officer, said to have been the one who prepared the inventory was not called as a witness. The issue of the items recovered from the accused is crucial in light of the defence given by the Appellant. The Appellant did not deny the fact that they were subjected to a search by the police as they were about to depart from the country. It was his evidence that the police searched their bags and recovered nothing. He denied knowledge of the bags said to contain the drugs in question, stating that he only saw the photographs of the bags for the first time in court. That is why it is only Corporal Teddy who would have shed light on exactly what was recovered from the Appellant as he recorded it in an inventory.

PW6 on his part testified that he prepared inventories of the items recovered from the suspects, including the Appellant. PW6 took over the case on 1st August, 2012. This may explain why the inventory was dated 1st August, 2012, a day after the recoveries were made. It is also a pointer to the fact that the inventory may not have been prepared at the scene. It also contradicts the account by PW1 that the inventory was prepared by Corporal Teddy in PW1's presence. If any such inventory was prepared by PW6, this could only have been from the account given by the arresting officers since PW6 was not present at the time when the Appellant was arrested.

A successful prosecution of a criminal offence is determined by the quality of investigations carried out. Where the quality of investigations is compromised, the prosecution is similarly affected. The Narcotics and Psychotropic Substances Control Act gives directions as to procedure of handling of recoveries made for the purposes of presenting a case in court. In cases of this nature, record keeping should be secured in the entire chain from the recovery of the suspected samples, their sampling and analysis, their storage and to their eventual presentation in court. Where the safety and integrity of the samples is not secured in the custody chain, then a water tight case is not assured. The latter is clearly represented in this case, which has definitely rendered a fatal blow to the prosecution's case. The lapses in the investigations resulted in gaps in the prosecution's evidence material to the case. These being matters of evidence, the gaps cannot be cured under the law, compromising what was an otherwise good case. The sum total is that the prosecution failed to prove its case to the required standard. This appeal has merit and is hereby allowed. I quash the conviction, set aside the sentence imposed and order that the Appellant be and is hereby set free unless otherwise lawfully held.

DATED and DELIVERED at NAIROBI this 23RD Day of DECEMBER, 2015

G.W.NGENYE -MACHARIA

JUDGE

In the presence of;

1. Mr. Kang'ahi for the Appellant.
2. Mr. Murithi for the Respondent.