

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.1304 OF 2002

PRISCILLA JEMUTAI KOLONGEI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[From Original Conviction and Sentence of the Senior Principal

Magistrate's Court at Kibera]

JUDGMENT

The appellant herein was on 06.11.02 convicted by the Senior Principal Magistrate, Kibera of the offence of trafficking in narcotic drugs or psychotropic substances, contrary to ^{Section} 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No.4 of 1994 and sentenced to a fine of Kshs.10 million, in default 12 months imprisonment and in addition to serve 18 years imprisonment. The drugs in question were ordered to be forfeited to the State and to be destroyed. She appealed against her conviction and sentence.

When the appeal came up for hearing on 02.12.03, learned counsel for the appellant, Mr. Oruko informed this court that the appellant wished to abandon her appeal against conviction and pursue only her appeal against sentence. The appellant's application to abandon her appeal against conviction was allowed and appellant's counsel proceeded to argue only the appellant's appeal against sentence.

Appellant's counsel pointed out that the appellant had been in custody for 1 year before sentence and had by the time of the appeal served 2 years of her 18-year jail term, i.e. she had been in custody for a total of 3 years. Appellant's counsel submitted that the appellant is a young lady, aged 37 years; unmarried; and has a young daughter aged 3 - 4 years old who is suffering as a result of the appellant's imprisonment. That the appellant is remorseful as she also informed the trial court at the time of her sentence. That the evidence against her did not say she dealt in drugs but that she was a conduit. That she co-operated with the investigating officer and the court. That had all the above factors been taken into account, the sentence would have been substantially affected downwards. That the appellant is epileptic and had many times in prison been seized by epileptic fits

and was rushed to Kenyatta National Hospital and that medical reports and treatment notes by Dr. Mwinzi were availed to court. That her continuous confinement is bound to increase incidents of her attacks. That the appellant is a Kenyan. That she is now a saved person and conducts church services in prison. Appellant's counsel urged that the appellant's appeal against sentence be allowed.

Learned counsel for the respondent, Miss Nyamosi submitted that the issue of sentence is at the discretion of the court. That the magistrate took account of the issues raised by the appellant's counsel. Respondent's counsel left the matter of sentence to court.

The issue ^{for} ~~of~~ the determination of this court is whether a case has been made out for this court to interfere with the sentence passed against the appellant.

Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 under which the appellant was charged, convicted and sentenced provides as follows:

“4. 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 liable –

(a) in respect of any 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 appellant has urged this court in its appellate jurisdiction to reduce her sentence on the grounds advanced by her. Main grounds or guidelines on which an appellate court can interfere with the sentence passed by a trial court are: whether there has been a misdirection; whether there has been application of wrong sentencing principles; or whether the sentence is manifestly excessive or inadequate.

I would first like to address the issues of the appellant's reported illness and what the appellant describes as the suffering of her 3 - 4 year old innocent child occasioned by her (appellant's) incarceration. The Prisons Act (Cap.90) makes fairly elaborate provisions for the treatment of ailing prisoners. The fact that the appellant was referred by the prison authorities to Kenyatta National Hospital for treatment stems from enabling provisions of

the ^prisons Act. This answers the appellant's prayer regarding illness. The issue of the appellant's imprisonment having adverse consequences on her innocent young child does indeed pose a major penological dilemma, both here and I believe worldwide. Indeed the problem can be extended to other dependants of convicts who get imprisoned. There is no easy answer or solution to this knotty problem. Yet the bitter message must be driven home that the demands of good citizenship include a requirement for everybody to keep on the correct side of the law or else invite unflattering consequences for its non-observance upon the offender and/or dependants. The appellant must take full responsibility for the inevitable consequences of her wrong-doing.

I now revert to the actual sentence complained of. After hearing counsel for the appellant and the respondent on sentence, the learned trial magistrate made the following pronouncement;

"On the issue of fine, the Act provides for a fine of 1 million or 3 times the market value of the drugs. In this case, the court was given the valuation certificate showing that the drugs were worth 27.8 million. A fine of 3 times that amount is to say the least overwhelming and impossible for anybody to raise. I will therefore exercise my discretion and impose a more reasonable fine of Kshs.10 million in default 12

months imprisonment. In addition the accused will serve 18 (eighteen) years imprisonment."

As noted earlier, a person guilty of the offence of trafficking in any narcotic drug or psychotropic substance under section 4 (a) of the Act is liable, inter alia, to Imprisonment for life. The appellant was awarded 18 years imprisonment after her mitigation was considered by the trial magistrate. Under the general provision relating to imprisonment stipulated by section 26 (2) of the Penal Code (Cap.63), the court has discretion with regard to a convict liable to life imprisonment to sentence such convict to a lesser term. The appellant was convicted of trafficking in 27.8 Kgs of "heroin", which is a hard drug. The amount is large. The trial magistrate took into account the adverse effects or consequences of hard drugs on society. The street value of the drugs was given as kshs.27.8 million.

Appellant's counsel pointed out that the evidence advanced showed the appellant not to be a user but just a conduit and submitted that this is a mitigating factor. With respect, it cuts both ways and in my view it is more of an aggravating factor in that a

conduit provides the main channel through which narcotic drugs or psychotropic substances reach the market, with adverse consequences on the wider society. The harmful role played by the conduit cannot, therefore, ^{be} over-emphasized.

In my respectful view, there is no misdirection by the magistrate in her having awarded the appellant the prison term of 18 years. The magistrate did not apply any wrong sentencing principles, neither is the prison sentence manifestly excessive. The same is hereby upheld and the appellant's appeal in respect thereof dismissed.

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 ^r ~~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 unauthorised 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 ^ppsychotropic ~~S~~ubstances (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.

Orders accordingly.

Delivered at Nairobi this 15th day of December, 2003.


B.P. KUBO

JUDGE