REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 327 of 2008

BETWEEN

EUNICE KALAMA JABU.....APPELLANT

AND

REPUBLIC……..……..RESPONDENT

(Appeal from a judgment of the High court of Kenya at Malindi (Omondi, J) dated 31st July 2008

in
H.C.CR.A NO 91 of 2007
****

JUDGMENT OF THE COURT

This is a second appeal. That being the case, this Court, by dint of the provisions of **section 361** of the Criminal Procedure Act is required to consider mainly legal issues raised by the appeal unless it is shown that the two courts below considered evidence that never existed or failed to consider evidence that was before them or on the proper construction of the evidence that was on record, came to a conclusion that was perverse. We will later, in this judgment revisit the provisions of that section as will be relevant. The appellant Eunice Kalama Jabu, was charged in the Senior Resident Magistrate's court at Kilifi with the offence of trafficking in narcotic drugs contrary to **section 4(a**) of the Narcotic Drugs and Pychotropic Substances (Control) Act No 4 of 1994. The particulars were:

> **"On the 5th day of February 2007 at Timboni village Shariani area in Kilifi District within Coast Province, jointly with others not before court, trafficked in narcotic drugs, by storing 787 big rolls, 46 cut rolls and 4 stones of cannabis with a street value of Kshs. 79,960/- in contravention to the said Act"**

She pleaded not guilty to the charge but after full hearing the learned Senior Resident Magistrate (C.O. Obulutsa) found her guilty of the offence as charged, convicted her and sentenced her to imprisonment for a term of 10 years, and a fine of Kshs. 1,000,000 or in default to serve 12 months imprisonment. The imprisonment term and defaulting term to run consecutively.

She was dissatisfied with that conviction and sentence and she appealed against both to the superior court. The superior court (Omondi, J) considered the appeal and in a judgment delivered on 31st July 2008, dismissed it both on conviction and sentence. Hence, this appeal premised on seven grounds which are as follows:

" 1 That I was held in police custody than (sic) stipulated under section 72(3) (B) of the constitution.

2 That, the charge is defective, vi3; (sic)
(a) The particulars of the charge was framed contrary to section 137 (1) of the CPC
(b) The date as reflected in the OB Number doesn't tally with the date the offence was allegedly committed.
3 That, the trial was conducted partly without full coram.
4 That, the government analysis designation and qualifications is unknown amounting to error of law.
5 That, the high court erred in law in failing to re-examine and re-evaluate the entire evidence.
6 That, the trial court failed to indicate the language in which the appellant made her statement in defence rendering the trial a nullity.
7 That, the trial magistrate failed to follow provisions of section 169(2) of the CPC to his judgment and conviction (sic)."

When the appeal came up for hearing, the appellant, who conducted her appeal in person, did not make any submissions challenging the conviction, even after we drew her attention to the fact that her appeal was on both conviction and sentence. She however insisted that she was still appealing against conviction as well. All she did before us by way of submission was to seek this Court's lenience on sentence on grounds that she was a parent having three children the last of whom was left while only 3 years and these children were undergoing severe conditions as she had lived in a rented house and is not aware where they are now. She sought court's mercy to reduce the sentence to such term that would enable her join her children and provide them with the necessary motherly care.

Mr Ondari the learned Assistant Deputy Public Prosecutor supported the conviction and the sentence, contending that both were merited. He submitted that none of the grounds raised on the memorandum of appeal particulars of which we have reproduced herein above, could be sustained and he sought dismissal of the appeal.

PC Damaris Arusei (PW1) was at the relevant time working with Anti Narcotic Unit. On information, she together with Cpl Kasak Langat, PC Maina and Lwambe went to the house of the appellant at Shariani Timboni on 5th February, 2007. She found the appellant seated outside the house. She introduced herself and her team and gave their reason for their visit. They then asked her to lead them to her house. She did so. They searched the house and in the appellant's bedroom under the bed, they found 11 white nylon sacks and a toss detergent container. Inside the sacks were rolls in Khaki envelope which had plant material. They were 787 rolls, and 46 cut rolls together with 4 stones. They arrested her and took her to Central Police Station. Exhibit memo was prepared and samples for the different exhibits were forwarded to Government Chemist for analysis. The team also found the appellant's photograph inside that house and they took that as well. PC Wainaina (possibly the one referred by PC Damaris as Maina) (PW2), who was in the team, confirmed in every material aspects the evidence of PC Damaris. John Njoroge (PW3) a Government Analyst at Mombasa received the several exhibits from PC Damaris for analysis. Those exhibits included 3 khaki envelopes, one with stone of plant material, another with 10 rolls and the last with cut rolls for analysis. He analysed the exhibits and found that all the exhibits contained bhang as prescribed by the Act. He prepared a report which he produced in Court as exhibit 1.

In her defence in court the appellant stated in an unsworn statement that she had gone to Timboni to visit her sister. While there she was given a mat to rest on and as she was resting on the mat, police approached her; asked her for Kalama's house but her sister in law's mother pointed to another house. Many people assembled there. The police then went to a neighbour's house and found a boy whom they questioned. The Police officers ordered them to stand up; her handbag was taken and a photograph was recovered from it. The Police officers claimed that was her house. They also went to a house they claimed was Kalama's house. It is from there they came out with packages which they opened but of which contents they did not count. They claimed those properties were hers. She was charged with the offence of possessing drugs which the police did not show her.

We have perused the evidence, the Senior Resident Magistrate's judgment, the judgment of the superior court and the record as a whole. We have also considered the submissions of the appellant, which as we have stated, was only plea for leniency on sentence. We have noted that although she did not address us on her appeal against conviction, she nonetheless made it clear that she was not abandoning her appeal on conviction and because the appeal on conviction was not abandoned, we have considered it fully together with the submission of Mr. Ondari, the learned Assistant Director of Public Prosecutions. We have also considered the law as regards the entire appeal.

The first ground of appeal is that the appellant's Constitutional rights under **section 72(3**) of the Constitution of Kenya, were violated as she was arrested on 5th February 2007 and was not produced in the court within 24 hours as is required by the provisions of **section 72(3)** of the Constitution. She was produced in court on 7th February, 2007. This complaint was raised in the superior court for the first time and the learned Judge of the superior court, referring to the decision of this Court in the case **Eliud Nyaga Njeru v R Criminal Appeal no 182 of 2006**, dismissed the complaint on ground that the point was raised too late in the day and the respondent had no time to prepare any response to the complaint. While accepting that this is a valid ground for rejecting the complaint, we also think that in this case, an informed decision would have been made if the time of the arrest was known. We say so because if the appellant was arrested on 5th February 2007 at say 6.00 p.m, then it would have been preposterous to require her to be produced in court at 9.00a.m, the usual plea time, the next day 6th February, 2007. In such scenario, the only reasonable time for appellant's production to the court would have been 7th July 2007, in which case the provisions of **section 72(3**) would not have been in any way violated. What we are saying is that in order to rely on the provisions of **section 72(3)** to declare that accused's constitutional rights have been violated, the facts must establish delay beyond any doubt. Borderline cases will not do. Court must take judicial notice of the need for the Police Stations to prepare the case for presentation to court. Things such as taking witnesses statements, opening files for the suspects, and preparing a summary of facts just in case a suspect decides to plead and does plead guilty in court are matters that cannot be ignored. All these take time and so if one is arrested close to the end of a working day e.g. at 4.00p.m. or 6.00p.m., it cannot be practical to carry out all these procedural requirements and produce the suspect in the court for plea the following day at 9.00 a.m in cases such as this where time limit is 24 hours. This is one of the reasons why this Court stated in the case of **Paul Mwangi Murunga v Republic CR.A No. 35 of 2006** as follows:

> **"So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that."**

In this appeal, the delay may very well have been a matter of few hours if we consider that the time of arrest was not stated. Considering the nature of the offence and the fact that the delay period was negligible, we see no merit in this ground. If the appellant feels offended by the delay, she still has the other constitutional avenues to challenge it such as pursuant to **Section 84** of the Constitution. Nothing turns on that ground.

We have considered the appellant's ground that says the charge was faulty on grounds that particulars were framed contrary to **section 137 (3) (f)** of the Criminal Procedure Code. **Section 137 (f)** of the Criminal Procedure Code has since been amended even as the whole section has been amended. The amendment was done through Act no 11 of 2008. In the month of February 2007, when the offence, the subject of this appeal took place, **section 137(f)** stated as follows:-

> **" 137. The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code.**
>
> **…….**
>
> **(f) subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in**

ordinary language so as to indicate with reasonable clearness the place, time, thing, act or omission referred to."

As the appellant did not address us on the appeal on conviction, it is not easy to fathom what was in her mind when she raised this ground as an issue in her appeal. However, perusing the charge thoroughly and the provisions of the law as stated above, we find it difficult to appreciate the appellant's claim as stated in this ground of appeal. The particulars of the drugs she was found with is stated; the street value of these drugs is stated; the place where she was found with the drugs is stated and the manner in which she was trafficking on the drugs which was that she was storing them is also stated. We do agree with Mr Ondari that the charge was properly drawn and we see no reason to interfere with the subordinate court's decision and the superior court's decision on this score.

The trial started on 21st February 2001. The record shows that on that day, the Senior Resident Magistrate was present, IP Ogola, the prosecutor was present; Elvis was the court clerk and interpreter and accused were also present. On that day two witnesses were heard, and hearing was adjourned. When on 11th June 2007, the hearing resumed, the same coram was present in court. On that day, the last prosecution witness was heard, the prosecution closed its case and the appellant was put on her defence and gave her defence. Thereafter, a judgment date was fixed and judgment delivered. We have gone through all these attendances in an attempt to see if there is any hearing day when the coram was not realized and yet the hearing proceeded. We have seen none and, the record is clear. That disposes of the third ground of appeal. It has no basis. The Government Analyst did not give his description beyond his job and his name. We accept this. However, he stated he was a Government Analyst and none challenged that at the time the matter was heard nor did anybody on cross examination make any suggestions that he was not a qualified analyst. That was thus never an issue before the trial court. Before us, there is no suggestion that he was not qualified for his job. We have not been invited to ignore his expert opinion, because of his lack of qualification. In our minds this was a frivolous complaint and we need not consider it any further. We have perused the judgment of the superior court. It is plain to us, that the learned Judge indeed analysed with a tooth comb, the evidence that was adduced in the trial court, evaluated it and came to its own independent conclusion. We find it difficult to understand why this ground was taken. The learned Judge indeed complied with the requirements as stipulated by this Cosurt in the case of **Okeno vs R (1972) EA 32** to the letter. The fifth ground is neither here nor there.

On 7th February, 2007, when plea was taken the language of communication was recorded as English to Kiswahili. On 21st April, 2007 when the first two witnesses were heard, the language was stated as "Interpretation English to Kiswahili", and on 11th June, 2007 when the last prosecution witness and the appellant were heard, the language was English/Swahili. The complaint that the language in which the appellant made her defence was not stated is spurious. It was either English but was interpreted into Kiswahili or it was most likely Kiswahili which was interpreted into English. This is clear from the record. In any case she is not complaining that she was not afforded opportunity to give a defence in a language she understood. All her complaint is that the court failed to indicate the language in which she made her defence. The record shows it was indicated and that ends her complaint. It is rejected.

The last ground of appeal is that the learned Magistrate failed to specify the offence of which, and the section of the Penal Code under which she was convicted and the provisions under which she was sentenced. The offence the appellant faced was one. The section was stated on the charge. The learned Senior Resident Magistrate clearly specified at the opening of his judgment the charge, and the section under which the charge was brought. At the end of his judgment he stated:

"The accused is found guilty and is convicted accordingly."

That conviction would have only been in respect of the one charge the learned Senior Resident Magistrate had stated at the beginning of his judgment and none other.

What we have stated above make it clear that having considered all aspects of the case that was before the trial court and the first appellate court, we are not persuaded that any reasons exist for interfering with the conviction of the appellant. It must stand.

On sentence, we have sympathetically listened to the appellant on her pleas for mercy on sentence. However, much as we may sympathize with her on her alleged predicament, the law is clear on the issue. This is a second appeal. **Section 361 (1) (a)** of the Criminal Procedure Code states:

"361 (1) (a) 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."

As we stated earlier on this judgment, this is a second appeal. Sentence is therefore a matter of fact by dint of the provisions of **section 361 (1) (a)** above. We have no jurisdiction to entertain the pleas on severity of sentence.
In conclusion, having considered all the above matters raised before us and the law, we do not find any reason to interfere with the decision of the two courts below. Those decisions were made on sound law and must stand.
The appeal is dismissed.

Dated and delivered at Mombasa this 29th day of January, 2010.

E.O. O'KUBASU
……..……
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
…….
JUDGE OF APPEAL

ALNASHIR VISRAM
……
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR