IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE SITTING AT NSAWAM MEDIUM SECURITY PRISONS ON TUESDAY, 13TH JUNE 2023

CORAM: HIS LORDSHIP JUSTICE KOFI NYANTEH AKUFFO – JUSTICE OF THE HIGH COURT

CASE NO. D16/27/2020

FRANCIS NNANDI

V.

THE REPUBLIC

JUDGEMENT

INTRODUCTION

Francis Nnandi (hereinafter called "Appellant") and two (2) others were arraigned before the Circuit Court sitting in Accra facing a number of counts:

However, this Appeal only relates to the second count on the charge sheet, that is prohibited advertisement, Contrary to Section 114 of Act- Act 851/2012.

The facts that gave rise to the instant matter, in a nutshell, is that the Appellant advertised the sale of unregistered and counterfeit drugs on Social Media without the requisite authorization from the Food and Drugs Authourity (FDA).

Indeed, the complainants were officials of the FDA.

The Appellant pleaded not guilty and after a full trial, he was found guilty and convicted accordingly.

The Appellant was sentenced to a fine of 10,000.00 penalty units or in default 15 years in prison in hard labour.

Aggrieved by and dissatisfied with the conviction and sentence, the Appellant has appealed against both.
The Counsel for the Appellant duly filed written submissions.
The Republic also duly filed written submissions.
With regards to the grounds of Appeal, the Counsel for the Appellant couches it in the following manner:

> **"…It's the case of the Appellant that his arrest, trial, conviction and sentence were not borne out of the law and justice. He was wrongly convicted and sentenced for no wrong done…"**

For a methodical presentation, I will deal with the following:

(a) Burden and standard of proof
(b) Elements of offence.
(c) Applicable principles governing appeals against conviction.
(d) Applicable principles and guidelines on sentencing.
(e) The decision of the court.
(f) Conclusion.

BURDEN AND STANDARD OF PROOF

With regards to criminal trials in this jurisdiction, it is the duty of the prosecution to prove the guilt of the Accused person.
Moreover, the guilt of the Accused person needs to be proved to the degree of beyond reasonable doubt. The dicta of two (2) prominent Jurists are in point.

Brobbey J (as he then was) stated the following in **Republic v. District Magistrate Grade II, Osu, ex parte Yahaya (1984-1986) 2 GLR 361 at 365:**

> **"…One of the cardinal principles of criminal law in this country is that when an accused person pleads not guilty, his conviction must be based on evidence proved beyond reasonable doubt…".**

The ubiquitous Ollenu JSC, on his part, stated as follows in the celebrated case of **Oteng v. The State (1996) GLR 352 at 354, SC:**

> **"…The citizen too is entitled to protection against the state and that our law is that a person accused of a crime is presumed to**

be innocent until his guilt is prove beyond reasonable doubt….".

So what constitute reasonable doubt?
Once again, the words of two (2) eminent common law Jurists amply define its meaning. Justice Shaw, former Chief Justice of the United States of America (USA) stated as follows in 1850, during the trial of Professor Webster of Harvard University for the murder of Dr. Parkman.

> **"… It is the condition of mind which exists, when Jurors cannot say that they feel an abiding conviction, a moral certainty of the truth of the charge. For it is not sufficient for the prosecution to establish probability, even though a strong one according to chance. He must establish the fact to a moral certainty, a certainty that convinces the understanding, satisfies the reason and directs the Judgement…".**

On a more recent note, Denning J (as he then was) commented on the topic as follows in the case of Miller v. Minister of Pensions (1947) 2 All ER 372 at 373:

> **"…It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice… if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probate', the case is proved beyond reasonable doubt…".**

ELEMENTS OF OFFENCE

Section 114 (1) of Act 851/2012 provides as follows:

> **"… A person shall not advertise a drug, a herbal medicinal product, cosmetic, medical device or household chemical, Substance to the general public as a treatment, prevention or cure for a disease, disorders or an abnormal physical state, unless the advertisement has been approved by the authority…"**

Gleaning from the above provision, it is clear that the under-listed are the elements needed to be proven to the degree of beyond reasonable doubt by the prosecution.

(a) There must be an advertisement of a drug, herbal medicinal product, cosmetic, medical device or household chemical.
(b) The advertisement must be to the general public.
(c) The advertisement must be for the treatment, prevention or cure for a disease, disorder or abnormal physical state.
(d) The advertisement must be made without the approval of the FDA.

THE APPLICABLE PRINCIPLES GOVERNING APPEALS AGAINST CONVICTION

So, what are the grounds upon which an Appellate Court can rightly disturb the findings of a trial court?

The most important ground is that there has been a substantial miscarriage of justice.

Additionally, is it opt to establish that there exists three (3) ways upon which substantial miscarriage of justice can be grounded.

The esteemed scholar and Jurist, Dennis Dominic Adjei, in his authoritative book, Criminal Procedure and Practice in Ghana, Volume 1, wrote the following on what constitutes substantial miscarriage of justice at page 469:

> **"…There is one main ground under which an appeal may succeed, that is where the Appellant proves that there is a substantial miscarriage of justice. There are three separate grounds of Appeal which constitute substantial miscarriage of justice and a successful proof of any one of them may allow the appeal. The first ground is where the appellate court considers that the verdict or conviction or acquittal ought to be set aside on grounds that it is unreasonable or cannot be supported having regard to the evidence. The second ground is where the court considers that the judgement was decided on wrong question of law or fact. The last ground is where the court**

finds that there was a miscarriage of justice. Any other ground of appeal outside the three grounds discussed above error or defect or technically unless it has occasioned substantial miscarriage of justice…".

APPLICABLE PRINCIPLES AND GUIDELINES ON SENTENCING

Given that the Appellant is complaining against the harshness of the sentence meted out to him, I will take the opportunity to provide an elaboration on the principles to be applied when it comes to sentencing people convicted for criminal offences.
It is trite learning that there are three (3) theories of punishment.
These are:

(a) Retributive theory
(b) Utilitarian theory; and
(c) Reformative theory or Restorative theory.

The Retributive theory relates to the theory that specifies that an offender must suffer in proportion to the offence committed.
Effectively, it is based on the biblical principle, "An eye for an eye".
Indeed Exodus Chapter 21 verse 23 provides the inspiration for the Retributive theory.
It states as follows:

"…If any harm follows, you should give life for live, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe…".

The utilitarian theory provides that punishment rendered must achieve the effect of preventing the Accused from committing another crime and also act as a deterrent to others in the community.

Effectively, the utilitarian theory has the aim of making sure that offenders learn lessons from their actions.

The Reformative theory, relates to the rehabilitation of the offender. Proponents of the theory argue that punishment must ultimately seek to reform the offender.

I am of the considered view that before a court of law impose a sentence, the court must necessarily consider the main objective to be achieved by the sentence given.
In this modern era of criminal justice, I am fortified in my belief that the retributive theory is hardly applied. In this jurisdiction, the death penalty for the offence of murder is the remaining example of retributive justice.

The modern thinking is that, when it comes to sentencing, the court should have as its focus the utilitarian theory as well as the reformative theory.
Indeed the reformative theory of punishment is the theory of choice in many a jurisdiction.
Baidoo JA (as he then was) stated thus in **Ali Yusif Issa (No.1) v. The Republic (2003-2004) 1GLR 189, CA.**

> **"…Admittedly modern jurisprudence frowns on custodial sentences and considers restorative justice more beneficial and economical to society…"**

Apart from the theory to be relied on, when it comes to sentencing, a court also needs to take into account some established general sentencing principles. These factors were clearly elaborated in the case of **Kwashie v. The Republic (1971)1 GLR 488, CA.**

Azu-Crabbe JA (as he then was) said:

> **" … In determining the length of sentence, the factors which the trial Judge is entitled to consider are (1) the intrinsic seriousness of the offence; (2) the degree of revulsion felt by law-abiding citizens of the society for the particular crime; (3) the premeditation with which the criminal plan was executed; (4) the prevalence of the crime within the particular locality where**

the offence took place, or in the country generally; (5) the sudden increase in the incidence of the particular crime; and (6) mitigating and aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed. Thus, a Judge in passing sentence may consider the offence and the offender as well as the interest of society …".

Apart from the aforestated principles, it is my humble view that before passing sentence, the court must also consider certain intrinsic factors that relates to the specific offence being dealt with.

In this jurisdiction, the Judiciary has duly published the 'Ghana Sentencing Guidelines' which aims to provide Judges and Magistrates with the relevant factors to be considered before passing sentence.

This could bring about consistency in the way offenders are dealt with by the courts.
Examples of aggravating factors include the following:

(1) High Value
(2) Sentimental Value
(3) Premeditation
(4) State of goods on recovery
(5) Public property
(6) Two or more offences
(7) Position of trust
(8) More than one accused – instigator; leading part.

With regards to mitigating factors, the following are some that have been listed therein:

(1) Law Value
(2) Necessity
(3) Spur of the moment or opportunistic
(4) Recovery in good condition
(5) Refund
(6) Only one offence
(7) More than one accused – lesser part, not instigator.

The above would be taken into consideration in the instant Appeal.

As stated ut Supra, the instant Appeal is against both conviction and sentence.

To prove their respective cases, both the Appellant and the Republic duly filed written submissions.

Amongst the points raised in the submissions of the Appellant are the following:

(1) The conviction and sentence of the Appellant was not borne out of law and justice.
(2) A whatsapp message cannot be regarded as a public medium. Therefore, the prosecution could not prove all the essential elements of the instant offence.
(3) There is no statute or case law which was breached by the Appellant.
(4) The prosecution failed to provide the exact words used by the Appellant to advertise on social media.
(5) The harsh sentence imposed on the Appellant did not fit the crime he was supposed to have committed.
(6) The trial Judge failed to take pertinent mitigating factors into due consideration.
(7) The supposed advertisement was not printed and tendered in court.
(8) The prosecution failed to prove its case to the degree of beyond reasonable doubt.

The authourties cited in the Appellant, submission include the following:

(a) Haruna v. The Republic (1080) GLR, 189
(b) Abu v. The Republic (1990) GLR, 294

As expected, the written submissions filed by the Republic consisted at a complete rebuttal of the arguments put up by the Appellant.
According to the Republic, the trial Court exercised its mandate within the confines of statutory requirements.
Additionally, it was argued that the sentence imposed was merited.

A variety of authorities were relied on in the written submissions.

It includes the following:

(a) Miller v. Minister of Pensions (1947)2 ALL ER 372.
(b) Commissioner of Police v. Isaac Antwi (1961) GLR 408.
(c) COP v. Senchery (1959) GLR, 225.
(d) State v. Otchere (1963) 2 GLR, 463.
(e) Bour v. The State (1965) GLR.
(f) Banda v. The Republic (1975) 1GLR, 52.
(g) komegbe v. The Republic (1975) 2 GAR, 370.
(h) Abu v. The Republic (1980) GLR, 294.
(i) Republic v. Blake (1967) 2 QB, 377, CA.
(j) Dabla & others v. The Republic (1980) GLR, 501.

It is trite learning that Appeals are by way of rehearing.
As such, when an Appellate Court is considering an Appeal, it is vitally important to consider the record placed before the trial Court and evaluate same. It is only after performing the above exercise that an Appellate Court would be entitled to decide if the Appeal should succeed or fail.
Having undertaken the above topic, could it be said that the instant Appeal ought to succeed? I think not.

Five (5) cogent reasons inform the above conclusions.

I hereby, ut intra, proceed to elaborate on the reasons.

Firstly, It must be noted that the instant offence created by statute and is a strict liability offence.

When it comes to such offences, there is absolute liability and intent does not matter. In other words, Men rea is inconsequential as the mental state at the time of the Commission of the offence is irrelevant.

The Prosecution led evidence about an advertisement on social media.

The advertisement was for the sale of three (3) drugs namely:

1) Mitabon
2) Paractin, and
3) Postinor 2

The advertisement included the name and telephone number of the Appellant. The above evidence, clearly points to the fact that the Appellant was intent on inviting the general public to contact him for the sale of the drugs.

Additionally. there is evidence on record that the drugs were advertised on the basis that some can offer prevention and cure for a disease or a disorder,

Also, evidence was led to establish the fact that the drugs was not advertised with the approval of the FDA.

The testimony was not discredited or rebutted.

Given the aggregate of evidence produced by the prosecution and juxtaposing with fact that the offence at play is a strict liability one, I cannot hesitate to conclude that the prosecution proved the guilt of the Appellant beyond reasonable doubt.

In the famous case of **Miller v Minister of Pensions (1947) 2 ALL ER, 372,** the distinguished Jurist, Denning J (as he then was) stated as follows:

> **"… if the evidence is so strong against a man so as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt.."**

Relating the above dictum to the instant Appeal, the evidence against the Appellant is overwhelming and some leaves less than a remote possibility in his favour.

Secondly, I am at the considered opinion that the Appeal failed to lead requisite evidence to raise reasonable doubt as to his guilt. In his caution statement, the Appellant asserted that he was basically advertising the drugs on behalf of one Chinadu.

According to him, he only sent some emails to some pharmacies in order to sell the drugs to make a little profit.

He denied advertising on social media. It is worth noting that that the Appellant did not produce any evidence in Court to corroborate his claims.

Also, the Appellant did not call any witnesses to corroborate his contention.

The net effect of the above is that insufficient evidence was led by the Appellant to raise reasonable doubt as to his guilt.

It is trite law that an Accused person is not required to lead evidence to prove his innocence.

However, it is also a legal truism that, it is incumbent upon an Accused person to lead evidence to raise reasonable doubt as to guilt.

- **See Ali Yussif Issah (No.2) v The Republic (2003-2004) 2 SCGLR,181**

In the instant matter, the unavailability of the evidence to raise reasonable doubt as to guilt was, to all intents and purposes, fatal to the case for the defence.

Thirdly, I am of the firm views that strong circumstantial evidence was produced by the prosecution to prove the guilt of the Appellant.

The prosecution tendered in evidence the following:

- 32 Pieces of Mifabon
- 28 Packets of Paractin
- 35 Pieces of Postinor 2

The above drugs were confiscated when the premises of a co-accused was searched.

Also, evidence was led on oath to prove that the Appellant met the Prosecution witnesses whilst having in possession the following:

- 30 Pieces of Mifabon
- 50 Packets of Paractin
- 30 Packets of Postinor 2

The question begging to be asked is this:

What was the Appellant doing with such a large consignment of drugs?

The only reasonable conclusion that can be drawn is that, there is circumstantial evidence that the Appellant was in the business selling drugs.

In order to sell the drugs, it is also clear that the Appellant duly advertised some without the approval of the FDA.

In the English Case of R v. Taylor (1928) Crim. App Rep, 21, Chief Justice Lord Hewart stated as follows in respect of circumstantial evidence:

> **".. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics…"**

Relating the above dictum to the instant case, the strong, compelling and decisive circumstantial evidence produced by the prosecution negates the arguments raised in the instant Appeal with regards to the guilt of the Appellant.

Fourthly, one of the grounds of Appeal is that the sentence handed to the Appellant is harsh and excessive.

This Appellate Court disagrees with instant contention.

Even though the Appellant was a first time offender, the mitigating factors needs to juxtaposed with inherent aggravating factors. It is clear that advertising unapproved drugs is a dangerous venture that can easily lead to people suffering fatalities.

The reason for which the instant offence was created is the need for drugs to be quality assured and the need to avoid fake drugs being consumed by the population.

Additionally, it must be borne in mind that the sentence imposed by the trial Judge was within the range of sentences available to the Court to impose.

- Section 129 of Act 851/2012 reads as follows,

> **"A person who contravenes sections 111 to 124 commits an offence and is liable on Summary Conviction to a Fine of not less than Seven Thousand Five Hundred (7500) Penalty units and not more than Fifteen Thousand (15000) Penalty units or to term of**

imprisonment of not less than Fifteen (15) years and not more than Twenty-Five (25) years"

Fifthly, As stated ut supra, there is one main ground upon which an Appeal may be allowed. That is the fact there has been a Substantial miscarriage of Justice.

- See Section 31 (1) of the Courts Act-Act 459/1993.

Upon perusal of the evidence placed before the Court and evaluation of the Judgement delivered by the trial Court, this Appellate Court is not convinced that there was a miscarriage of Justice.

This Court of the opinion that the verdict and the Conviction is reasonable and can be supported having regard to the evidence on record.

Also, I am of the considered opinion that the Judgement was decided on the correct question of law and fact.

Again, the trial Judge did not commit any glaring, palpable, obvious or patent errors of law.

In sum, the Judgement as it relates to both Conviction and sentence cannot be impeached.

CONCLUSION

Taking into account all the analysis contained ut supra, I deem the Appeal to be unmeritorious. The instant Appeal against both Conviction and Sentence is accordingly dismissed.

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* **Mohadeen Osuman Esq.,for the Appellant.**
*** State Attorney absent.**

SGD.
HIS LORDSHIP JUSTICE KOFI AKUFFO
(JUSTICE OF THE HIGH COURT)