



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E026 of 2021)
[2022] KEHC 10905 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E026 OF 2021**

JN NJAGI, J

MAY 26, 2022

BETWEEN

PATRICK MAINA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was convicted of the following offences;

Count 1- Selling Pest Control Products that have not been registered, packaged or labelled in accordance with regulation 3(2) and regulation 8(1) of the *Pest Control Products (Labeling, Advertising and Packaging) Regulations*, Legal Notice No. 89/1984 contrary to section 4(1) as read with section 12(1) of the *Pest Control Products Act*, Cap 346 Laws of Kenya.

Count 2- Displaying for sale Pest Control Products without a license contrary to section 3(1) and regulation 2(1) of the *Pest Control Products (Licensing of Premises) Regulations*, Legal Notice No. 45/1984 as read with section 12(1) of the *Pest Control Products Act*, Cap 346 Laws of Kenya.
2. For each count, the appellant was sentenced to pay a fine of Kshs. 250,000/= and in default to serve one year imprisonment.
3. The appellant, being aggrieved by the conviction and sentence of the trial court, he filed this appeal setting forth the following grounds of appeal:
 - i. That the learned trial magistrate erred both in law and fact in concluding that the charges were personal and not vicarious and thereby occasioned a miscarriage of justice against the Appellant who was only an employee.
 - ii. The learned trial magistrate erred in law and fact in holding the Appellant, an employee liable for using unlicensed premises which was a duty of his employer.



- iii. The learned trial magistrate erred in law and fact in convicting the Appellant on the charge of selling when the prosecution had not proved that a sale had taken place.
 - iv. The learned trial magistrate erred in law and fact in holding that the prosecution had proved their case against the Appellant beyond reasonable doubt.
 - v. The learned trial magistrate erred in law and fact in not considering and/or dismissing the defence of the Appellant which was cogent and unshaken by the prosecution.
 - vi. The learned trial magistrate erred in law and fact in meting a sentence which was harsh and excessive in the circumstances.
4. Upon perusal of the court record, the appellant took plea on 28th August, 2019 and pleaded not guilty to the charges brought against him. Upon admission of an amended Charge Sheet on 27th January, 2020, the Appellant yet again pleaded not guilty to both charges as had been brought against him. The matter proceeded for trial thereafter with the court eventually finding as stated hereinabove.
 5. The appeal was canvassed by the way of written submissions. The appellant, through his counsel, submitted that two issues arose for determination before this court:
 - a. Whether the crucial elements of the charges were proved beyond any reasonable doubt.
 - b. Whether the sentence meted out to the Appellant was harsh and excessive.
 6. On the first issue, the appellant set out four elements that the prosecution was obligated to prove beyond reasonable doubt. These are that the appellant was in possession of the pest control products, that he was selling pest control products, that the pest control products were not registered, packaged or labelled in accordance with the requisite regulations and that the premises were not licensed to sell pest control products.
 7. The appellant submitted that none of these was proved as no certificate of analysis was produced in evidence to prove that the exhibits produced as Pexh 1 and Pexh 2 were pest control products and there was no evidence of actual sale of the alleged pest control products as was the evidence of all the prosecution's witnesses at trial. Further, on account of want of proof that the exhibits were pest control products, the Appellant submitted that the requirement for licensing was untenable.
 8. On the second issue, as to whether the sentence meted out was harsh and excessive, the appellant submitted that indeed it was especially in light of his earlier submission that the exhibits had not been proved to be pest control products.
 9. The respondent through the Prosecution Counsel, Ms. Mwaniki, in its submissions conceded to the entire appeal. The learned prosecution counsel submitted that section 14 of the *Pest Control Products Act* was not complied with and consequently the prosecution had failed to prove beyond reasonable doubt that the items seized and produced as Pexh1 and 2 were indeed pest control products. This, she submitted, was paramount as the entire case against the appellant was pegged on the inference that the items were not registered for use in Kenya.
 10. The first duty of the first Appellate Court is to re-evaluate the evidence presented before the trial court and draw its own inferences as was set out in *Gabriel Kamau Njoroge v Republic* [1987] eKLR. The Court stated as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal and that court cannot excuse itself from



the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and to make due allowance in this respect”.

11. On the first issue, the appellant submitted that crucial elements of the charges were not proved beyond reasonable doubt. More particularly, the Appellant contends that there was no evidence adduced that the items seized were indeed pest control products. No samples were taken, no analysis conducted on the “products”, no certificate of analyst was tendered in evidence and no analyst was called as a prosecution witness. The respondent concedes as much.
12. The case against the appellant is borne on the inference that the items seized from his premises were pest control products. The key issue for determination is whether the said items were indeed pest control products was non-negotiable in order for any of the charges against the Appellant to be sustained.
13. Section 14 of the *Pest Control Products Act* contemplates prosecution for contravention of the Act and makes provision for a certificate of analyst that should bear the result of an examination of an article or sample submitted to him by an inspector. It provides:

“Certificate of analyst

1. Subject to this section, a certificate of an analyst stating that he has analysed or examined an article or a sample submitted to him by an inspector and stating the result of his examination shall be admissible in evidence in a prosecution for the contravention of this Act or any regulations made thereunder and shall be prima facie evidence of the statements contained therein.
 2. The party against whom a certificate of an analyst is produced under subsection (1) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.
 3. No certificate shall be received in evidence under subsection (1) unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.”
14. Clearly, it is intended for any articles or samples to be examined and the results thereof to inform prosecution for any contravention of the Act.
 15. In the instant case, there was no evidence of analysis of the products seized from the appellant. An accused person cannot be convicted on account of products whose composition has never been ascertained. This court finds that the prosecution failed to prove that indeed the items seized from the Appellant were pest control products and as such, the charges against the Appellant were not proved. The Appellant was wrongly convicted of the two offences.
 16. Further to this, count 1 was particularized that the Appellant was found selling unregistered pest control products which are not duly registered for use in Kenya. A review of the evidence shows that none of the prosecution’s witnesses testified as to witnessing a sale of the alleged pest control products. There having been no sale, count 1 against the Appellant was not sufficiently proved and the same must fail.



17. On count 2, the appellant was charged with using unlicensed premises for displaying and selling pest control products. Regulations 2(1) of the [pest control products \(licensing of premises\) regulations](#) provides that:

“No person shall use any premises, or being the owner or occupier thereof permit or allow the premises to be used, for the purposes of manufacturing, formulating, packaging, selling or storing pest control products unless that person is in possession of a licence issued under these Regulations in respect of those premises.”

18. As earlier stated herein, there was no cogent evidence that the items seized were pest control products and further there was no evidence of sale or any other activity et out in regulation 2(1). This count too must fail.

19. The upshot is that there was not sufficient evidence adduced before the trial court to sustain the appellant’s conviction.

The appeal is thus upheld. The conviction is quashed, the sentence set aside and the appellant set at liberty.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH MAY, 2022.

JESSE N. NGAGI

JUDGE

In the presence of:

Mr. Maina Kangithi for Appellant

Mr. Muroro for Respondent

Appellant – present

Court Assistant: Mr. Kinyua

14 days right of Appeal.

