



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E043 OF 2021

1. MAUR ABDALLA BWANAMAKA

2. FEDERAL INVESTMENTS COMMERCIA LIMITED

3. ALI MOHAMMED AHMED

4. CAPTAIN SHIPPING AGENCY LIMITED

5. ABDULLA HUSSEIN MER.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement and sentence passed by Hon. E. Nyaloti, CM

on 15th May 2021 and 3rd June 2021 in Mombasa Chief Magistrate's Court

Criminal Case No. 2314 o 2019)

RULING

1. Maur Abdalla Bwanamaka, Federal Investments Commercial Ltd, Ali Mohammed Ahmed, Captain Shipping Agency Ltd and Abdulla Hussein Mer were jointly charged in Mombasa Chief Magistrate's Court CR.C. No. 2314 of 2019 with offence of making a false report contrary to section 24(6)(b) as read with section 209 of the EACCMA, 2004 in count I.

2. They were also charged with offence of conveying imported goods contrary to section 199(b)(i) of the EACCMA 2004.

3. The trial magistrate found the appellants guilty of the offence in count I and II. The 1st appellant was also found guilty in count II. The 1st appellant was fined 5000 dollars in count I. The 3rd appellant fined 5000 dollars in count I in default of payment of the fine they were to serve 12 months jail terms each. The 5th accused/appellant was fined 10,000 USD in respect to count II as per section 199(i) of EACCMA in default to serve 12 months jail term. The trial magistrate also ordered the importers 1st appellant to pay outstanding amounting to Kshs. 9,654,163 in default to serve 2 years imprisonment. The rice was ordered to be destroyed as it was unfit human consumption. The destruction to be supervised by the court and to involve Multi-agency team.

4. The appellants being aggrieved by the conviction and sentence have preferred appeal herein concurrently with an application dated 8th June 2021 seeking that the court be pleased to issue stay orders and/or an injunction against the orders issued on 3rd June 2021 by Hon. trial magistrate in CR.C No. 2314 of 2019 and all other consequential orders respectively pending the hearing and determination of the application and instant appeal.

5. They also sought that the court grants to the appellants/applicants bail pending the hearing and determination of the instant application and appeal and/or in the alternative the applicants/appellants to be placed on the initial bond terms at the trial court pending hearing and determination of the application/appeal and/or further orders

6. It was also prayed that the court orders the immediate release of the goods and vessel MV AL FAZAL forthwith upon payment of requisite statutory payments.

7. The applicants also sought that the court quashes/sets aside and/or dismiss the judgement and sentence issued by Hon. Nyaloti, CM delivered on 15th May 2021 and 3rd June 2021 respectively.

8. It was further prayed that the court directs that criminal proceedings in CR.C. No. 2314 of 2019 was in total violation of the law and the Constitution of Kenya and therefore be and is hereby dismissed.

9. The application was supported by the grounds on the face of the application and supporting affidavit sworn by 1st appellant Maur Abdalla Bwanamaka on 8th June 2021.

10. The application was canvassed by the oral submissions of counsel on record for the Appellants and Respondent respectively.

11. I have considered the application, the grounds and supporting affidavit. I have also perused the proceedings and judgement of the trial magistrate and the sentencing proceedings and find that the 1st appellant had the opportunity to pay fine of 5000 USD using cash bail deposited in court. Subsequently he will remain to pay the outstanding tax as ordered by the trial magistrate amounting to Ksh 9,654,163. I have considered that the 1st appellant was granted bond of Kshs. 5,000,000/= and a surety and in the alternative cash bail of Kshs. 2,000,000/=. He paid the cash bail and dutifully attended court throughout the trial to its conclusion.

12. After paying the fine of USD 5000 in count's 1 and II each it is my opinion that it will not be prejudicial for 1st appellant to be released on bond pending the hearing and determination of appeal. The 1st applicant/appellant is released on bond of Kshs. 2,000,000/= plus surety of similar amount or cash bail of 900,000/=.

13. Concerning prayers 5 and 6 I have seen that the trial court ordered for the destruction of the rice as it is unfit for human consumption. There are stay orders which were granted on 8.6.2021 in respect of the said orders but it has not been shown by the appellants that the status of the rice has changed. In that respect one would have expected a certificate to the contrary from the relevant agency. This court cannot order release of rice which has been declared unfit for human consumption in to the hands of the appellants without knowing how they intend to deal with it. That application is dismissed.

14. Concerning the release of the vessel, the matter in the trial court is scheduled for mention on 6th July 2021 for the owner of the vessel to show cause why it cannot be forfeited. This order was made after presentations were made in court that the owner of the vessel was in India. Since forfeiture proceedings are still pending before the trial court it was premature for the applicants to approach this court after asking for time to avail the owner of the vessel.

15. The applicants counsel hereby ordered to pursue the typing of proceedings in the trial court and prepare ROA and serve to the expeditious disposal of the appeal herein. Mention 30.9.2021 to confirm ROA prepared.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 24TH DAY OF JUNE, 2021.

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE

24.6.2021

In the presence of:-

Ogwel – court assistant

Ms. Karanja for Respondent

Appellants – present in person

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE

24.6.2021