



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 33 OF 2019

JAMES NDERITU KARIMI.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Eldama Ravine Criminal Case no. 997 of 2018 delivered on the 20th day of May, 2019

and 3rd June, 2019 respectively by Hon. J.L. Tamar, PM/

JUDGMENT

1. The appellant was on 20th May 2019 convicted for the offence of *BEING IN POSSESSION OF UNCUSTOMED GOODS (ETHANOL) CONTRARY TO SECTION 200 (d) OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004* and BEING IN POSSESSION OF EXCISABLE GOODS (ETHANOL) THAT HAS BEEN ACQUIRED IN CONTRAVENTION OF SECTION 39(5) AS READ WITH SECTION 41 OF THE EXCISE DUTY ACT 2015 and on 3rd June 2019 sentenced to imprisonment for respectively three and 2 years, both sentences running concurrently.

2. The appellant faced two counts and an alternative charge as follows:

“CHARGE SHEET

COUNT I:

CHARGE: BEING IN POSSESSION OF UNCUSTOMED GOODS (ETHANOL) CONTRARY TO SECTION 200 (d) OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004.

PARTICULARS OF OFFENCE: JAMES KARIMI NDERITU: On the 25TH JUNE 2018 at around 1305 hrs at KAMELILO in KOIBATEK Sub County within BARINGO County along Nakuru-Eldama Ravine road was found being in possession of uncustomed goods (ETHANOL) to wit 225 Litres packed in 9 jerricans of 25 Litres each loaded in motor vehicle registration number KAC 258R make Toyota STARLET contrary to section 200 of the East African Community customs management act 2004.

COUNT II

BEING IN POSSESSION OF ETHANOL WITHOUT AN EXCISE LICENCE CONTRARY TO SECTION 15 AS READ WITH SECTION 38 OF THE EXERCISE DUTY ACT 2015

JAMES KARIMI NDERITU: On the 25TH JUNE 2018 at around 1305 hrs at KAMELILO in KOIBATEK Sub County within BARINGO County along Nakuru-Eldama Ravine road was found being in possession of ETHANOL to wit 225 Litres packed in 9 jerricans of 25 Litres each loaded in motor vehicle registration number KAC 258 R make Toyota STARLET without excise license.

ALTERNATIVE CHARGE TO COUNT II

BEING IN POSSESSION OF EXCISABLE GOODS (ETHANOL) THAT HAS BEEN ACQUIRED IN CONTRAVENTION OF

SECTION 39(5) AS READ WITH SECTION 41 OF THE EXCISE DUTY ACT 2015.

JAMES KARIMI NDERITU: On the 25TH JUNE 2018 at around 1305 hrs at KAMELILO in KOIBATEK Sub County within BARINGO County along Nakuru-Eldama Ravine road was found being in possession of ETHANOL to wit 225 Litres packed in 9 jerricans of 25 litres each loaded in motor vehicle registration number KAC 258R make Toyota STARLET in contravention of section 39(5) as read with section 41 of the Exercise Duty Act 2015.”

Judgment of the trial court

3. In convicting the appellant, the trial court resolved the issues before it as follows:

“The issue for determination is generally whether the Prosecution have proved the case against the accused to the required standard.

Secondly whether the accused was found in possession of uncustomed goods ethanol and without an excise license contrary to exercise Duty Act 2015.

The substance found in possession of the accused person was sampled and put in nine plastic bottles 500ml each. Upon analysis, R,K Langat Government analyst round that the substance in each bottle was ethanol an excisable good under the exercise Duty Act 2015.

Section 15 of the Act prohibits undertaking of any of the activities listed herein unless the person is licensed and registered to undertake the activities of manufacturing of excisable goods in Kenya or it's importation.

Section 39(5) similarly prohibits the possession of any excisable goods manufactured contrary to the Provisions of the law.

Ethanol is a spirit based and with very high alcohol content as shown in the Government analyst report the supply, manufacture and importation must be licensed under the exercise Duty Act.

It has been established that the accused person is not licensed or registered to manufacture or import the excisable goods contrary to the law. The substance was found with the accused in his car whose ownership is not disputed.

After thus evaluating the Prosecution case and the defence I find as a fact that the accused was arrested after an ambush and inside his car Registration KAC 258R was found nine jerrican containers of 25 litres each. Upon examination of the substance in the containers it was established that the same were ethanol with 92% alcohol by weight and 94.71 by volume or 166.06% proof of spirit. The substance is excisable under the law with stringent regulations regarding its manufacture and importation.

Consequently, I find that the accused was found in possession of uncustomed goods contrary to section 200 (d) of the East African Community Customs Management Act 2004 and convicted him of the same.

In Count II the Prosecution have not specified the distinct offences under section 15 of the Exercise Duty Act 2015 that accused has committed. Possession of Ethanol is not one such offence created by Section 15 aforementioned. Count II is thus dismissed.

I however, find the alternative Count proved. The accused had in his possession excisable goods (ethanol Contrary to Section 39 (5) and convict him of the same under Section 215 CPC.

Dated and delivered this 20th day of May 2019.”

4. As regards the sentences, the trial court ruled:

“Sentence

I have seen the Probation Officer’s Report on the accused person and considered it in meting out sentence. I have also noted that the accused is a repeat offender;

Previously charged and convicted in Traffic Case No. 80/2019 and Criminal Case No. 868/13.

Taking all into account I think a custodial sentence is appropriate for the accused person.

I thus sentence the accused James Nderitu Karimi to serve three years imprisonment in Count I and two years in Alternative to Count II. Accused has 14 days of appeal. Sentence to run concurrently.

Hon. J.L. Tamar

Principal Magistrate

03.06.2019”

5. The appellant was aggrieved and he appealed from the conviction and sentence on grounds set out in a Memorandum of Appeal dated 14th June 2019 as follows:

“MEMORANDUM OF APPEAL

JAMES NDERITU KARIMI, the above named appellant being dissatisfied with the decision of the Honourable Principal Magistrate, Eldama Ravine (Honourable J.L. Tamar) in Eldama Ravine Chief Magistrate Criminal Case No. 997 of 2018) appeals against the conviction and the sentence delivered on 3rd June 2019 on the following grounds:

1. THAT the Learned Magistrate erred in law and fact in finding that the accused person was found in possession of unaccustomed goods contrary to section 200 (d) of the East African Community Customs Management Act of 2004 against the weight of the evidence and material placed before her.
2. THAT the Learned Magistrate erred in law and in fact in not finding that the prosecution had not proved its case beyond reasonable doubt and that the evidence tendered by the prosecution raised serious doubt and was totally insufficient.
3. THAT the Learned Magistrate erred in fact in not considering the evidence of the accused person during conviction.
4. THAT the Learned Magistrate erred in law and in fact in not finding that there was no link between the Appellant and the alleged unaccustomed goods (Ethanol) 225 litres packed in 9 Jerricans loaded in Motor vehicle registration number KAC 258R make Toyota Scarlet.
5. THAT the Learned Magistrate erred in fact by considering irrelevant factors namely that the accused person is a repeat offender having been charged with a Traffic offence previously which offence is not a similar to the one the accused was charged with.
6. THAT the sentence meted was excessive, unlawful, unjustified and manifestly harsh in the circumstances.

REASONS WHEREFORE the Appellant prays that the appeal be allowed and the conviction be quashed and the sentence be set aside.

DATED at **NAKURU** this 14th day of June 2019.

6. Counsel for the appellant filed written submissions dated 31st January 2020 and Counsel for the DPP made oral submissions before the court as follows:

“ Mr Konosi

Count I - Being in possession of uncustomed goods contrary to section 200 of EACMA

Count II: Ethanol without exercise license. Exercise Duty Act and alternatively being in possession of exercisable goods.

He was convicted of the 1st count and alternative charge.

Pw1, Pw2 and Pw4 laid ambush where they arrested the appellant together with Pw3 and Pw4. There were 2 motor vehicles.

The Pw6 Investigating Officer confirmed that the substance was ethanol. Appellant gave unsworn evidence. He was convicted and sentenced to serve 3 years on count I and 2 years in alternative charge both running concurrently.

Six grounds of appeal

1. No evidence by prosecution to show that ethanol was uncustomed. No customs officer was called. It was not shown where the ethanol was coming from, how much duty should have been paid. There was no evidence to support count II.
2. Alternative charge to count II. Accused is charged with possession of Ethanol, goods acquired in contravention of section 39 (5) of Excise Duty Act. No officer from CRA was called to testify on the manner that the ethanol had contravened the provisions of the Act. It is not said that the excise duty had been paid or not. I refer to section 41. The value of the ethanol is not disclosed.

There is no evidence to support the 2 counts which the appellant was convicted.

3. Framing of count I. I refer to paragraph 22 of the submissions. We have set out section 200 (d) (i)(ii) and (iii). The court did not specify which paragraph he was charged with. The charge was defective.

Section 201 East African Community Customs Management Act provides for forfeiture of payment of duty on conviction. It does not say how much duty was unpaid or whether there was an order of forfeiture and motor vehicle produced as exhibits.

We pray that the exhibits be released to the appellant. The court was wrong in convicting the appellant. With regard to sentence, the court never gave option of a fine which is provided for section 41 of East African Community Customs Management Act provides for option of fine. The appeal has merit and should be allowed.

Ms. Macharia for DPP

Appeal is not opposed as regard to Count I.

Appeal is opposed as regard count II. Appellant convicted of two counts in possession of uncustomed goods contrary to section 200 of East African Community Customs Management Act and sentenced to serve 3 years.

Alternative to count II of being in possession of exercisable goods and sentenced to serve 2 years. Sentences to run concurrently from 3rd June 2019.

He has already served 2 months of the concurrent sentence.

There was no proof the ethanol was uncustomed as provided under section 200 (d) of East African Community Customs Management Act.

Uncustomed goods are defined under section 2.2 of Act including dutiable goods in which full duty has not been paid and any good dutiable or not imported exported or transferred or in any way dealt with country to provisions of the law.

Prosecution failed to prove that the duty had not paid and that the goods were imported. The source of the goods was not established.

Count II alternative: Evidence was found in possession of substance goods to be ethanol.

Prosecution proved that the ethanol was an excisable good as provided for under First Schedule of Excise Duty Act 2015.

After the testing of Ethanol, it was found to have high ethanol content.

Appellant being in possession of the ethanol failed to produce a licence to show that he was authorized to deal with the same as provided under section 39 (5) of the Act.

In his defence he denied being in possession of the ethanol and alleged that the same had been planted on him.

We urge court to find the appellant had no authority to be in possession of ethanol and the same should not be released to appellant irrespective of the decision of the court.

Sentence of 2 years without an option of fine and may review sentence to give option of fine under section 41 of the exercise Duty Act. That is all.

Mr Konosi in reply

Review of sentence

Fine is three times value of goods. No value is disclosed in the evidence or charge sheet. It is a defect in the charge. The charge ought to have shown the value of ethanol.

Ethanol was excisable goods.

It was not proved whether excise duty had been paid or not. It is also not shown how the Act has been contravened.

Source of the goods was not established.

The Evidence

4. The evidence adduced before the trial court by the prosecution and the defence was as follows:

PW1

My name is Senior Chief Pius Kibet Eldama Ravine Location. I do recall on 25.06.2018 around 10:00 am. I was in the office when I was called by DAPC and asked to proceed to DCC office. I went there and the DCC informed me that there was a motor vehicle suspected to be carrying ethanol. I was told that the vehicle was coming from Nakuru to Eldama Ravne.

I, Madam DCC Mary Muchene, DAPC David Ondiek and some Police Officers proceed and laid an ambush at Kamelilo. We were given the particulars of the vehicle by informer KAC 258R Starlet Toyota.

We had three motor vehicles. I went to Society area myself and the rest remained at Kamelilo.

At around noon I saw the said vehicle being towed by KAE 129V Nissan Sunny. I followed the vehicle from behind and informed the DCC and DAPC at Kamelilo. We stopped [them]. Inside the towed vehicle was Geoffrey Ochieng and the accused person. KAE 129V was being driven by Nelson Onguma who was the mechanic.

We ordered the three out of the vehicle and conducted a search. The three were arrested and handcuffed. The motor vehicle KAE 129V had nothing inside.

We found containers of ethanol in motor vehicle Reg. No.KAC 258R. We found 225 litres in nine jerricans of 25 litres.

We then escorted the three to the Police Station and handed them over to the Police. The mechanic and driver were interrogated and released. The nine containers recovered are in Court. MFI 1 – MFI 9. The motor vehicle KAC 285R MFI 2.

The accused is a notorious brewer who has been in and out of Court. The accused is not licensed to deal with ethanol.

Cross examination by accused

I do not have grudge with you. I knew you before. The DCC received intelligence information from members of the public. The vehicle is yours.

Re-examination

Nil.

PW2

My name is Mary Muchene. I am the District County Commissioner Koibatek. I recall on 25.06.2018 around 10:00 am. I was in the office when I received a call from an informer. I got the information that there was a vehicle transporting illegal brew from Nakuru to Eldama Ravine. I was given the details of motor vehicle KAC 258R. I was informed that the owner of the vehicle was a notorious brewer.

I mobilized my team including the DAPC, SSP Davis Ondieki and the area Chief Pius Kibet and Two AP Officers.

Together with my team we proceed to lay an ambush. The Chief went to Society area and I at Kamelilo. Around 12:00 pm. The suspected vehicle was seen being towed by another vehicle Reg. No. KAE 126V. When the vehicle approached we stopped and ordered the occupant out. One of the occupants told us that he was a mechanic and on the vehicle being towed were two men Ochieng and Nderitu the accused. Ochieng was on the driver's seat in Nderitu's car.

We did a search on the two vehicles. There was nothing on the first vehicle. On the second car we found nine jerricans of 25 litres each. The container had substance that seemed suspicious. The two vehicle were towed to Eldama Ravine Police Station where the Police took over.

Later the substance in the nine containers were taken for analysis at the Government Chemist. The report is here MFI-11.

The report indicate that the substance was ethanol. I requested the NACADA people and KRA officers who worked together with the Police.

The accused was found to have had un-customed good without excise license. The containers we recovered are in court. MFI – MFI 9 identified. The vehicle owned by the accused is at the Police Station. The accused is the owner of the vehicle that had transported the nine containers of ethanol. The accused is not licensed to manufacture ethanol.

Cross examination by accused

Not true that we carried the container in GK vehicle.

Re-examination

Nil.

PW3

My name is Nelson Ongoma Amakosi resident of Kapdening. I am a mechanic.

On 25.06.2018 9.15 am I was in the house when I received a call from Geoffrey Ochieng. He told me that there was a car that was involved in an accident and was damaged.

I went to work and found him there. He asked me to go to the scene of the accident in Esageri. I went together with Ochieng. On arrival we found a motor vehicle Reg. No. KAC 258R that had been involved in an accident. The vehicle belonged to Nderitu whom I knew as a customer of many years. I towed the vehicle using my car to the garage. On my way I felt that the car was a bit loaded and felt heavy. On my way I was stopped by a Police vehicle in Kamelilo. I also saw DCC vehicle then AP vehicle. The accused was inside his vehicle.

The two vehicle were searched. I was arrested together with Ochieng and Nderitu.

The Police searched my vehicle. I only had a tool box. In Nderitu's vehicle nine jerricans were recovered. I didn't know what was inside. I later learnt that the container had ethanol.

Cross examination by accused

You were in your car when we were arrested.

Re-examination

Geoffrey was with accused in his car.

PW4

My name is Geoffrey Ochieng. I am a mechanic in Eldama Ravine Court. I do recall on 25.06.2018 I was in the garage when Nderitu called me and told me that his car had developed mechanical problem. I know Nderitu. I had been fixing his car.

I called Nelson Ongoma and we proceeded to Esageri where we found Nderitu and pulled the vehicle towards garage. Nderitu sat on Ongoma's vehicle and I drove Nderitu's vehicle. I did not check what was in Nderitu's motor vehicle.

In Kamelilo we were stopped by Police Officers. There were vehicles from Police. APs and DCC Koibatek.

The Police arrested us and did a search on our vehicles. In Nderitu's vehicle a number of jerricans were found. The jerricans were in the boot. I later learnt that the jerricans had ethanol. Shown the jerricans. This were the one inside Nderitu's car.

Cross examination by accused

No questions.

PW5

I am No.82050390 SPP Davies Ondieki Sub-County AP Commander Koibatek.

I recall on 25.06.2018 at around 10:00 hrs I was on duty. I received a call from DCC to immediately proceed to her office. She told me that she had received information that a vehicle KAC 258R was suspected to be carrying illicit brew to Eldama Ravine.

I called the Senior Chief Pius Kibet and two AP Officers and DCC. We planned an ambush along the Eldama Ravine Road. At 12:30 pm we spotted motor vehicle KAC 258R being towed by KAE 129V Nissan Sunny.

We stopped the two vehicles and did a search on both vehicles. KAC 258R had the accused and one of the mechanic. Ochieng was with the accused person.

Ochieng was the one driving.

We ordered the arrest of all the occupants and ordered the vehicle driven to Police Station in Eldama Ravine.

Upon search we found nine jerricans of 25 litres each of a substance which after analysis later was found to be ethanol.

I recorded my statement with the Police. The person we arrested is in Court as well as the nine jerricans.

Cross examination by accused

You were sitted in your car KAC 258R. We did not plant the nine jerricans on you.

Re-examination

The nine litres of jerricans were in the accused vehicle.

PW6

I am No. 101992 PC Sarah Kerario attached at Kakamega Police Station previously Eldama Ravine Police Station. I am the investigating officer in this case. On 25.06.2018 I was in the office when the OCS called me and directed me to take over the investigation on a matter that had been reported at the station.

The witnesses were recorded. I took over the conduct of the nine jerricans containers each 25 litres and the contents therefore. All the containers were full of the substance. I wish to produce the nine jerricans as exhibit. Exh. 1(a), (b), (c), (d), (e), (f), (g), (h), (i).

I took the sample of the exhibits for analysis at Kisumu Government Laboratory. The result indicated that the substance was ethanol with 92% alcohol by weight which 94% alcohol by volume or 166.06% proof spirit. The report is dated 27.06.2018. Report MFI 3.

Court Prosecutor.

I wish to have the investigating officer produce the report if the accused has no objection.

Accused.

I have no objection. The investigating officer may produce the report.

Court.

Section 177 of Evidence Act complied with MFI 3 production as exhibit 3.

Witness continues:

I also wish to produce the motor vehicle Registration No. KAC 258R as exhibit MFI – 2 exhibit.

I also have an exhibit memo which forwarded the exhibit to Government Chemist MFI 4 – exh 4. I then recorded my statement.

Cross examination – accused

I do not have any question.”

5. When put on his defence, the appellant gave an unsworn statement as follows:

DW1

My name James Nderitu resident of Shauri Eldama Ravine.

The Chief and DCC planted the exhibit in my car. My vehicle got mechanical problems at Esageri Centre. I was arrested together with mechanics. I didn't see the DCC load the exhibits in my car. That is all.

I am a driver and sometimes called by Elder Motors to drive their vehicles while in Eldama Ravine. I operate a Taxi business. I have done the business for three years. I am also farmer. I rear cattle.

Issues for determination

6. The broad questions for determination are whether the offence in the two counts against the appellant were proved on the evidence, and, particularly, whether as conceded by the DPP the charge in Count I was bad for duplicity.

DETERMINATION

Count I

7. The counsel for the appellant filed written submissions on this count principally as follows:

21. The offence for which the Appellant was convicted, in Count I of the charge sheet reads as follows:

“Being in possession of uncustomed goods (ethanol) contrary to section 200 (d) of the East African Community Customs Management Act 2004.”

22. Section 200 (d) of the Act reads as follows:

A person who-

- a.
- b.
- c.

d. Acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be:

i. Prohibited goods; or

ii. Restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise; or

iii. Uncustomed goods, Commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

23. Section 200 (d) contains more than one offence. It is clear that when drafting a charge under Sub-Section (d) the accused in any one count can only be charged under either 200 (d) (i), 200 (d) (ii) or 200 (d) (iii). An accused person cannot be charged under 200 (d) in one count. The rationale is simple, that an accused cannot at any one given time be dealing with prohibited goods, restricted goods and uncustomed goods. He could only at any given time either be dealing with prohibited goods, restricted goods or uncustomed goods in which case he would be charged with separate counts each constituting the particulars of the specific counts. The instant charge having combined the three elements is bad for duplicity. In this case the appellant having pleaded to the charge was prejudicial to him as he was faced with difficulty of knowing exactly what he was answering to. The Appellant ought to have been charged with the offence of being in possession of uncustomed goods contrary to section 200 (d) (iii) as read with Section 201 (c) and section 213 of the East African Community Custom Management Act of 2004.

24. The charge as framed was defective and this is a proper case where the court should allow the appeal, by quashing the conviction and setting aside the sentence. Ordering a retrial in this case will be prejudicial to the Appellant as he has already served 7 months in jail and the fate of the exhibits is unknown. The Appellant will not get a fair trial. The interests of justice do not require it and it is likely to cause an injustice to the accused.”

8. The DPP, properly, did not oppose the appeal from conviction on the count I and this court only accepts that to charge a person in one count under section 200 (d) of East African Community Customs Management Act is duplicitous because the section makes several offences under sub-paragraphs (i) (ii) and (iii) respectively for “Prohibited goods; or Restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise; or Uncustomed goods.” The charge in Count I was duplex. see *Cherere s/o Gukuli v. R* (1955) 22 EACA 478, cited in *Kasyoka v. R* (2003) KLR 406 (Mbaluto, J.) and *Josephat Shikuku v. R* [2010] eKLR (Emukule, J.). The court must reject the charge as bad for duplicity and quash the conviction thereon and set aside the sentence of three years thereon imposed by the trial court.

Count II and alternative

9. In his submissions on Count II, the appellant’s counsel urged that-

16. “No evidence was tendered to show that ethanol attracted excise duty and if so how much. Section 39(5) of the Excise Duty Act, 2015 provides as follows:

“Any person who buys, or, without proper authority, receives or has in the person’s possession, any excisable goods that have been manufactured contrary to the provisions of this Act, or which have been removed from the place where they ought to have been charged with excise duty before such duty has been charged and either paid or secured commits an offence.”

The prosecution never adduced any evidence to show how the ethanol had been manufactured contrary to the Act. No evidence was tendered to show which provisions of the Act had been contravened. In the absence of such evidence the Appellant ought to have been acquitted of the alternative Charge to Count II.”

10. The DPP urged that there was evidence to support the charge in the evidence of the Investigating Officer (PW6).

11. Clearly, the charge in Count II is defective, the only offence created under section 15 of the Excise Duty being the manufacture or importation of goods, or supply of services without a licence, for which penalty is provide under section 38 of the Excise Act, as follows:

“15. Activities requiring a licence

(1) A person shall not undertake any of the following activities unless the person is licensed or registered by the Commissioner to undertake the activity—

- (a) the **manufacture** of excisable goods in Kenya;
- (b) the **importation** into Kenya of excisable goods specified by the Cabinet Secretary under section 28 as requiring an excise stamp;
- (c) the **supply** of excisable services;
- (d) the use of spirit or illuminating kerosene to manufacture goods in Kenya that are not excisable goods; or
- (e) the carrying out of any other activity in Kenya for which the Commissioner, by notice in the Gazette, may impose a requirement for a licence.

(2) A person who manufactures excisable goods or supplies excisable services in contravention of subsection (1) shall be liable for the excise duty payable in respect of the excisable goods or services at the rate specified in the First Schedule.

(3) The excise duty payable by a person under subsection (2)—

- (a) shall be payable on demand made by the Commissioner; and
- (b) shall be in addition to any penalty or sanction imposed on the person under this Act or the Tax Procedures Act, 2015 for breach of subsection (1).

[Act No. 38 of 2016, s. 23, Act No. 15 of 2017, s. 3.]

38. Penalty

(1) A person who undertakes an activity referred to in section 15 (1) (a) or (b) without being licensed to do so shall be liable to a penalty equal to—

- (a) double the excise duty that would have been payable if the person were licensed in the case of a person to whom section 15 (1) (a) applies; or
- (b) double the amount of excise duty payable in respect of the importation of excisable goods requiring an excise stamp, in the case of a person to whom section 15(1) (b) applies.

(2) A licensed manufacturer who manufactures excisable goods in premises that are not specified on the manufacturer's licence as the factory in which the manufacturer is permitted to manufacture the goods shall be liable to a penalty equal to double the excise duty payable on those goods.

(3) If under section 27(1) has been applied to deem a licensed manufacturer to have removed excisable goods from excise control, the manufacturer shall be liable to pay a penalty equal to double the excise duty payable on those goods.

(4) The Tax Procedures Act, 2015 shall apply to penalties imposed under this section.”

12. There was no evidence that the appellant did manufacture the goods (ethanol) found in his possession, and the trial court properly dismissed the charge as **possession** is not one of the offences under the provisions of section 15 of the Excise Duty Act.

Alternative charge

13. As to the charge in the Alternative Charge to Count II, the appellant's possession of the ethanol was proved by the consistent evidence of the Senior Chief (PW1), the District County Commissioner (PW1) and Sub-County Police Commander (PW5) who upon an ambush arrested the appellant and recovered the 9 jerricans which liquid confirmed upon Government Chemist examination to be ethanol. The appellant's mechanics (PW3) and PW3 whose help he sought upon his vehicle breakdown testified to the recovery of the jerricans from the appellant's car when they were towing it to garage. The appellant's allegation in his unsworn statement that the ethanol was planted by the DCC (PW2) must be rejected in view of the consistent evidence of the its recovery by the 5 prosecution witnesses including the mechanics with who were riding with the appellant in his car and towing vehicle.

14. The Investigating Officer (PW6) presented, pursuant to section 77 of the Evidence Act with no objection by the defence, a report of the Government Chemist dated 27th June 2018 PEX 3 established that the exhibit in 9 plastic bottles received from the police was as follows:

“The colourless liquid in nine plastic bottles was analyzed and found to be Rectified Spirit (Ethanol) with **92 per cent alcohol by weight which is equivalent to 94.71 percent by volume** or 106.06 percent proof spirit.”

15. Section 39(5) of the Excise Duty Act creates the offence charge in the alternative charge to count II as follows:

“39. (5) Any person who buys, or, **without proper authority, receives or has in the person's possession, any excisable goods that have been manufactured** contrary to the provisions of this Act, or which have been removed from the place where they ought to have been charged with excise duty before such duty has been charged and either paid or secured commits an offence.”

16. Under the Excise Duty Act, “excisable goods” means the goods specified in Part I of the First Schedule. The Excise Duty Act under its First Schedule provides for excisable goods to include “***Spirits of undenatured ethyl alcohol; spirits liqueurs and other spirituous beverages of alcoholic strength exceeding 10%***”. The prosecution proved that the appellant was in possession of ethanol of the proof spirit qualifying it as an excisable good as shown in Government Chemist’s report hereinabove.

17. Ethanol is an excisable good under the Excise Duty Act, for which lawful authority is required to deal with. Although ‘proper authority’ in section 39 (5) of the Act is not defined in the Act, it must mean a licence or other permission as may be given by the Commissioner under the Act. The appellant should have shown **proper authority** to receive or be in possession of the excisable goods.

18. The appellant did not show a licence or other proper authority as, say, a transporter for a licenced person as the defence said he was a taxi operator, to be in possession of ethanol which is an excisable good under the Act. The prosecution witnesses PW1, PW2 and PW5 also said that the appellant did not have a licence to possess ethanol, and he could only have lawfully acquired it if he had a licence or proper authority under the Act to deal with ethanol as an excisable good, in default of which his possession manifested an offence under section 39 (5) of the Excise Duty Act. It is really the evidential duty of the appellant under section 111 of the Evidence Act for proof fact that he was licenced to deal with ethanol, which are circumstances which bring the case within exception, exemption or qualification to the operation of the law by showing proper authority as a licence is a ***fact especially within the knowledge of the licensee***. Section 111 of the evidence Act is in terms as follows:

“111. Burden on accused in certain cases

1. When a person is accused of any offence, **the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

2. Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

To require the prosecution to prove that the appellant was not licenced is improperly to require the prosecution to prove a negative, which it is exempted from proving under section 111 (2) (b) of the Evidence Act.

19. The appellant was properly convicted for the offence charged as alternative to count II.

Sentence

20. The DPP concedes that the court did not consider the sanction of the fine as prescribed under section 41 of the Excise Duty Act and urged the court to review the sentence accordingly by imposing a fine. Section 41 of the Act is as follows:

“41. Sanctions for offences

(1) Subject to subsection (2), a person convicted of an offence under sections 39 and 40, shall be liable to **a fine not exceeding five million shillings** or to imprisonment for a term not exceeding three years, or to both a fine and imprisonment.

(2) Where an offence under this Part or the Tax Procedures Act has been committed in relation to **excisable goods, the court may impose a fine not exceeding the higher of—**

(a) the maximum fine specified for the offence; or

(b) three times the value of the excisable goods to which the offence relates.

(3) For the purposes of subsection (2), the value of excisable goods shall be determined in accordance with section 9.”

21. **The Kenya Judiciary Sentencing Policy Guidelines** at paragraph 11.5 at p. 28 require the court to consider the penalty of a fine where the same is provided as an option before imposing the custodial sentence as follows:

“11.5 **Where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence.** If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so, as it proceeds to impose the available option.”

22. Although the trial court did consider that because of the previous convictions, the appellant did not deserve a non-custodial sentence the court did not specifically advert to the penalty of fine as prescribed by the Kenya Judiciary sentencing Policy Guidelines. The trial court did not also consider that whilst a person may not be suitable for community based sentence as urged by the Probation Officer, it is no reason to deny an alternative for payment of a fine which is available under the law. In this, the trial court erred and the sentence is, therefore, subject to review on the principle of *Wanjema v. R* (1971) EA 393, 494. Moreover, the Court of Appeal has in *Kyalo v. R* (2009) KLR 325 warned against wholesale acceptance of reports of Probation Officers which are not subjected to cross-examination as follows:

“The Probation report though important as it led the court into making its mind as to whether to put a person convicted on probation, was nonetheless composed of allegations some of which had not been tested through cross-examination in court and were matters that the person convicted had not had an opportunity to comment on and as such should not form the only basis for sentencing.”

23. The Probation Officer’s report in this case concluded as follows:

CONCLUSION

Your honour the accused before the honorable Court is a 36 year father of three. He is unskilled, therefore works as a taxi driver, supplier and brewer of illicit alcohol and also suppliers ethanol to make ends meet. Home report show a person who poses a threat to its community as he brews alcohol and escapes the arm of law as he bribes off for his freedom.

He admits to be brewing alcohol for some time now. He also confirms that the ethanol is his and does not show remorse for the action he committed though he admits to have committed a crime.

His wife and brother in-law all confirmed the accused has been brewing for almost five years now and had stopped but was forced to revive it after he was financially strained to pay off his loan. They plead with the court for leniency since he is the sole bread winner of the family as the wife is unemployed and he has young school going children.

The village elder has tried talking the accused out of brewing illicit alcohol but he failed to change. He confirms that the accused has been arrested severally on matters relating to brewing alcohol but has since failed to change. He has also threatened his superiors [Chief] and has a lot of pride since he can buy his way out. The accused was also given a chance to change through a non-custodial sentence bur he re-offended, that is why he will leave it to the discretion of the court for his sentencing.

The chief and Assistant County Commissioner are of the opinion that since the accused uses money to get his freedom, he threatens people who are working to help eliminate alcohol brewing and use in their area, he is seen as a king pin whom justice cannot be served to, uses bribe and works with officers to get off the hook of law. These are some of the reasons that have proven difficulty to apprehend him. They are also of the opinion that the cry of the community should be heard and justice served, such that he should not be granted a non-custodial sentence, thus helping stop his supply of ethanol that is an ingredient used to brew changaa as he is one of the main suppliers. His incarceration will also act as a deterrent measure when his colleagues see their tycoon has been stopped.

Your honour, the accused does not show remorse for the offence committed, he has been sending officers to intimidate the office to work on his favor, he is not a first offender [**CR: 868/13 offence of contravening the alcohol drinks and sentenced to serve 6 months on probation**]

RECOMMENDATION

In view of the aforementioned, I find the offender not fit for any of our programmes.

Electer Vuyanzi,

Probation Officer,

Koibatek Sub-County,

3rd June, 2019.”

24. In his sentencing the trial court considered previous convictions as follows:

“I have seen the Probation Officer’s Report on the accused person and considered it in meting out sentence. I have also

noted that the accused is a repeat offender;

Previously charged and convicted in Traffic Case No. 80/2019 and Criminal Case No. 868/13.

Taking all into account I think a custodial sentence is appropriate for the accused person.”

25. The appellant had in response to the record of previous conviction only admitted conviction in Traffic Case No. 80 of 2019 as follows:

“It’s true that I was charged and convicted in Traffic case NO. 80/2019 and I paid a fine of Ksh.100,000/-. I was never charged in Criminal case No. 307 of 2015.”

26. A letter on the trial court file addressed to DPP by the OCS Eldama Ravine dated 24th May 2019 appears to raised as to the appellant’s previous conviction in Cr. Case No. 307 of 2015 as follows:

“24th May 2019

TO. OFFICE OF THE

DIRECTOR OF PUBLIC PROSECUTION

ELDAMA RAVINE

P.O. BOX:

KABARNET

REF: POLICE RECORDS ON PCR NO. 179-180/2015 CF NO.307/2015.

In our records concerning the above case it clearly shows that two suspects by the names I. James Nderitu and Ismail Mohammed were arrested by members of the public at Society Village with 23 litres of Changaa. The two were booked at the station vide OB No.13/05/04/2015. The two suspect were resident of Society Village and they were all fined Ksh.10,000/= I/D four imprisonment on 07/04/2015.

Now the suspect in court is one **James Karimi Nderitu** who is a resident of Shauri Yako Village. **We cannot state with certainty whether the records of PCR No.179-180/2015 belong to James Karimi Nderitu since we don’t take finger prints for PCR Cases. And effort to find the co-accused one Ismail Mohammed has not being successfully.**

(AMOS NAMSAKA) C.I

OCS ELDAMA RAVINE”

[Emphasis added]

27. It would appear that the trial court was improperly influenced by the Probation Officer’s Report which alleged a previous conviction in “Cr. 868/2013 offence of contravening the Alcoholic Drinks and sentenced to serve 6 months on probation”, which previous conviction was not put to the appellant for him to admit. With respect, the previous conviction in an unrelated traffic case should not count as a previous conviction in a case for alcohol related charged of being in possession of ethanol without licence or authority.

The Alternative of Fine

28. The object of imposition of a fine is to penalise the offender by paying the fine and serve non-custodial sentence, and not to impose a default custodial sentence, which will follow upon likely failure by offender to pay the adjudged fine. The Kenya Judiciary Sentencing Policy Guidelines puts the matter as follows:

“Determination of a fine

The fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases and in which case the necessary information is within the court’s knowledge, a presentence report should be requested for probation officer to provide information which would assist the court in reaching a just quantum.”

29. In his statement before the trial court, the appellant said he was a taxi driver. I consider that a fine of Ksh.200,000/- would meet the justice of the case. In default of payment of the fine of Ksh.200,000/- the appellant shall serve imprisonment for a period of 12 months in accordance with the scale set out in section 28 (2) of the Penal Code. The fine need not be three times the value of the excisable goods.

Section 41 of the Excise Duty Act above only makes provision for an alternative method of assessing the fine where the goods are excisable and their value established. In other cases, such as this where the value of the excisable goods is not established the court is required to pass a fine not exceeding the maximum fine specified for the offence which is “**a fine not exceeding five million shillings.**” In imposing a fine of Ksh.200,000/-, I have considered that the appellant has been in custody since sentence on 3rd June 2019, a period of nine (9) months.

Release of the goods subject of the charge to appellant

30. The appellant’s counsel urged the court to release the jerricans of ethanol and the motor vehicle saying –

“26. The trial court never made an order for the forfeiture or payment of duty upon conviction of the appellant contrary to section 201 of the east African community Custom Management Act 2004. We urge the court to order that the goods that were found with the appellant and the motor vehicle be released to him forthwith. (See **Paul Otieno Musumba v. Republic** [2015] eKLR).

31. The DPP opposed the release of the ethanol pointing out that the appellant had no authority to be in possession of the ethanol and that in his defence he had said that the ethanol was planted on him.

32. In **Paul Otieno Musumba v. Republic**, supra, Makau, J. held as follows:

“16. In the instant case the Court did not make an order for forfeiture or payments of duty upon conviction of the appellant and that was an error on the part of the trial Court. **Section 201 of The East African Community Customs Management Act – provides:**

“201. Where on conviction for an offence under this Act, a person is liable to pay a fine, that person shall, unless the goods are prohibited goods or are ordered to be forfeited under this Act, pay duty on the goods in addition to the fine.”

The Court's judgments is silent on what become to the goods found in possession of appellant contrary to Section 201 of the East African Community Customs Management Act.

17. Having come to the conclusion, I have, I find that the conviction and sentence imposed upon the appellant was unsafe and unsatisfactory. **That as the goods found with the appellant were not proved to be prohibited goods or attracted unpaid duty, I therefore order the same to be released to the appellant forthwith.** I hereby quash the conviction and set aside the sentence on all counts. The Appellant is set at liberty forthwith unless lawfully held.”

[emphasis added]

33. With respect, I am unable to take benefit of the learned judge’s holding because, in this case, the appellant denied having been in possession of the goods, and he cannot be held to have been entitled to them. The court cannot give to the appellant what was not lawfully in his possession. He denied possession saying the ethanol was planted and he therefore did not show that he was entitled to possession. Section 177 of the Criminal Procedure Code, which permits restitution of property subject of a criminal trial to “**the person who appears to the court to be entitled thereto**”, is in the following terms:

“RESTITUTION OF PROPERTY

177. Property found on accused person

Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order—

a. that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or

b. that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.”

35. The right to restitution is for the person appearing to be the owner of the property. The appellant disowned the goods, and he cannot now be heard to claim them back! As regards the motor vehicle, the court would order that the same be returned to its registered owner upon proof of ownership.

Orders

36. Accordingly, for the reasons set out above, the court makes the following orders:

1. The conviction of the appellant in Count I for the offence of *BEING IN POSSESSION OF UNCUSTOMED GOODS (ETHANOL) CONTRARY TO SECTION 200 (d) OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004* is quashed and the sentence of imprisonment for three (3) years set aside.

2. The conviction of the appellant for the offence in alternative charge to Count II for the offence of *BEING IN POSSESSION OF EXCISABLE GOODS (ETHANOL) THAT HAS BEEN ACQUIRED IN CONTRAVENTION OF SECTION 39(5) AS READ WITH SECTION 41 OF THE EXCISE DUTY ACT 2015* is upheld but the sentence of imprisonment for two (2) years is set aside and substituted with a sentence for the payment of a fine of Ksh.200,000/-.

3. In default of payment of the fine of Ksh.200,000/- the appellant shall serve imprisonment for a period of 12 months in accordance with the scale set out in section 28 (2) of the Penal Code.

36. In exercise of the trial court's powers pursuant to section 354 (3) (d) of the Criminal Procedure Code, this court makes a consequential direction that the ethanol the subject of the trial herein, which has not been lawfully claimed by the appellant or any other person, shall be forfeited to the State. The motor vehicle *KAC 258R Make Toyota STARLET* shall be returned to its registered owner upon proof of ownership.

Order accordingly.

DATED AND DELIVERED THIS 5TH DAY OF MARCH 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Konosi & Co. Advocates for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.