



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 54 OF 2008

UVITO KIIA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court
Criminal Case No. 25 of 2006 by Hon B. Ochieng, PM on 21/2/08)*

JUDGMENT

1. **Uvito Kiia**, the appellant is charged with two(2) counts:-

- i. Stealing from a parked motor-vehicle contrary to **Section 279 (c)** of the **Penal Code**. Particulars thereof being that on the nights of 4th and 5th January, 2006 at **Makindu Market, Makueni District** within **Eastern Province** jointly with others not before court stole 160 litres of diesel valued at Kshs. 10,400/= from a parked motor-vehicle Registration Number KAS 064/A Trailer No. ZC 1074 make Renault, the property of **A.O.B Bayusuf Transporters Limited**.
- ii. Storage of petroleum product not in accordance with the **Petroleum Act** contrary to **Section 2** of the **Petroleum Act Cap 116 Law of Kenya**. Particulars thereof being that on the 5th January, 2006 at **Makindu Market in Makueni District** within **Eastern Province**, he was found storing 160 litres of diesel for sale which was not in accordance with the laid down by laws.

2. Facts of the case were that **No. 51688 Sergeant David Kambi (PW1)** acting on a report made by **Steve Macharia**, the driver of motor-vehicle Registration Number KAS 064A ZC 1074 Renault Trailer that its diesel tank had been tampered with followed trails of oil that had been spilled. This led them to a house stated to belong to the appellant's father but occupied by the appellant. The door was broken down following his orders. Some eight (8) jerricans of liquid believed to be diesel each weighing 20 litres were recovered. Also recovered were some 13 pieces of gloves and clothes stained by the substance. On the 12th January, 2006, the appellant presented himself to the police. He was arrested and charged.

3. In his defence the appellant stated that he was at his place of business, **Makindu Hotel** when arrested. He was questioned about a lorry that belonged to **Bayusuf** and fuel. He was later charged.

4. Having denied the charges he was subjected to the trial process, found guilty, and convicted of both counts. He was sentenced to serve seven (7) years and 1 year imprisonment on count 1 and 2 respectively.

5. Being aggrieved by the conviction and sentences thereof he appealed on 22 grounds which can be condensed as follows:-

- i. There was no complainant in the first count;
- ii. The owner of the premises where the fuel was recovered was not availed;
- iii. No evidence of occupancy of the house was adduced;
- iv. Exhibits produced were not found in possession of the appellant; and
- v. The sentence meted out in count 2 was not in accordance with the law.

6. Rival submissions by both counsels for the appellant and the State have been considered.

7. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).

8. In count 1, the property stolen was stated as belonging to **A.O.B Bayusuf Transporters Limited. PW2, Mohammed Hussein Mustafa** who purported to be supervisor with **Bayusuf Transporters Company, Mombasa** did not say whether or not he worked for **A.O.B Bayusuf Transporters Limited**, the complainant herein. It can therefore not be stated that there was complainant in the matter. No evidence of ownership of motor-vehicle registration Number KAS 064/A trailer No. ZC 1074 make Renault was adduced. There is hence no proof that the motor-vehicle was owned by **A.O.B Bayusuf Transporters Limited**.

9. PW1, the investigating officer alleged to have received the report from **Steve Macharia**, the driver of the motor-vehicle. This particular person was not called as a witness. **PW3, Michael Nyambu Peter** who described himself as a turn-boy of the motor-vehicle claimed that they parked the motor-vehicle at 7.00pm. In the morning they noticed fuel on the ground. According to him fuel had been syphoned. No evidence was called to establish what quantity of fuel had been loaded in the motor-vehicle and after the purported syphoning how many litres of fuel were in the motor-vehicle. There was hence no proof of theft as alleged. There was also no evidence of a person having been found taking any fuel as alleged.

10. In the second count, it is stated that the appellant was found having stored 160 litres of diesel for sale in contravention of by laws. Some liquid suspected to be diesel was found in a house alleged to be owned by the accused's father. The house was broken into by the police irregularly. The name of the owner of the house was not divulged. PW1 did not tell the court his source of information. The prosecution failed to adduce evidence of ownership of the said house. On cross-examination, PW1 stated that there were several rooms at the premises but he did not take any of tenants' names. No evidence of actual possession or occupancy of the premises in which the substance produced in evidence was found was adduced. It can therefore not be stated that the liquid in jerricans belonged to the appellant.

11. PW1 submitted some liquid was taken to the Government Chemist for analysis. He submitted some 500ml blue plastic bottles containing some brownish liquid to the Government Chemist for analysis. A report was un-procedurally produced in evidence by the same witness. Per the report, the liquid was found to be diesel, a petroleum product. In his evidence, PW1 stated thus:-

“I prepared an exhibit Memo Form and forwarded samples of the recovered diesel to the Government Chemist who on analyzing confirmed the same was diesel.”

The witness did not state where the liquid was drawn from. We are told there were eight (8) containers, each purportedly contained some liquid. The report which was in respect of single sample was produced in evidence without any basis being laid down. It is not known why the Government Analyst did not come to court. The appellant was not given an opportunity of stating whether or not he wished to subject him to cross-examination. The procedure adopted by the trial magistrate was un-procedural and indeed prejudicial to the appellant

12. Finally, the charge as drawn indicates that the accused contravened **Section 2** of the **Petroleum Act**. That is a section that defines what petroleum is. The particulars of the offence alluded to some “*laid down by laws*”. These by laws were not stated. A charge is stated to be fatally defective if it does not disclose the offence. It is not stated in clear and unambiguous manner. (*See Section 134 of the Criminal Procedure Code,; Sigalai versus Republic [2004] 2KLR 480*).

13. There is no way the appellant would have been able to prepare for his defence properly considering the fact that the particulars of the offence as framed were ambiguous.

14. From the foregoing, the appeal must succeed. It is allowed. The conviction is quashed and sentence set aside. The appellant shall be at liberty unless otherwise lawfully held.

15. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 14th day of JANUARY, 2015.

L.N. MUTENDE

JUDGE