



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MISCELLANEOUS CRIMINAL APP NO. 15 OF 2014

REPUBLIC.....APPLICANT

VERSUS

JOHN MAINA MWANGI.....RESPONDENT

RULING

By a notice of motion dated 7th April, 2014, brought to court under **sections 362 and 364** of the Criminal Procedure Code, the applicant sought the orders of this court to have the record in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** brought into this court for the court to satisfy itself of the correctness, legality or propriety of the orders made by the subordinate court on 18th March, 2014.

The applicant also sought to have the summons by the magistrate's court dated 3rd April, 2014 directed at the officer in charge of Kigumo police station permanently stayed. Finally, the applicant asked this court to declare as void the orders made in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014**.

The application was supported by the affidavit of Douglas Mwanzia who described himself as the officer commanding Kigumo police station. In the affidavit which was sworn on 7th April, 2014, Mr Mwanzia swore that on 20th January, 2014, the respondent was arrested while driving motor vehicle registration number KXC 228 which was ferrying alcoholic drinks that the police suspected were unfit for human consumption.

On 23rd January, 2014, the respondent was arraigned in court and charged with two counts under the **Alcoholic Drinks Act, No. 4 of 2010** and five counts under the **Standards Act (Cap. 496)**. The vehicle together with the alcoholic drinks were impounded and stored at the police station for purposes of presenting them as exhibits in court in the trial against the respondent.

As part of the police investigations, samples of the alcoholic drinks were tested by the Kenya Bureau of Standards and found to be short of the requisite standard.

On 24th February, 2014 the first two counts under the **Alcoholic Drinks Act, No. 14 of 2014** against the respondent were withdrawn leaving only the counts under the Standards Act.

In an undated ruling, the learned magistrate dismissed the charges under **section 89(5)** of the **Criminal Procedure Code** holding that the charges did not disclose any offence.

The applicant claims that in dismissing the charges, the learned magistrate did not give any reason contrary to **section 90(2) of the Criminal Procedure Code (Cap. 75)**.

Again, although the learned magistrate only directed that the motor vehicle be released to the respondent, the order that was extracted stated that all the exhibits, including alcohol, which may endanger the life of the members of the public be released to the respondent as well.

It is Mr Mwanzia's position that he should not be summoned or compelled to obey contradictory orders. In any event, so he swore, the respondent was subsequently charged in Murang'a Chief Magistrate's Court Criminal Case No. 25 of 2014 apparently after the charges against him in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** were discharged.

The respondent opposed the applicant's application in an affidavit he swore on 19th May, 2014, in response thereto, he stated that he is a licensed alcohol distributor and he believed the alcohol manufacturers on whose behalf he distributes this commodity are licensed and equipped to trade in the alcohol business.

He admitted to have been arrested on 20th January, 2014 with alcoholic products and charged on 23rd January, 2014 with two counts of transporting alcoholic drinks without a license contrary to **section 8(1) of the Alcoholic Drinks Act No. 4 of 2010** and breach of licence contrary to **section 34(1)** of the same Act.

The respondent contended that although the learned magistrate ordered that the vehicle be released to him, the officer commanding Kigumo police station had ignored the order. He further stated that even after all the charges against him were dismissed, the officer was adamant and refused to release the vehicle together with the alcoholic drinks to him.

The respondent swore that he was charged in Murang'a **Chief Magistrate's Court Criminal Case No. 354 of 2014** with the same charges that he had been charged with in the magistrate's court at Kigumo. He said that he pleaded autrefois acquit before the Chief Magistrate and was acquitted of the charges. In his view the applicant ought to have appealed against the learned magistrates' orders if, for any reason, he was not satisfied with them. He asked the court to dismiss the application herein.

In order to satisfy myself of the correctness, legality or propriety of the proceedings and the orders made in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** I called for the original record from the subordinate court for my perusal.

There are two charge sheets on record; in the first charge sheet, the respondent is charged with two counts the first of which is of transporting alcoholic drinks without a licence issued by the drinks licensing committee contrary to **section 8(1) of the Alcoholic Drinks Act No. 4 of 2010**. The second count is of breach of licence contrary to **section 34(1)** of the same Act.

In the second charge sheet there are seven different counts ; the first two counts are the same counts in the first charge sheet. The rest of the counts are all related to offering for sale of sub-standard alcoholic drinks which do not comply with specifications prescribed in relevant Kenya Standard or East African Standard for portable spirits contrary to **section 9(2) of the Standard Act (Cap 496)** as read with **section 15** of the Act; each of these counts relates to distinct brand of alcohol of various quantities.

Both charge sheets bear the date of 23rd January, 2014; however, on the material date, the respondent is recorded to have taken plea on two counts. The record shows a plea of not guilty was entered on those two counts; this would imply that it is the first charge sheet with the two counts that was read to the respondent.

After this plea was taken, the respondent was given a bond of Kshs 100,000/= with a surety of the same amount or in the alternative a cash bail of Kshs 50,000/=. The case was then set for hearing on 24th

February, 2014.

On 11th February, 2014 the respondent applied to have his motor vehicle released; the prosecutor is recorded to have not objected to the application and consequently the court ordered that the vehicle be released.

When the case came up for hearing on 24th February, 2014, counsel for the accused informed the court that he had noted the charge sheet was “totally defective”. He told the court that the particular section under which the respondent was charged under the first count does not create the offence with which the respondent was charged. As for the second count, he stated that the particulars provided are insufficient. In the circumstances, counsel asked the court to invoke **section 89(5)** and dismiss the complaint.

In response to the counsel for the respondent’s application, the prosecutor applied to substitute the charges; counsel for the respondent objected to the application on the ground that it was an abuse of the process of the court. The court overruled him and allowed the application for substitution. The charges as per the new charge sheet were then read to the respondent; he pleaded not guilty to all the seven counts in this charge sheet.

Interestingly, immediately after the plea had been taken on the new charge sheet, the prosecutor applied to withdraw the first two counts which were the same counts that were in the substituted charge sheet. The application was based on **section 89(5)** of the **Criminal Procedure Code**.

In his ruling, the learned magistrate opined that those counts did not disclose any offence and accordingly dismissed them under **section 89(5)** of the **Criminal Procedure Code** and “discharged” the appellant in respect of those counts.

The learned counsel for the respondent asked the court to go even further; he applied that the third count should be dismissed under **section 89 (5)** of the Criminal Procedure Code on the ground that it is defective. He argued that the charge under **section 9(2)** of the **Standards Act** did not provide sufficient details such as the gazette notice or order on which the state was relying upon to declare the alcohol unfit for consumption. The charges as framed were, in the learned counsel’s view contrary to **section 234** and **237** of the **Criminal Procedure Code**. My copy of the Code shows that these two sections of the law have been repealed and do not exist.

The state opposed the application and urged that the details the respondent’s counsel was looking for were matters of evidence which could be availed in the course of the trial.

In an undated ruling the learned magistrate made a finding that the only issue for determination was whether in the absence of “details”, the charge was thereby defective. He continued to hold that under **section 234** of the **Criminal Procedure Code**, the information is an integral part of the charge and that the charge sheet must contain sufficient details which in this particular case were held to be the order of the relevant gazette. Without these details, the learned magistrate held that the charges did not disclose any offence. He dismissed the charges before him under **section 89(5)** of the **Criminal Procedure Code**. He also discharged the respondent and once again ordered that the motor vehicle be released to him. There was no mention of the alcohol.

I have considered the arguments by the leaned counsel for the state and the respondent’s counsel. It is not in dispute that the respondent was charged under **Section 9(2) of the Standards Act (Cap 496)**; however, **subsection (2) of section 9** is directly linked to sub-section (1) of the same section; the two subsections read as follows:-

“9. Declaration of Kenya Standard

(1) The Council may by notice in the Gazette-

(a) declare any specification or code of practice framed or prepared by the Bureau to be a

Kenya Standard;

(b) notify from time to time any amendment to, replacement of, or abolition of, a Kenya Standard declared under paragraph (a).

(2) where a Kenya Standard has been declared under subsection (1), the Minister, on the advice of the Council, shall, by order in the Gazette, prescribe a date after which no person shall manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with the specification or code or practice.”

Subsection (4) thereof is clear that any person who contravenes the provisions of an order under **subsection (2)** shall, unless there is in force in respect of him a notice of exemption under **subsection (3)**, be guilty of an offence.

In each of the five counts that were impugned the respondent was charged with “*offering for sale substandard alcoholic drinks which do not comply with specifications prescribed in the relevant Kenya Standards or East African Standards for portable spirits contrary to clause 9(2) of the Standards Act Cap 496 Laws of Kenya as read with section 15 of the same Act.*”

The wording of the particulars of the offence in each of these counts was similar except for the type or brand and the quantity of the alcoholic drink the respondent is alleged to have been found offering for sale; for instance, in the third count, the particulars were that on the 20th January, 2014 at Kinyona Trading Centre Kigumo District within Murang’a County, the respondent “*was found offering for sale 240 pieces super ice 750 ml and 312 pieces 275 ml substandard alcoholic drinks which do not comply with specifications prescribed in relevant Kenya standards or East African Standards for portable spirits.*”

The respondent’s argument, which was upheld by the learned magistrate, was that the charge was deficient because it did not specify the order or the gazette in which the Kenya or the East African Standard had been declared; without the details of the notice or the gazette, the learned magistrate held that “*the charges do not disclose the offence.*”

The main issue for determination in this application is whether the charges against the respondent in the subordinate court were properly framed, and in any event in accordance with the law. The law relating to framing of charges and informations is found in **section 137** of the **Criminal Procedure Code**; that section is quite comprehensive and detailed as to what comprises a charge or information. It says at the very beginning that:-

137. The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code-

The question in this application, therefore, is whether the charges against the respondent were framed in accordance with the provisions in the Code and in order to answer that question adequately, it is necessary to refer to the relevant provisions under **section 137 of the Code** to see whether the details which the learned magistrate found as having been omitted from the charge sheet are a necessary ingredient in a charge or information.

The provisions of **section 137(a) (i) and (ii)** describe what constitutes a count of a charge; they provide as follows:-

(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as much as possible the use of technical terms, and without necessarily stating all the essential

elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.

All the five counts with which the respondent was charged with were framed as follows:-

“Offering for sale substandard alcoholic drinks which do not comply with specifications prescribed in the relevant Kenya Standards or East African Standards for portable spirits contrary to clause 9(2) of the Standards Act Cap 496 Laws of Kenya as read with section 15 of the same Act.”

This count, in my humble view, describes the offence in an ordinary language and more importantly specifies the section of the law which creates the offence. It certainly meets the requirements of **section 137(a) (ii)** of the Code. For avoidance of doubt the provision is clear that not all the essential elements of the offence have to be stated in the statement of the offence. I suppose the details of the gazette or the order which the learned magistrate referred to in his ruling would constitute the elements which, though essential, do not have to be stated in the statement of offence. The omission of these details is, not, in my view, fatal to the charges against the respondent.

In any event the existence or non-existence of the order or the gazette is a question of fact which would be properly determined in evidence. The production of, for instance, an official Gazette, would under **section 85 of the Evidence Act (cap 80)** be prima facie evidence of the purpose of the due making of the law and the tenor of such a law as contained in the gazette. The omission of the details of the order or the particulars of the official gazette from the charge or information would not be an error, omission or irregularity which could be said to occasion a failure of justice as contemplated under **section 382** of the **Criminal Procedure Code**.

I must mention something about the manner in which the objection against the information was taken by the counsel for the respondent. The record shows the charges against the respondent were dismissed after the respondent had taken plea. Counsel for the respondent invoked **section 89(5)** of the **Criminal Procedure Code** and applied orally to have the charges dismissed. The learned magistrate allowed his application and dismissed the charges on the basis of **section 89(5)** of the Code. That section of the law provides as follows:-

“(5). Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or the formal charge and shall record his reasons for the order.”

This provision of the law enables the magistrate to move *suo moto* to reject a complaint or a formal charge where it does not disclose an offence; this power can only be exercised by a magistrate before the charge is read to the accused person; once the charge has been read to the accused and he has taken plea, there is no way the magistrate can then refuse to admit the complaint because at that stage of the proceedings the charge has already been admitted. The learned magistrate clearly fell into error when he purported to refuse to admit the charge or information after the respondent had taken plea.

After the plea had been taken, the only course available to the learned magistrate, if it appeared to him at that stage of the proceedings, that the charge was defective either in substance or form, was **section 214 (1)** of the Code under which he could order the alteration of the charge by either amendment, substitution or addition of new charges. That section provides:-

“214. (1) Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case...”

The second thing to note about **section 89(5)** of the Code is that it is not a provision available to the accused person or his counsel to move the court to reject a complaint or a formal charge; it is presumed

that the accused person is not aware of the charges facing him until the information is formally read to him. He cannot therefore object to what he does not know; this explains why **section 89(5)** of the Code is only available to the magistrate for purposes of rejecting a complaint or a formal charge where he feels that it does not disclose an offence. The application which the learned magistrate allowed was, therefore, misconceived.

Before concluding this judgment, it is necessary to make some remarks on the Murang'a **Chief Magistrate's Court Criminal Case No. 354 of 2014** in which the respondent was charged after he had been discharged of all the charges against him in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014**. When both counsel for the respondent and the state made references to the proceedings in the Chief Magistrates Court, I called for the records to examine the proceedings and satisfy myself of the correctness, legality or propriety of any orders made therein and the regularity of the proceedings thereof.

The record shows that when the respondent was arraigned in court to take plea, his counsel applied to have "*the case dismissed as it is an abuse of the process.*" The learned magistrate found that indeed the charge sheet as drafted did not disclose any offence and rejected it under **section 89(5)** of the **Criminal Procedure Code**.

To the extent that I have found and held that the charges against the respondent in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** were proper and validly before court the proceedings taken in Murang'a **Chief Magistrate's Court Criminal Case No. 354 of 2014** were a nullity and of no consequence.

I would, therefore, in exercise of this court's powers under **sections 362 and 364** of the **Criminal Procedure Code** order as follows:-

1. Except for the order for release of the motor-vehicle **KXC 228** to the respondent, the order issued in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** discharging the respondent of all the counts with which he was charged is hereby reversed and/or set aside;
2. **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** is hereby reinstated and the respondent shall be tried by any magistrate of competent jurisdiction other than the magistrates who dismissed the charges against him in **Kigumo Senior Principal Magistrate's Court Criminal Case No. 150 of 2014** and in Murang'a **Chief Magistrate's Court Criminal Case No. 354 of 2014**;
3. Subject to the provisions of the Criminal Procedure Code, the state or the court are at liberty to alter the charge or counts against the respondent as appropriate if and when need arises;
4. The order summoning the officer commanding the Kigumo police station to appear in court is set aside;
5. The proceedings in Murang'a **Chief Magistrate's Court Criminal Case No. 354 of 2014** are hereby declared null and void.

It is so ordered.

Dated, signed and delivered in open court this 30th October, 2014

Ngaah Jairus

JUDGE