REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 114 & 96 of 2009

1. IRENE NACHIRO KAVU

2. JAIRO KIONGO KARANJA …….…….. APPELLANTS

-AND-

REPUBLIC ……....……..…….RESPONDENT

(Being an appeal from the Judgment of Senior Principal Magistrate, Ms. L. Mutende dated 24th June, 2009 Criminal Case No. 3911 of 2007

at Mombasa Law Courts)

JUDGMENT

Theappellants herein were charged with related offences in two counts: firstly, making a false document contrary to s.203(a) of the East African Community Customs Management Act, 2004; and conspiracy to contravene provisions of the East African Community Customs Management Act, 2004 contrary to s.193 as read with s.203(e) of the said Act.

It was alleged, on the first count, that the appellants herein, on divers dates between ***29th September*** and ***17th October, 2007***, at Mombasa, jointly with others not before the Court, made a false ***Import Entry No. 2007 MSA 910107,*** dated ***29th September, 2007*** by falsely declaring that M/s. Rolex Garments EPZ Limited were the importers of 1 x 40ft container No. MSKU 9977274 said to contain 400 bales of plain and dyed fabrics.

On the second count, it was alleged that the appellants, during the period in question and at the same place, had jointly conspired with others not before the Court, to fraudulently evade payment of import duty of approximately Kshs.3.5 million due to the Commissioner of Customs Services and payable on imported goods on container No. MSKU 9977274, by knowingly lodging a false customs import entry No. 2007 MSA 910107 dated ***29th September, 2007***.

After reviewing the evidence, the learned Senior Principal Magistrate arrived at a final determination as follows:

"A perusal of the bill of lading (exh.2) [shows that] the legal person who had imported the fabrics… was ACTIVE WEAR LIMITED. However, when 1st accused lodged the entry in the system, [she] declared the importer as Rolex Garments EPZ Ltd, changing the details on the bill of lading. This was definitely with the consent of the owner of the goods, 2nd accused herein. Had the entry reflected the owner of the goods as ACTIVE WEAR LIMITED, they would …automatically [have] paid duty. There was a truck ready to carry away the goods in issue. This was evidence of…conspiracy to contravene the provisions of the statute. Having eventually paid tax as required, after the case was already in progress, [rather] than absolving the accused [of] blame, it does point to their [guilt]. The prosecution [has] therefore proved the case against the accused beyond doubt. They are guilty and [are] convicted on that account…"

After hearing statements made in mitigation, the trial Court treated the appellants herein as first offenders, and sentenced each to a two-and-a-half-year term of imprisonment, on each count, the two terms to run concurrently for each.

For 1st appellant, M/s. J.O. Magolo & Co. Advocates filed a petition of appeal, the main thrust of which was as follows:

(i) the charges were defective;

(ii) there was no evidence to connect the appellant to the offences;

(iii) there was no evidence of conspiracy to contravene the provisions of the law;

(iv) proof beyond reasonable doubt was not achieved;

(v) the appellant was being exposed to double jeopardy;

(vi) the sentence was manifestly excessive.

On the occasion of hearing this appeal learned counsel, ***Mr. Magolo*** appeared for 1st appellant, learned counsel ***Mr. Onserio*** for the respondent, and 2nd appellant appeared in person.

Mr. Magolo submitted that the evidence against 1st appellant was scanty, even though seven prosecution witnesses testified. Counsel urged that notwithstanding the Prosecution's position that 1st appellant had attempted to get a container out of the port without payment of duty, and that later on the said duty was paid, after discovery of the mischief, there was nothing pointing to the offence charged. Counsel submitted that the first time 1st appellant's name was mentioned in relation to the offence, was the time she was said to have been present at the time the consignment was being verified: and her mere presence should not be treated as proof of the offence; it had not been shown that she is the one who lodged the clearance documents. Consequently, it was urged, there was no evidence against 1st appellant, and she should be acquitted.

The 2nd appellant made no oral submissions, opting to rely exclusively on a pre-written set of submissions which had been filed earlier. He said he was not an employee of Rolex Garments EPZ Ltd., and so he could not have had access to their rubber stamp; he was also not an employee of the clearing agent, Vilex Agencies.

The 2nd appellant urged that the trial Court had erred: because, after investigations, the Department of Customs and Excise had written to the Court saying that all the taxes due had now been paid up, and so the criminal case should be withdrawn. This appellant urged that he had already been punished by a competent authority, and so he was now being subjected to double jeopardy.

The 2nd appellant also contended that the trial Court had entered judgment on the basis of

"***insufficient and uncorroborated prosecution evidence."***

Mr. Onserio, for the respondent, submitted that the making of a false document had not been demonstrated in Court. Counsel submitted that "***the duty said to have been evaded was subsequently paid in full by 1st appellant, and the goods were released***." Counsel urged that it was wrong in law for the trial Magistrate to proceed to convict on the basis that the taxed duty was paid: ***"it's like self-incrimination". Mr. Onserio*** submitted that the trial Court should also not have convicted on the second count, as "***even the complainant asked for withdrawal of that count***." ***Mr. Onserio*** urged: "***On both counts, both appellants should have been released. The two counts are not proved to the required standard."***

Upon considering the evidence tendered by the seven prosecution witnesses, I was unable to see a focused indictment showing the hands of either of the two appellants in the violation of the prohibitions of the law. And, listening to all the parties, in the conduct of the appeal, I have seen no conviction expressed, buttressed by law, fact and inference, pointing unambiguously to involvement by the appellants in a criminal act. These perceptions lead me to the conclusion that no proof of commission of offences, beyond all reasonable doubts, have been shown. The benefit of such a state of things must, in law, be accorded the accused; and consequently, I hereby allow both appeals, quash the convictions in the case of each, and set aside the sentences in respect of both counts, and in relation to both appellants. If the appellants are at present serving sentence, they shall forthwith be set at liberty.

Orders accordingly.

SIGNED at **NAIROBI** ……..……

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 26th day of August, 2011.

M.A. ODERO

JUDGE