



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL MISC. APPLICATION NO. 14 OF 2011

DAVID MURIITHI NJUE.....

.....APPLICANT

VERSUS

REPUBLIC.....

RESPONDENT

RULING

The Applicant brought this Application under Sections 362, 363, and 364 of Criminal Procedure Code seeking five (5) orders.

Order 1 and 2 of the Application were granted on 5/4/2011 and the proceedings in *Criminal Case No. 146/2011 Siakago Principal Magistrate's Court* were stayed and the file brought herein.

The other prayers are:

- 1. The court to declare that the failure by the state to constitute an implementing and enforcement body under the Alcoholic Drinks Act was an insubordination of its role.**
- 2. The court to declare that the acts of arresting, and charging people in court for failure to possess a licence under the said Act or any other offence related to licencing was unconstitutional and a gross violation of individuals rights as emulated in the Notice of Motion.**
- 3. The court to give any other direction.**

The state and the Applicant's counsel were given time to file written submissions. Only Mr. Mungai for the Applicant did file his. Briefly Mr. Mungai took issue with the transitional clause of the Act which commenced on 22/11/2010 while the Regulations were issued on 17/12/2010. When the Applicant was arrested and charged the District Committees charged with issuance of licences had not been constituted. The state concur that the Applicant was charged during the transition period.

The record in Siakago PM's Criminal Case No. 146/2011 is now before this court. Under Section 362 of the Criminal Procedure Code this court may

“call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any such proceedings of any such subordinate court”.

The Applicant has stated in his affidavit that he was brought to court because he refused to bribe the arresting officers an averment which has been denied by I.P. Evans Wambani in his replying affidavit. Of course this issue of bribe was never raised when the applicant first appeared in court on

23/2/2011

I wish to point out that as per the charge sheet (whether sound or defective) this was a bailable offence and the court ought to have granted the applicant bond. He admitted the charge and no facts were read out as the analysis report of the substance was not ready. He was therefore not convicted. There was need for the court to give him bond without him having to apply for it unless the prosecution said there were special circumstances leading to its denial. This is the law and the court should not have denied the applicant bond and only granted it on 2/3/2011 (ten days after arrest) upon the application of the defence counsel.

Section 70 of the Alcoholic Drinks Control Act is the Transitional Clause. It covers several groups of people including Retailers (sellers), owners or managers of any premises. So whether the Applicant was a seller or owner he was covered. And the clause says they had nine (9) months within which to comply with the requirements of the Act. And among the requirements was the constitution of the District Committee known as the District Alcoholic Drinks Regulations Committee charged with among other things the issuance of licences. And even if the Applicant was desirous of obtaining a licence where was he to get it before the constitution of that committee?

The particulars of the charge are that:

“David Muriithi Njue was on 23rd February 2011 at Karuraciri Market in Mbeere South District within Embu County of the Republic of Kenya found selling alcoholic drinks namely 100 litres of Ndume without a licence”.

The issue here was the license not even the selling of alcohol. If he had had the licence there would have been no problem. And this committee is the same one which was to issue licences to the manufacturer, distributor, retailers, premises owner/manager etc. and it was not in place by the time the Applicant was arrested and arraigned in court !

The state counsel has conceded that this incident took place within the transition period. There was no Body put in place to issue licences before the Constitution of the District Alcoholic Drinks Regulation Committees. Section 69 of the said Act repealed the Liquour Licensing Act. So the Board that had been formed under that Act to issue licences could no longer issue licences.

Having stated so much above, I do find that as at 23/2/2011 when the Applicant appeared before the Principal Magistrate Siakago for plea there was no District Committee constituted to issue licences and so the Applicant could not have been expected to have a licence under the Alcoholic Drink Control Act No. 4 of 2010.

It was the duty of the police to confirm with the implementing agency about the issuance of licences before embarking on the exercise of arresting people for nonexistent offences. Their acts amounted to harassment of individuals.

Section 8(3) of the Alcoholic Drinks Control Act gives the composition of the District Committee. This composition includes the Officer Commanding Police Division. The Police who are entrusted with the duty of effecting arrests are therefore well represented and should be well informed of the due processes of the execution of the Act.

This Act referred to is well intended and I do believe that once all the systems are operational we shall all reap the fruits. This has clearly come out in the well reasoned Ruling of my brother Judge Hon. Justice Warsame in *Nairobi High Court Criminal Revision Nos. 71, 72, 73 & 74 OF 2011 – Julius Muthanji & 11 Others Vs Republic*.

In conclusion I find that the trial magistrate at Siakago ought to have

1. granted bond to the Applicant at the first instance.

2. *gone through the ACT to re-assure himself that the Applicant was properly before the court.*

Failure to do this amounted to a miscarriage of justice as the Applicant pleaded to a defective charge and was unlawfully remanded in prison following the taking of that plea.

I believe by now the District Committees have been constituted and are now discharging their mandate under the Act. I therefore find that the charge against accused was in contravention of the law. I quash the proceedings before the lower court and dismiss the charge. The cash bail deposited to be refunded to the Applicant forthwith. Orders accordingly.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 27TH DAY OF OCTOBER 2011.

**H. I. ONG'UDI
JUDGE**