REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

REVISION CASE NO. 126 OF 2011

FAIRVIEW HOTEL.....APPELLANT

VERSUS

REPUBLIC.....……..…….…….... RESPONDENT

**(Being a criminal revision from
City court criminal case no. 259(a) of 2009-
Republic vs. The proprietor/manager of
Fairview hotel**

RULING ON REVISION

The applicant, **FAIRVIEW HOTEL LIMITED,** is facing trial before the City Court, in Criminal Case No. 259 (A) of 2009.

When the applicant appeared before the court in the first instance, it objected to the taking of the plea. The reason for the said objection was that the charges were duplex.

Following the applicant's objection to the taking of the plea, the learned trial magistrate granted leave to the applicant to refer the issue to the High Court, for Revision.

The applicant has invoked the provisions of **section 362 of the Criminal Procedure Code.** The applicant also invoked the provisions of **section 365 of the Criminal Procedure Code**, seeking audience before the High Court, at the hearing of its application for revision.

Exercising the discretion bestowed upon it by **section 365 of the Criminal Procedure Code,** this court granted audience to both the applicant and the Attorney General.

Mr. Allan Gichuki, the learned advocate for the applicant, submitted that the City Hall of Nairobi, which put together the charge sheet in the criminal case in issue, regularly uses "standard-form" charge-sheets.

In other words, the charges were not drawn-up to meet the requirements of each specific offence.

It was explained that whereas some offences were defined within some specific subsidiary legislation, the charge-sheet would cite a separate statutory provision, which spells-out a stiff sentence. As a result, the applicant says that offences which should attract fines of KShs.2,000/-, if the charges were drawn-up in line with the subsidiary legislation, ended up attracting fines ranging from KShs.100,000/- to KShs.500,000/-.

I was told that when the applicant first raised the issue with the Respondent, the latter indicated that they would amend the charge sheet.

However, notwithstanding that initial position taken by the Respondent, they later changed their minds.

As the charge-sheet was not amended, the applicant contends that it gives rise to duplex charges. It is the applicant's submission that the alleged offences fall squarely under **Regulation 319**.

Therefore, in the considered opinion of the appellant, the sentence for the said offence cannot be pegged to **section 36 of the Food Drugs and Chemical Substances Act.**

It is common ground that the applicant is faced with four (4) counts in Criminal **Case No. 259A of 2009**. The said counts are in the following terms;

"1. Selling Food contrary to section 4 and punishable under section 36 (1) of the Food, Drugs & Chemical Substances Act, Cap 254 L.O.K. and as contained in statutes law Misc. (Amendments) Act No. 2 of 2002 in respect of penalties"

The facts were that on 4th of August 2009, the applicant had in its possession food for sale, while the date markings had expired.

Counts 2 and 3 are worded in exactly the same way, save that the items whose date of sale had expired varied, from bread, to passion juice, mango juice, samosas, veal, crab meat and eunature.

Meanwhile count 4 stated that the applicant was guilty of:-

"Selling food contrary to section 6 and punishable under section 36 (1) of FOOD, DRUGS & CHEMICAL SUBSTANCES ACT, CAP 254, Laws of Kenya, and as contained in Statutes Law (Misc. Amendments) Act No. 2 of 2002 in respect to penalties."

In respect to that offence, the applicant is said to have been in possession of a dented tin of "Epomodori", which rendered the food damaged.

Mr. Tanui, learned state counsel, submitted that the charges were not duplex. As far as he was concerned, the charges under **sections 4 and 6 of the Act** were punishable under **Section 36 of the Act**.

He submitted that under the regulations, certain offences were created, and penalties prescribed for the same. He submitted that in this instance, the applicant faced charges that were prescribed under the Act,

and not under the regulations. Therefore, it was the Respondent's contention that the charge was not duplex as alleged by the applicant, or at all.

The applicant had cited the case of **KENGELES HOLDINGS LTD. –VS- REPUBLIC, HCCCR. NO. 36 OF 2008**, as authority for the preposition that where an accused person faced charges that were, in reality, strictly under the subsidiary legislation, it was wrong to cite a sentence prescribed under the statute.

On the other hand the Respondent believes that that case is wholly distinguishable from the case before me. The Respondent points out that in the **Kengele's Case,** the charge was duplex as it cited an offence under both **regulation 14(e)** and **Section 4 of the Food, Drugs and Chemicals Substances Act.** In contrast, the Respondent asserts that the offence herein was charged only under the Act, to the exclusion of the regulations.

In answer to that contention, the applicant submitted that the court did, in the Kengele's Case, address the issue of **Section 4 of the Act**. In the applicant's understanding, the court held that **Section 4 of** the Act only deals with the deception. Therefore, in so far as the offences that the applicant was charged with do not deal with deception, the applicant believes that the offences fall under the regulations.

It was further argued by the applicant that **Section 4** of the Act does not describe any offence. The description of specific offences is said to be found in the regulations. In effect, the applicant believes that the sentences prescribed under the regulations were applicable to any specific offences as described under the regulations.

It is trite law that a conviction cannot be allowed to stand if it is founded on a duplex charge, as the accused person would be unable to know which of the two offences he is alleged to have committed.

In the case of **KENGELES HOLDINGS LTD. –VS- REPUBLIC, HCCCR. NO. 36 OF 2008** Ojwang J. (as he then was) held that

"the manner in which the charges have been framed, invites the application of different penalties, of profoundly differing gravity; and thus there is a duplicity in the charge. Charges of such a kind will inevitably limit the scope for defence, and in this way, they stand in contradiction to the applicable provisions of the Constitution – notably those set out in Section 77"

In that case, the charge sheet against the applicant was worded as follows;

(i) Selling food in contravention [of] regulation 14 (e) (Food Hygiene Regulations) contrary to S. 4 and punishable under S. 36 (1) of the Food, Drugs and Chemical Substances Act (Cap. 254, Laws of Kenya) as contained in statute Law (Miscellaneous Amendments) Act, Act No. 2 of 2002 in respect of penalties".

(ii) Exposing Food for sale in contravention [of] regulation 14 (e) (Food Hygiene Regulations) contrary to S. 4 and punishable under s. 36 (1) of the Food, Drugs and Chemical Substances Act (Cap. 254, Laws of Kenya) and contained in Statute Law (Miscellaneous Amendments) Act, Act No. 2 of 2002 in respect of penalties".

Clearly, those charges cite both **regulation 14 (e)** of the **Food Hygiene Regulations,** and **section 4 of the Food, Drugs and Chemical Substances Act,** as the basis for the offences that the applicant in that case is alleged to have committed.

In the considered opinion of the learned Judge, the charges were duplex because both the regulations and the statutory provisions stipulated different penalties, in relation to the same offence. Not only are the penalties different, they are profoundly so. That is because under the regulations the prescribed penalty for a first offender is KShs.2,000/- whilst under **section 36 of the Act** the penalty is a fine of Kshs.500,000/-.

A perusal of the charge sheet in the case before me reveals that the charges were solely under sections 4 as read with **section 36(1) of the Food, Drugs and Chemicals Substances Act.** There is no mention of the regulations in the charge sheet. To that extent therefore, this case is distinguishable from that of the Kengele's Case.

However, that does not alter the finding by the learned Judge in the Kengele's Case that **Section 4 of the said Act** is only concerned with deception, and it thus provides;

"Any person who labels, packages, treats, processes, sells or advertises any food in contravention of any regulations made under this Act, or in a manner that is false, misleading or deceptive as regards its character, nature, value, substance, quality, composition, merit or safety, shall be guilty of an offence."

The question that then arises is whether or not the offences, with which the applicant has been charged, under **section 4 of the Act**, relate to deception.

The particulars cited in the charge sheet suggest that the applicant was deemed to have had in its possession;

(a) bread whose expiry date had lapsed;

(b) juice and samosas which did not have a label affixed or applied to the containers thereof and;

(c) veal, crab meat and eunature whose label did not have proper storage instructions.

It thus appears that the particulars of the offence do not suggest any deception.

Under **section 28 of the Food, Drugs and Chemical Substances Act**, the Minister is authorized to make regulations respecting the labeling and packing and the offering, exposing and advertising for sale, of Food, Drugs, Chemicals Substances, Cosmetics and devices. He is also mandated to make regulations in relation to the conditions for sale of any Food, Drug, Chemical Substances, Cosmetics or device. It would therefore follow that the failure to properly label the food items with date markings, or proper storage instructions or any other specified label would offend the regulations which the Minister is mandated to make.

The Minister has made the requisite regulations. And in order to determine whether or not any person had violated or infringed the said regulations, one has to have recourse to the regulations made by the Minister.

Regulation 319 provides that any person who contravenes the provisions of the regulations shall be guilty of an offence. The said regulation stipulates the sentences attached to the infringement of any such regulations.

In so far as the substance of the offences allegedly committed by the applicant is spelt out under the regulations; which regulations stipulate the applicable penalties, l find and hold that it is irregular to draw up charges purporting to found the same under the substantive provisions of the Act.

Section 36 of the Act only comes into play when no special penalty is provided for in respect of specific offences. To that extent I find that the decision by the Respondent to draw up the charges in the manner it has done, offends the spirit of the law. I direct that the said charges be withdrawn forthwith, and that they be reframed in accordance with the provisions of **Section 137 of the Criminal Procedure Code**.

Dated, Signed and Delivered at Nairobi this 3rd day of November, 2011

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FRED A. OCHIENG
JUDGE