REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL REVISION CASE NO. 36 OF 2008

KENGELES HOLDINGS LTD. .....APPLICANT

-VERSUS-

REPUBLIC .....RESPONDENT

RULING

This matter related to Nairobi Magistrate's Court at City Hall Crim. Case No. 75A of 2008 and was brought before the High Court by a letter dated 6th May, 2008 from M/s Walker Kontos Advocated to the Deputy Registrar.

It is stated that the applicant had objected to the charge brought against it; but the Magistrate's Court dismissed the objection on 28th April, 2008.

The applicant was charged under s. 14 (e) of the City Councils Foods, Drugs and Chemicals substances (General) Regulations. Under the said regulations. The prescribed penalty is Kshs. 2,000/= for a first offender under s. 17 (a); but s. 36 of the statute as different penalties. It was contended that the penalty provided for under s. 17

(a) Was self-contained, and greater penalty on the basis of s. 36 of the Act, could not apply at the same time. The objection was raised that the City Council had produced standard charge-sheets that were indifferent to the distinction, in levels of penalty, between ss. 14 (e) of the Regulations, and s. 36 of the Act.

The relevant portions of the charge-sheets reads as follows, in the case brought against the applicant:

(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 Chemicals 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".

Counsel submitted that when two charges were thus brought against their client in standard format, an objection was raised; but the trial Court overruled the objection.

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 character, nature, value, substance, quality, composition, merit or safety, shall be guilty of an offence".

The penalty is stated in s. 17 of the Regulations, which thus provides:

"Any person who contravenes the provisions of these regulations shall be guilty of an offence and liable-

(a) In the case of a first offence, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months, or to both such and imprisonment ….."

Learned counsel, ***Mr. Karungo*** urged that the particulars of the charge brought against the applicant were duplex, as the two charges were brought in a standard form, without regard to the specific provisions of the statute; and the effect was that the applicable penalty provided for under s. 17 of the

Regulation would not be the sole penalty applying.

Counsel submitted that s. 77 (4) of the Constitution accorded the applicant protection against retroactive penalties; but that the said duplicity in the charge, would subject the applicant to punishment created by provisions coming subsequent to the alleged commission of the offence. The duplex form of the charge-sheet, counsel urged, would subject the applicant to a penalty that was not defined in written law, contrary to s. 77 (8) of the Constitution; and in the present form, a plea of guilty could lead to a fine of Kshs. 500,000/=.

Learned counsel called in aid past judicial decisions. In ***Kasyoka v. Republic*** [2003] KLR 406 the High Court ***(Mbaluto, J.)*** had thus held (p.406)

"Considering the nature of the offence with which the appellant was charged, what the learned Magistrate stated was not sufficient to identity which the offence the appellant had been convicted of.

"The appellant was convicted on a duplex charge and no one can state for sure which of the two offences he had committed. Such conviction should not be allowed to stand".

Learned respondent's counsel ***Mrs. Gakobo*** conceded that the charges in question were marked by duplicity and so, could not stand. She urged that the offences in question were punishable under Reg. 17 of the Food, Drugs and Chemical Substances Regulations; and so a charge could not at the same time be brought under s. 36 of the Act which provided for higher penalties; and there was thus, duplicity in the charges which would prejudice the applicant.

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

This Court intervenes by quashing the charge and the proceedings so far conducted by the trial Court. It is directed that the charge-sheets shall be amended to remove the scope for duplicity in the penalties, in the manner indicated in this ruling; and any further trail proceedings shall proceed on that basis.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 5th day of February, 2009.

J.B. OJWANG

JUDGE