



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Miscellaneous Criminal Application 91 of 2008**

REPUBLIC ..... APPLICANT

**VERSUS**

GRACE KEMUNTO KOGERO ..... RESPONDENT

**RULING.**

The respondent was charged with possession of public stores contrary to **Section 324 (2)** of the **Penal Code**. The particulars of the offence were that on the 24<sup>th</sup> day of June 2008 at Keroka market in Nyamira District jointly with others not before court, were found in possession of public stores namely, assorted Government of Kenya drugs marked “GOK” of the Ministry of Medical Services, such property being reasonably suspected of having been stolen or unlawfully obtained, all valued at Kshs. 1,300,000.00. The respondent also faced three other counts of unlawfully possessing part I poisons contrary to **Section 26 (2)** as read with **Section 26 (1) (b)** of the **Pharmacy and Poisons Act** as amended by **Kenya Gazette Supplement No. 49 (Act No.3) of June 2002**, unlawfully carrying on of a business as a pharmacist while not registered as a pharmacist by the Pharmacy and Poisons Control Board contrary to **Section 19 (2)** of the **Pharmacy and Poisons Act** and carrying on a business of a pharmacist in a premise not registered by the Pharmacy and Poisons Board contrary to **Section 23 (6)** of the **Pharmacy and Poisons Act** as amended by the **Kenya Gazette Supplement No. 49 (Act No. 3 ) of June 2002**.

All the aforesaid offences were allegedly committed at Keroka, Corner Chemist Building.

After a full trial the respondent was acquitted of all the charges. The trial court ordered that all the drugs that were seized from the aforesaid premises and produced as exhibits save those which had marks “GOK” or “MOH” be released to the respondent. Those which had the aforesaid marks were to be released to the Government of Kenya through the Medical Officer of Health, Kisii.

The applicant was dissatisfied with the aforesaid judgment and preferred an appeal to this court. The grounds of appeal are as follows:

- “1. That the trial magistrate erred and misdirected himself in law when he failed to analyse and interpret the evidence laid before him by the prosecution and arrived at an unjustified decision in acquitting the accused under Section 215 CPC.
2. That the trial magistrate erred in law in failing to find that the prosecution had proved the charges

**against the accused on all counts charged**

**beyond reasonable doubt.**

**3. That the learned trial magistrate erred in law by**

**relying on the defence evidence which was**

**riddled with untruths and falsehood that did not**

**dislodge the overwhelming prosecution**

**evidence.”**

The applicant filed an application by way of notice of motion. The same was brought under **Section 357 of the Criminal Procedure Code** and all other enabling provisions of the law. The court was urged to suspend and/or stay execution of the lower court order regarding release of the aforesaid drugs. On 27<sup>th</sup> October 2008 this court granted interim stay of the aforesaid orders and directed that the application be served for hearing **inter partes** on 20<sup>th</sup> November 2008. After several adjournments the application was heard on 31<sup>st</sup> March 2009. The application was supported by an affidavit sworn by **Beatrice A. Obinge**, a Drug Inspector based at Kisii. She deposed, *inter alia*, that the respondent being an unregistered pharmacist who was operating a pharmacy without a licence ought not to be allowed to possess any medical drugs and more particularly the ones which were recovered from her premises. This is because by law she cannot dispense drugs and to release such a large quantity of drugs to her is contrary to the provisions of **Section 26 of the Pharmacy and Poisons Act**. She further deposed that the premises where the drugs were recovered from was not licensed to operate as a pharmacy and to release the said drugs to the same was contrary to the law.

**Mr. Kemo, Senior Principal State Counsel**, made brief submissions in support of the application.

Mr. Oguttu for the respondent opposed the application and relied on an affidavit filed by the respondent. In the said affidavit the respondent stated that at all material time her chemist was under the management and supervision of a qualified pharmacist, one **Mr. Charles Kipkoech Chirchir**, who was in-charge of dispensing drugs. That fact was known to the trial court and as such the court was right in making the order for release of the assorted drugs to her as the proprietor of the aforesaid chemist. She discounted the averments by Beatrice Obinge that the drugs were being released to an unqualified person. She added that some of the drugs were about to expire. She urged the court to dismiss the application by the Attorney-General.

Mr. Oguttu submitted that the application herein had been brought under the wrong provisions of the law in that **Section 357 of the Criminal Procedure Code** was only applicable to a person who had been convicted by a trial court and who is seeking release on bail pending appeal. He added that the order of release of the drugs was made on a solid basis since the trial court was aware that there was a registered pharmacist who was managing the respondent's chemist. Counsel further submitted that under the provisions of **Section 46 of the Pharmacy and Poisons Act** the trial court was empowered to make orders with regard to release or disposal of perishable drugs.

In view of the argument that most of the drugs that were seized from the respondent's chemist belonged to the Ministry of Health and had the mark “**GOK**” or “**MOH**” and that some of them were about to expire, the court directed that the assortment of the drugs be delivered to court so that they could be viewed.

On 30<sup>th</sup> April 2009 an assortment of drugs was brought in a pick up outside the court. Mr. Oguttu said that the drugs which were taken from his client's premises were carried in two pick ups and in his view, about half of the drugs had not been delivered to court. The court proceeded to view a sample of the drugs outside the courtroom. It was evident that some of the drugs had the mark “**GOK**”. In others the said mark had been tampered with. Some of the drugs had expired but for others the expiry date had not yet reached.

Mr. Kemo made an oral application for the court to deem the application as brought under **Section 356 of the Criminal Procedure Code** and not **Section 357** as cited. That application was opposed by Mr. Oguttu saying it was an afterthought and was intended to defeat the valid objection which he had raised.

I have considered the rival arguments made by the parties and their respective counsel. I have also carefully perused the proceedings and judgment by the trial court. It is not in dispute that the respondent was acquitted of all the

charges that had been preferred against her although an appeal has been preferred by the Attorney-General. Whereas the court is not dealing with the merits of the appeal for now, all I can say is that the appeal is not a frivolous one. It raises weighty issues of law. At this juncture the court is only dealing with the application relating to release of the drugs. Although Mr. Oguttu opposed the oral amendment that was sought by Mr. Kemo, there is nothing wrong with the said application. An oral amendment such as the one that was sought by Mr. Kemo can be allowed in an application of this nature. Under **Section 356** of the **Criminal Procedure Code** the High Court has power to stay execution of an order made by a subordinate court pending hearing and determination of an appeal. The subordinate court which has convicted or sentenced a person also has power to stay execution of the sentence or order pending appeal.

Ordinarily, when an appeal has been lodged, exhibits that were produced before the trial court are supposed to be preserved pending hearing and determination of the appeal. This is because the appellate court may either allow the appeal or dismiss the same or even order a retrial. In an appeal from an acquittal, the court may reverse, affirm or vary the determination of the subordinate court or remit the matter with its opinion thereon to the subordinate court for determination. The High Court is also empowered to take additional evidence if it thinks such additional evidence is necessary.

The assortment of drugs that was ordered released was obtained from the respondent's chemist. Apart from the ones that are marked "GOK" or "MOH", the rest were ordered released to the respondent.

One of the counts which the respondent was acquitted of alleged that she was carrying on business of a pharmacist in a premise which was not registered by the Pharmacy and Poisons Board contrary to **Section 23 (6)** of the **Pharmacy and Poisons Act Cap 244**. During the hearing before the subordinate court, no evidence was tendered by the respondent to show that her premises were duly registered by the Pharmacy and Poisons Board as required. It would be illegal to release drugs to be kept in unregistered premises.

Although the respondent is not a registered pharmacist she alleged that the chemist was being managed by Charles Kipkoech Chirchir who is a Pharmaceutical Technologist. But according to the annual licence to practice as a Pharmaceutical Technologist that was issued to Mr. Chirchir on 20<sup>th</sup> December 2007, he was licensed to practice as a Pharmaceutical Technologist in premises known as **GERYSEN PHARMACY at Plot No. 7288/25 in Sotik**. There is nothing on record to show that he was licensed to practice at the respondent's chemist known as Corner Chemist. It is therefore doubtful whether he could lawfully serve as a Pharmaceutical Technologist in the respondent's chemist.

The Attorney-General has appealed against the entire judgment delivered by the trial court. The first count that was preferred against the respondent indicated that she was in possession of public stores. When the court examined a small sample of the drugs it was evident that the marks "GOK" or "MOH" had been erased from some of the boxes or covers yet according to the order made, the only drugs that were to be released to the Ministry of Health are those which bear the aforesaid marks.

During the hearing of the appeal it may become necessary to order a close scrutiny of all the drugs. That would not be possible if they will have been released at this stage. **Section 46 (1)** of the **Pharmacy and Poisons Act** allows retention of such seized drugs until the final determination of proceedings relating to an offence under the Act. Pendency of the appeal is clear demonstration that final determination of the proceedings is yet to be reached.

I am aware that some of the drugs have expired and others are about to expire. However, the wider interests of justice require that the release of the drugs be withheld until the appeal is heard and determined. If the appeal is unsuccessful and the respondent suffers loss as a result of the charges that were preferred against her she can sue for compensation, after all, the value of the drugs is said to be Kshs. 1,300,000/= or thereabout. But to forestall any unnecessary delay in the hearing and disposal of the appeal, this court will proceed to fix hearing dates for the appeal within the next fourteen days from the date hereof.

For all the aforesaid reasons, I grant stay of execution of the orders made by the trial court regarding release of the drugs as sought by the applicant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF MAY, 2009.**

**D. MUSINGA**

**JUDGE.**

**28/5/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the Applicant

Mr. Otieno for the Respondent

**COURT:** Ruling delivered in chambers.

**D. MUSINGA**

**JUDGE.**