REPUBLIC OF KENYA

HIGH COURT AT KISII

CRIMINAL APPEAL 183 OF 2008

REPUBLIC …………………………………………….……………. APPELLANT

VERSUS

GRACE KEMUNTO KOGERO …………………………… RESPONDENT

JUDGMENT

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 24th 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 appellant 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."

Following the said judgment the state filed an application for stay of execution of the same as regards release of the aforesaid drugs. The application was argued and this court delivered a ruling on 28th May 2009 wherein the application was allowed.

Arguing the appeal, **Mr. Kemo, Senior Principal Prosecution Counsel**, submitted that the evidence that was adduced by prosecution witnesses before the trial court proved all the charges beyond any reasonable doubt.

This being the first appellate court, it is mandated to examine afresh the evidence that was adduced before the trial court, evaluate the same and reach its own conclusion, see **OKENO –VS- REPUBLIC**, [1972] E.A 32. Briefly stated, the prosecution evidence was as follows:

Corporal Anderson Kimathi, PW1, of Kisii Police station testified that on the material day together with other witnesses they were carrying out an operation of inspecting Pharmacies in the area. They were accompanied by Pharmaceutical Inspectors from Nyanza and Nairobi Provinces. They got information of a pharmacy in Keroka that was said to be unregistered and was also selling drugs belonging to the Government of Kenya. They travelled to Keroka and went to the said chemist known as Corner Chemist. When the owner of the chemist, the respondent herein, spotted the police officers and the said inspectors she quickly locked the premises and disappeared. Her employees in the chemist also escaped. The police managed to arrest the respondent. They ordered her to open the chemist for inspection but she refused to do so. When she realized that the officers had a court order to break open the premises she called a carpenter who broke the main door of the chemist. Inside the chemist the Pharmaceutical Inspectors found drugs which were said to be part I poisons. Other drugs had the mark "**GOK"** on them but on some others the said mark had been defaced. All the drugs were recorded in a seizure form which the respondent signed. The witness and the other officers also signed the form. The form as well as the drugs were produced in court as exhibits. On the seizure form, the part which was signed by the respondent reads as follows:

"**I Grace Kemunto Kogero, owner/employee (the person found dispensing drugs) in the premises mentioned do hereby certify that the drugs have been seized by the Inspector(s) as indicated above." (Signed)**

The drugs as recorded in the seizure form were handed over to the Medical Officer of Health, Kisii, for safe keeping.

James Mbogo King'ori, PW2, a Pharmaceutical Inspector with the Ministry of Medical Services based in Nairobi, testified that on the material day he was one of the people who accompanied PW1 to Corner Chemist at Keroka. He said that the pharmacy and Poisons Board is the regulatory authority which licences all pharmaceutical outlets in the country. The Board also licences anyone who wishes to practice as a Pharmacist. He corroborated the evidence of PW1 in all material aspects. He added that after the respondent locked her premises and refused the inspection team from accessing the same they sought assistance from the Officer Commanding Keroka police station. He advised them to seek a court order to enable them gain entry into the premises. They proceeded to Keroka law courts and swore an affidavit. Before the affidavit could be presented to the magistrate, the respondent changed her mind after the repercussions of the breaking order were explained to her. The respondent said that she did not have the keys to the premises and offered to hire a carpenter to break the main door which she did. The police and the inspectors went into the chemist and seized various drugs as stated by PW1. The witness added that they asked the respondent whether she was registered as a pharmacist and whether the premises were registered to be operated as a pharmacy and she responded in the negative. The respondent had also not displayed any licences issued by the Board in her premises.

Regarding the drugs that were seized, the witness said that items 1 to 11 in the seizure form were drugs under part I poisons as classified in the **Pharmacy and Poisons Act**. They were not marked "**GOK"** like the rest of the drugs in the seizure form. He added that they also recovered some drugs that were unregistered and had therefore been entered in the market illegally. The seized drugs were valued at approximately 1.3 million, PW2 stated.

Josuna Plekwa Lochaileu, PW3, is also a Pharmaceutical Inspector attached to the Pharmacy and Poisons Board. He was together with PW1 and PW2 and corroborated their evidence in every material aspect.

Similar evidence was further adduced by **Beatrice Adhiambo Obinge, PW4,** a Pharmaceutical Inspector.

At the close of the prosecution case, **Mr. Oguttu Mboya** for the respondent submitted that the prosecution had not established a ***prima facie*** case against his client. He submitted, ***inter alia,*** that count one was bad for duplicity. He said that the statement of the offence and the particulars thereof did not capture all the requisite ingredients as to enable the accused appreciate the alleged Government stores that she was said to have been in possession of.

As regards count two, counsel submitted that it was also defective because it referred to **sections 26 (2)** and **26 (I) (6)** which create separate and distinct offences which cannot be joined together in one count.

On count three, counsel submitted that the same referred to **Kenya Gazette Supplement No. 49 (Act No. 3)** of June 2002 which he said was non existent. For that reason the count was bad in law, he submitted. Counsel further submitted that count four had not been proved. He said that PW1 and the other witnesses who testified were not "**authorized officers"** as defined by **section 2** of the **Pharmacy and Poisons Act.**

The trial court in its ruling as to whether a ***prima facie*** case had been made out held that counts 1 and 2 had sufficiently been proved but there was no ***prima facie*** evidence as regards counts 3 and 4. The reasons for so finding were to be stated in its judgment after the respondent had tendered her defence. Consequently the respondent was acquitted of the charges in counts 3 and 4.

In her defence, the respondent said that she was a co-proprietor of Corner Pharmacy together with her husband, **Charles Kogero.** Next to the said pharmacy she runs a shop known as Corner Cosmetics. She stated that on 24th June 2008 at about 8.00 a.m. she was at corner cosmetics when she saw four people

holding the door to her chemist. At that time the chemist had not opened. She went out and inquired from them what their mission was. They told her that they wanted to see the owner of the chemist. She told them that she was the owner but the pharmacist who was in charge of the same was not available. The pharmacist was **Charles Kipkoech Chirchir, DW1.** She said that the pharmacist had attended the funeral of one of his in-laws. He was being assisted by a two qualified Pharmaceuticals Assistants, known as **Beatrice Gekara** and **Jackline** but they were also not available. She further testified that the four people went away and after a short while returned with two police officers and proceeded to break the lock to the chemist's main door. The four people removed several cartons of drugs from the chemist and put them in two vehicles which were parked outside the chemist. She said that the four people did not introduce themselves or make any inventory of the drugs that they had seized. Thereafter she was arrested and taken to Kisii police station. She was put in the cells and after about 20 minutes she was called to sign some papers. She signed the papers after which she was returned to the cells. She denied that there were any drugs marked "**GOK"** in her chemist.

DW1 testified that he was working at corner chemist as a registered Pharmaceutical Technologist. He holds a diploma in Pharmacy from the Kenya Medical Training College, Nairobi. He said that he joined corner chemist in February, 2008. There before he was working for Geryset Pharmacy at Sotik. He left that place in January, 2008. He said that his licence to practice as a pharmacist was not displayed at corner chemist but was in a drawer. On 24th June, 2008 he had attended a funeral and so the chemist was closed, he stated. He alleged that he was away for one week. When he returned he found that the chemist had been broken into and various drugs removed. Part I poisons and drugs that were in a cupboard had also been seized. He stated that he was the custodian of those drugs. In his absence his two Assistants, Beatrice and Jackline, would not open the chemist. He denied that there were drugs marked "**GOK"** in the chemist. He admitted that some of the drugs which were listed in the seizure form were part I poisons.

In cross examination, the witness said that the licence that he held as a pharmacist at Geryset pharmacy could be used in any other chemist as long as the holder was qualified. However approval of the licensing board had to be obtained.

Although DW1 claimed that he was an employee of the respondent he had no documentary proof to that effect.

In his judgment, the learned trial magistrate stated the reasons for acquitting the respondent of counts 3 and 4. He said that:

"**For count 3 and which also applies to count 4,**

the charges were totally defective. The charge

in count 3 was of unlawfully carrying (on) as a

business of a pharmacist (sic) **contrary to**

section 19 (2) as read with Kenya Gazette

Supplement No. 49 (Act No.3) of June 2002

amendments to Cap. 244. Section 19 (2) of

the Pharmacy and Poisons Act (Cap. 244 Laws

of Kenya) only prescribes a penalty to an

offence and does not create any offence. This

is a fundamental error in that even the Constitution of Kenya at section 77 (8) provides that:

No person shall be convicted on a criminal offence unless that offence is defined and the penalty thereof prescribed …" It was not for the accused to try and guess which among the several offences defined by section 19 (1) of the Act the penalty related to at any rate, this omission to define the offence in clear terms led to those ambiguity. Even though the accused was represented clearly it was the duty of the prosecution to bring the proper charges before court. There is sufficient case law to justify this position which I may not need to get into. Count 4 similarly referred to section 23 (6) which is only the offence."

As regards count 2, the learned trial magistrate held that the respondent had offered a reasonable defence particularly because DW1 testified that he was the one who was handling part one poisons in the chemist.

With regard to count 1, the learned trial magistrate held that the officers who entered into corner chemist and seized the drugs did not have a search warrant and neither were they authorized officers in terms of the provisions of **section 2** of the **Pharmacy** and **Poisons Act.** He added that there was no reference to any seizure form or sheet which set out details of the items that the respondent was allegedly in possession of.

Mr. Kemo submitted that it was not necessary to list all the drugs which the respondent was found in unlawful possession of. In any event, the prosecution produced a seizure form which listed the said drugs. He added that the evidence of all the prosecution witnesses left no doubt that the respondent was indeed found in unlawful possession of the said drugs.

With regard to count 2, he submitted that corner chemist was not registered as a chemist and neither was the respondent licenced as a pharmacist. No licence had been displayed in the chemist. Regarding DW1, the respondent never told any of the prosecution witnesses that DW1 was the pharmacist in charge of the chemist. His introduction was an afterthought. The said witness did not sufficiently prove that he was duly employed in the said chemist and neither did he show that he had a licence authorizing him to dispense drugs in the said chemist.

Mr. Kemo submitted that counts 3 and 4 were not defective. If at all there was any omission or defect in drafting the said counts, the same was curable under the provisions of **section 382** of the **Criminal Procedure Code,** he added.

Mr. Oguttu defended the trial magistrate's judgment. He reiterated his submissions which he had earlier made before the trial court placed the respondent on her defence regarding counts 1 and 2.

With regard to counts 1 and 2, counsel submitted that none of the prosecution witnesses was authorized by law to conduct any search pertaining to part I poisons and neither had they been authorized by the court to conduct the search. He submitted that the Pharmaceutical Inspectors are not authorized officers as defined in **section 2** of the **Pharmacy** and **Poisons Act.** He said that only Inspectors of Drugs were authorized to seize such drugs. As for PW2, he was below the rank of an Assistant Inspector of police and so under **section 2** of the said **Act** he was also not authorized to conduct any search in the respondent's premises. Owing to the illegality on the part of the prosecution witnesses all the charges that were preferred against the respondent were a nullity in law. He cited the Court of Appeal decision in **BENARD LOLIMO EKIMAT –VS- REPUBLIC**, Criminal Appeal No. 151 of 2004, where the court found that the prosecution of the appellant before the trial court was conducted by an unqualified police officer and as such the entire trial was declared a nullity.

On count 2, Mr. Oguttu further submitted that DW1 was a qualified and registered pharmacist and he was the one running the chemist. He was the person who was in possession of the part I drugs that were seized from the chemist. He further submitted that the count was bad for citing **Kenya Gazette Supplement No. 49 (Act No. 3)** which was non existent. He said that what was in existence was **Miscellaneous Amendment (Act No. 2 of 2002).**

Counsel submitted that counts 3 and 4 were already dismissed by the trial court. He added that they were bad for duplicity because **section 19 (I)** of **Cap. 244** creates three distinct offences. **Section 19 (2)** is the Penalty section for any violation of **section 19 (I).** The respondent did not know which of the three offences she was facing.

I have carefully considered all the evidence that was tendered before the trial court as well as the submissions that were made by counsel.

Before this court heard the application for stay of execution of the trial court's judgment, I had occasion to view the drugs that were said to have been seized from the respondent's chemist. It was evident that some of the drugs had the marks "**GOK"** or "**MOH"** meaning "**Government of Kenya"** or "**Ministry of Health"** respectively. On some of the boxes or covers the above marks had been erased but were vaguely visible. Evidence that was adduced by the prosecution witnesses left no doubt in my mind that the drugs were seized from Corner Chemist. The respondent had no explanation at all as to how such drugs ended up at her chemist. The respondent signed the seizure form that was presented as an exhibit before the trial court. The respondent's explanation that she was forced to sign the form after she had been arrested and while in police custody cannot be true. She implied that the prosecution witnesses conspired with police officers at Kisii police station to falsely implicate her in this case. I do not think so. PW2, PW3 and PW4 were Pharmaceutical Inspectors who were in the course of their duty and they had no reason to give false evidence against the respondent, a person they neither knew there before nor had any grudge against.

It was submitted by the respondent's counsel that PW2, PW3 and PW4 were not duly authorized to inspect the drugs which were seized from the said chemist. **Section 2** of the **Pharmacy and Poisons Act** defines an "**authorized officer"** to mean "**the Registrar, a Medical Officer, an Inspector of Drugs, an Administrative Officer or a Police Officer not below the rank of Assistant Inspector."** An Inspector of Drugs means "**a person appointed to the Public Office of that name."**

Section 45 of the **Act** empowers an authorized an officer to enter and search any premises, vehicle, or vessel and conduct a search if he has reasons to believe that an offence under any of the provisions of the Act has been committed.

PW2 told the court that Inspectors of Drugs had their titles changed to Pharmaceutical Inspectors. PW2, PW3 and PW4 were all Pharmaceutical Inspectors. That being the case they were duly authorized officers to enter corner chemist and inspect the drugs therein. As for PW1, he merely accompanied PW2, PW3 and PW4 who were Pharmaceutical Officers. Even though he was not of the rank of an Assistant Inspector of police his presence ***per se*** did not render unlawful the inspection and seizure of the drugs in the respondent's chemist.

From the evidence on record I am satisfied that count 1 was proved beyond any reasonable doubt.

Turning to count 2, the drugs that were listed as items 1 to 11 in the seizure form are all part I poisons. Schedule one of the **Pharmacy and Poisons Act** lists the kind of drugs that are commonly referred to as part I poisons. **Section 26 (1)** lists the persons who may be in possession of part I poisons. The respondent admitted that she is not one of the named persons. **Section 26 (2)** states as follows:

"**A person who is in possession of Part I Poison**

otherwise than in accordance with the

provisions of this section shall be guilty of an

offence and liable to a fine not exceeding thirty

thousand shillings or to imprisonment for a

term not exceeding three years or to both."

The penalty section as hereinabove quoted was amended vide the **Statute Law (Miscellaneous Amendments) Act, 2002.** This was done vide a special issue of the **Kenya Gazette – Kenya Gazette Supplement No. 49 (Acts No.3)**. It was therefore not entirely correct for the respondent's counsel to say that **Kenya Gazette Supplement No. 49 (Acts No.3)** was non existent.

The respondent's defence that DW1 was the person in charge of the chemist is untenable. Firstly, there was no evidence to show that DW1 was an employee of the respondent. Secondly, the respondent never told any of the witnesses that she had employed a Pharmaceutical Technologist in her chemist. I would agree with Mr. Kemo that her contention that DW1 was her employee was an afterthought. Thirdly, if indeed DW1 was in the respondent's employment he would not have been absent from duty for a whole week. The respondent's argument was that on the material day he had gone to attend a funeral but DW1 said that after attending the alleged funeral he did not return to the chemist until after one week.

I am satisfied that count 2 was proved beyond any reasonable doubt.

I now turn to counts 3 and 4 of which the respondent was acquitted.

The offence of carrying on a business of a Pharmacy by unregistered pharmacist is defined by **section 19 (1) (a)** of the **Act. Subsection 2** is the penalty clause and provides as follows:

"**(2) A person who contravenes subsection (1)**

shall be guilty of an offence and liable to a fine

not exceeding thirty thousand or to

imprisonment for a term not exceeding 3

years or both."

Section 77 (8) of the **Constitution of Kenya** which the learned trial magistrate referred to in his judgment states as follows:

"**No person shall be convicted on a criminal**

offence unless that offence is defined, and the

penalty thereof is prescribed, in a written law…"

In his view, failure to cite **section 19 (1)** of the **Act** was fatal to the said count. Mr. Oguttu cited the Court of Appeal decision in **<u>DAVID EKUSI LOKUYU -VS- REPUBLIC</u>**, Criminal Appeal No. 389 of 2006. That appeal related to a case where the appellant was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code.** The appellant had initially been charged under **section 296 (1)** of the **Penal Code** but the charge was altered by hand from **section 296 (1)** to **296(2)** and the appellant was not asked to plead to the altered charge.

With respect to the counsel, I do not find that authority to be relevant in the circumstances of this case. Whereas it would have been preferable to cite the provisions of **section 19 (1)** and **(2)** in count 3, I do not think that failure to refer to **section 19 (1)** of the **Act** was fatal to the charge. In **<u>ABDULRASUL G. SABUR –VS- REPUBLIC</u>** [1958] E.A. 126, it was held that where the particulars of the offence are adequate to inform an appellant of the offence with which he was charged there was no failure of justice and the defect was curable under **section 347 (**the equivalent of the present **section 382** of the **Criminal Procedure Code.**

Section 77 (8) of the **Constitution** merely prohibits conviction of a person for a criminal offence which is not defined in any law. It cannot be interpreted to mean that as long as the section of the law which creates the offence is not specifically referred to in the charge the same is defective even if all the particulars of the charge are sufficient to inform the accused of the offence for which he is charged.

With respect to the learned trial magistrate I do not agree that count 3 was defective. The particulars of the count were clear that the respondent was found carrying on a business of a Pharmacy while not registered as a pharmacist by the Pharmacy and Poisons Board. The respondent admitted that she was not a registered pharmacist.

In count 4 the charge was that of 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 Cap 244** of the **Laws of Kenya** as amended by the **Kenya Gazette Supplement No. 49 (Acts No. 3 of June 2002).** The prescribed penalty for such an offence is a fine of thirty thousand shillings or imprisonment for a term not exceeding three years or both. The law requires that the licence be displayed in the premises. The prosecution witnesses said that no licence was displayed in the respondent's chemist. The respondent did not display any licence as required by the appropriate section of the law. I am therefore satisfied that count 4 was also proved beyond any reasonable doubt.

From the foregoing, I allow this appeal and set aside the order of acquittal by the trial court. I substitute therefor an order of conviction of the respondent in all the four counts as charged. With regard to the drugs which were seized from the respondent's chemist, since she was not authorized to deal in part I poisons, any such drug which has not reached its expiry date shall be forfeited to the state and the expired ones shall be destroyed. The drugs that have a mark "**GOK"** or "**MOH"** and those which were unregistered by the Board shall also be forfeited to the state through the Medical Officer of Health, Kisii.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

Mr. Mutai: I do not have any records of the respondent. She may be treated as a first offender.

Mitigation: The respondent is remorseful. She appreciates the gravity of the offences charged. She pleads for leniency. She is a mother, with a child below 12 months. I pray that the court considers appropriate but non custodial sentence.

D. MUSINGA

JUDGE.

Court: Sentence on 25/9/2009 at 9.00 a.m. In the meantime the respondent shall be in custody.

D. MUSINGA

JUDGE.

SENTENCE:

I have considered the mitigating factors that were advanced by the respondent's advocate. The respondent was in unlawful possession of a substantial amount of Government drugs. She also exposed the general public to great risk by operating a chemist without appropriate authorization of the Pharmacy and Poisons Control Board. She has a young child and therefore a custodial sentence may not be appropriate. The respondent is sentenced to a fine of Kshs. 15,000/= in default to one year imprisonment on each count. In essence, if she elects to pay the fine, the total fine for the 4 counts shall be Kshs. 60,000/=. In the event that she is unable to raise the fine, the jail terms shall run concurrently.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

25/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the State

Mr. Oguttu for the respondent.

COURT: Sentence read out in open court.

D. MUSINGA

JUDGE.