

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Criminal Appeal 82 of 2006

(Appeal arising from BSA PM Cr. No.94/06)

NAOMI CHEGE.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Naomi Chege was convicted of an offence under the Copyright Act, 2001 and sentenced to pay a fine of Ksh.100,000/= in default to serve two years imprisonment.

The offence with which the appellant was charged was being in possession of infringing copies of music copyright work other than for private and domestic use contrary to section 38(1) a, b, c, d and e as read with section 26 (1) of the said Act.

Aggrieved by the said conviction and sentence, she brought this appeal.

When this appeal came up for hearing, the learned counsel for the Republic conceded the appeal and with respect, I agree.

The learned trial magistrate rightly stated in his judgment that the salient point for consideration is whether the accused was found to be in possession of the infringing copy of the CD. He then concluded that since the appellant was in the shop which was open and where music was sold then she was in possession of the subject matter. It mattered not that the shop belonged to one John Chege as she said in her defence.

With respect, that was a misdirection. For one to be held to be in possession of a subject matter, it must be proved, beyond any reasonable doubt, that he or she is in a position to deal with that subject matter as owner and independently to the exclusion of any other person. That evidence was lacking in this case.

The following is what the appellant told the court in her defence;

“I sell shoes at the market. I was found with the CD but I am not the owner of the shop. The shop belongs to John Chege. I do not know what the CD was in the shop for. I had just entered the shop and saw many people enter and take the CD. I don’t know if the CD was for sale. The charges are not true. I would not have known if it was for domestic use of for sale.”

The appellant’s defence was on oath and she was not cross-examined on the very important issue of possession. Her explanation is plausible and answers the charge in her favour.

The offence was not proved and conviction must not have been entered. Accordingly, this appeal is allowed, conviction quashed and sentence set aside.

If any fine was paid or security posted, the same shall be refunded to the appellant.

Orders accordingly.

Delivered, dated and signed this 10th day of July, 2008.

A. MBOGHOLI MSAGHA

JUDGE