REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 180 OF 2000

MICHAEL NGEI KAMWAKI :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

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J U D G E M E N T

The appellant herein was charged under S. 185 (d) (iii) as read with S.196(d) of the Customs and Excise Act (Cap.472) hereinafter, the Act, in that on 8.11.2000 along Loitoktok – Emali Road, Kajiado District he was found being in possession of uncustomed goods to wit 105 bags of maize valued at Ksh. 105,000/= in motor vehicle Reg. No. KAC 796 U a lorry. He pleaded not guilty. After a trial in which the prosecution called two witnesses the appellant gave an unsworn statement. The lower court also heard the owner of the lorry in question Daniel Muyambao (D.W.2) and concluded with a conviction and a sentence of Sh.20,000/= fine in default 8 months imprisonment.

M/s Wambua Kilonzo and Company Advocates first filed a 3 – point petition of appeal and later filed a supplementary petition with 6 points. Mrs. Mutua argued points 1, 2, 3 and 6 of the supplementary petition together and point 5 separately. She then took up ground 3 in the original petition on its own.

Mrs. Mutua argued that the Learned Trial Magistrate relied on hearsay evidence from IP Jacob Muchai (P.W.1) O.C.S. Loitoktok Police Station when he said that an informer gave him the tip on which P.W.1 acted to arrest the appellant. But the court clarified to Mrs. Mutua that those who give tips to police to follow up a crime do not testify in court normally for obvious reasons including risk to themselves. She however proceeded that the conviction was based on evidence of one witness only and that the whole prosecution evidence was contradictory and unreliable. That the defence evidence was not fully considered especially that D.W.2 (Daniel Muyamboo) had explained the origin of the maize in question which his employee, the appellant, was found in possession of. That the Learned Trial Magistrate relied on the point that this maize had a moisture content that did not 20 accord with that of the maize produced in Kenya and thus concluded that it was a product from a foreign source. Further that no expert produced the evidence on this issue of moisture content. That the producer, P.W.1, of (Exh.1) the certificate on moisture was not its maker or an expert in that area. That an officer from the Ministry of Agriculture would have been a proper witness.

Last, that the sentence was excessive for a first offender, whom it was argued S. 208 of the Act, applied to. To begin with the law under which the appellant was charged, S.185 (d) (iii) of the Act: “185. A person who –

(d) acquires, has in his possession, keeps or conceals, or procures to be kept or concealed,

goods which he knows, or ought reasonably to have known to be – 10 (iii) uncustomed goods,

shall be guilty of an offence and liable to imprisonment for a term not exceeding three years or to a fine not exceeding five hundred thousand shillings or both." Then there is this S.196 (d):

> "196. In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to 20 forfeiture –
>
> (d) goods which are imported, exported or carried coastwise concealed in any manner, or packed in a package (whether with or without other goods) in a manner appearing to be intended to deceive an officer,"

Uncustomed goods are defined under the Act as to include:

> "…….dutiable goods on which the full duties have not been paid and 30 any goods, whether dutiable or not, which are imported, exported, carried coastwise or in any way dealt with contrary to the provisions of this Act;"

And dutiable goods:

> "means goods chargeable with duty under this Act;"

After going over the law, the proceedings and the judgement this appeal must be allowed. First, it took considerable time and effort to refer to relevant parts of the Act but none so much as yielded the fact that maize constituted dutiable goods. If that is so it was vital that the legislative authority setting that out be incorporated in the charge. The sections under which the appellant was charged do not contain the particular that maize is a dutiable item. The charge as it stood no doubt was vague. The sections are reproduced above.

Now even if maize was dutiable, it ought to have been proved that the appellant knew that it was what constitutes uncustomed goods. That knowledge is central in S.185 of the Act yet it was not proved. Indeed it looks like the appellant, Moses Kasata (D.W.2) and the lorry owner D.W.2 maintained that the maize was taken from D.W.2 stores at Loitoktok while D.W.2 himself claimed that he grew it on his own form. IP Muchai (P.W.1) seemed to have gotten information that there was crop failure in this part of Kenya but those who gave that information would better have been the witnesses. Further that P.W.1 produced (Exh.1) on moisture content again the expert who certified that should have been the one to testify about it. P.W.1 was not.

The Learned Trial Magistrate in her usual way analysed all the evidence but with due respect the finding that:

> "The single incriminating point is that the lorry in issue KAC 796 U did not pass through the authorized route,"

should not have been sufficient to tend her mind to conclude that what it carried was uncustomed maize. Suspicion should be strong but that ends there.

On the whole this appeal is allowed. Conviction quashed and sentence sent aside. Fines if paid to be refunded.

Judgement accordingly.

Delivered on 31st July 2001.

J. W. MWERA

JUDGE