



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Appeal E106 of 2023)
[2025] KEHC 1577 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL E106 OF 2023
CJ KENDAGOR, J
FEBRUARY 24, 2025**

BETWEEN

CHARLES NGARI KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against conviction and sentence of the Chief Magistrates Court at Milimani Cr. Case No. E970 of 2021 delivered on 2nd March, 2023 by Hon. J. Ombura (SPM.))

JUDGMENT

1. The Appellant was charged with the offence of trading and dealing with LPG Cylinders of another licensee for gain without the said licensee prior written consent contrary to Section 99 (1) (m) of the [Petroleum Act](#).
2. He faced two (2) other counts. Under Count II: Transporting Liquefied petroleum gas without a valid license from the Energy and Petroleum Regulatory Authority contrary to Regulation 4 (1) (2) and 17 (1) (3) of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019 as read with Section 101 of the [Petroleum Act](#), 2019.
3. Under Count III: Supplying to the Market filled LPG cylinders without seals contrary to Regulation 14 (j) of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019 as read with the Fifth Schedule of the Regulations and Section 101 of the [Petroleum Act](#), 2019.
4. Summarily, the particulars of the offences are that on 1st September, 2021 at Lunga Lunga area within Makadara Sub County, in Nairobi County, jointly with others not before Court while using motor vehicle registration number KAW 401H make Toyota Hiace, he was found dealing with assorted LPG Cylinders to wit; (71 pcs filled 37 pcs empty (6kgs) and 2 pcs empty (13kgs) Pro Gas), (3 pcs filled and 1 pc empty (6kgs) K-gas), (2 pcs filled (6kgs) Total gas), (1 pc empty (6kgs) Lake gas) and (1 pc filled (6kgs) Hashi gas) for gain without prior written consent from the licensed owners.



5. Further, on the material date and location, he was found transporting the said LPG cylinders, using motor vehicle reg. no. KAW 401H make Toyota Hiace, without a valid licence from the Energy and Petroleum Regulatory Authority.
6. Lastly, on the material day and location using the said motor vehicle, he was found supplying 77 assorted LPG cylinders that did not have seals.
7. The Appellant was after full trial convicted on all counts but sentenced on count I and II, to a fine of KShs.10,000,000/= and in default, to serve 5 years imprisonment, each running concurrently. He was discharged on Count III under Section 35 (i) of the *Penal Code*, owing to the omission under Schedule 5 of the Regulations to categorically provide for a specific sentence for the offence.
8. The Appellant being aggrieved by the conviction and sentence, he preferred the present appeal. He based it on grounds that the charge was defective, for being framed contrary to Section 134, 137 (a) and 214 (1) of the *Criminal Procedure Code*. He contended that the learned trial magistrate erred in matters of both law and fact by convicting him on testimonies and evidence full of material contradictions, inconsistencies and doubts. Further that the prosecution did not discharge its burden of proof to the required standard. Further, that his defence was rejected without any cogent reason(s) contrary to Section 169 (2) of the *Criminal Procedure Code*. Lastly, that the sentence was harsh and excessive.
9. The appeal was canvassed by way of written submissions.

Written submissions

10. The Appellant reiterated and elaborated on his grounds for appeal, highlighting the deficiencies in the particularity of the charge sheet, the material inconsistencies in the prosecution's evidence, the incoherence of the testimonies, and the severity and harshness of the sentence.
11. The Respondent, at the time of making this determination, had not yet filed its submissions.

Determination

12. It is the duty of the first Appellate Court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

Whether the charge was defective as particularized?

13. Regarding the matter of a defective charge sheet, this court must determine whether the charge sheet failed to specify the offence with which the Appellant had been charged, whether it did not provide information about the nature of the offence charged, and whether the Appellant was prejudiced, or if this occasioned any miscarriage of justice.
14. Section 134 of the *Criminal Procedure Code* provides as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”
15. Having reviewed the disputed charge sheet, I find that it outlines the elements of the offence. The evidence on record was consistent with what was stated in the charge sheet; consequently, the court



determined that the Appellant had a case to answer. The Appellant was present throughout the trial and heard all the evidence against him, and in my opinion, no defect in the charge sheet would impact the merits of the case. Therefore, the Appellant’s appeal citing a defective charge sheet is unsuccessful.

Whether the prosecution established its case against the appellant beyond reasonable doubt?

16. The subject offences are borne from Section 99 (1) (m) of the *Petroleum Act*, which states that;
 - “ A person who;
 - i. (m) refills, rebrands, trades or otherwise deals with liquefied petroleum gas cylinders of another licensee for gain without the said licensee's prior written consent;
 - ii. commits an offence and shall on conviction, be liable to a fine of not less than;
 - iii. ...
 - iv. (ii) ten million shillings, or a term of imprisonment of not less than five years, or to such fine and imprisonment...
17. Regulation 14 (j) of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019 details what acts constitute the unauthorized refilling of cylinders, which includes (j) supply of a filled cylinder into the market without a seal; and any person who commits these acts shall be liable to the fine set out in the Fifth Schedule.
18. Similarly, under Regulations 17 (1) (3) of the Petroleum Regulations state that;
 - “ A person shall not transport more than three filled cylinders by road, except in accordance with the terms and conditions of a valid licence issued by the Authority or its licensing agents.
 - a. ...
 - b. (3) A person licensed to transport cylinders by road shall not permit any of his motor vehicles to load or off-load from or to a cylinder filling facility, wholesaler or retailer that is not licensed.”
19. Further, Regulation 4 (1) (2) of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019 provides that;
 - a. “A person shall not undertake liquefied petroleum gas business except in accordance with the terms and conditions of a valid licence issued by the Authority or its licensing agents.
 - b. A person who contravenes these Regulations commits an offence and shall, where no fine or penalty thereof is expressly set out in the Act, be liable on conviction to the applicable fines set out in the Fifth Schedule.”
20. The Appellant contends that the prosecution's evidence was fraught with inconsistencies, and their witness testimonies were questionable, to the extent that they could not support a conviction.
21. PW1; Edwin Njiru; a surveillance and enforcement officer with the Energy and Petroleum Regulatory Authority (EPRA) testified that on 2nd September, 2021 upon receiving instructions from his superiors he proceeded to the Parklands Police Station, where he found an impounded motor vehicle Reg. No. KAW 401H; a dark blue colour Toyota Hiace. He established that the vehicle was in



- possession of assorted 77 filled LPG cylinders and 41 empty cylinders. All the filled cylinders did not have seals and the driver did not provide authorization letters from the various brand owners to transport the cylinders.
22. PW1's testimony was corroborated by PW4; Clive Mutiso; the Head of Investigations and compliance at the Petroleum Institute of East Africa. He testified that the institute holds a special power of authority from eleven (11) LPG brand owners to ensure enforcement and compliance on their behalf, where in instances of irregularities they inform EPRA and the security agencies.
 23. He stated that he received a complaint from one of their members; Proto Energy over a retailer in Lunga Lunga which stocked their cylinders without any letters of certainty and the cylinders were illegally refilled. On 28th July, 2021 a raid was carried out at an illegal facility named Easy Gas which operated using two (2) vehicles KAD 663B and KAW 401H, and the facility was closed down.
 24. The perpetrators continued with the illegal operation elsewhere, this time at Ol Kalou Road, and on 2nd September, 2021, accompanied with DCI officers tailed motor vehicle KAW 401H as it collected empty cylinders within Lunga Lunga, up to its illegal docking facility.
 25. The Appellant was arrested while offloading cylinders, and failed to provide any letters of certainty. Further, it was established by the regulator (EPRA) that both the motor vehicle and the facility did not have a license to trade or deal with LPG. All filled cylinders did not bear seals. Further, they found the facility was a garage that was illegally siphoning LPG gas from LPG trucks and they had constructed illegal refilling manifold and pumps.
 26. Similarly, PW5; Corporal Charles Mugendi, a detective at DCI Parklands, testified and established that they intercepted motor vehicle Reg. No. KAW 401H as the appellant was unloading LPG cylinders at a small shop. He secured the area and the officers from (P.I.E.A) and EPRA established that the motor vehicle did not have a letter of certainty to transport LPG gas, and the appellant did not have any licence to deal with the same. He however did not see the Appellant driving the vehicle.
 27. Further, the details of registration and ownership of the motor vehicle by NTSA, established that the motor vehicle belonged to one James Maina Kariuki; DW2.
 28. The Appellant was thus put to his defence. He stated that on the material day he was called by his friend DW2; James Maina Kariuki who sells LPGs to see a new motor vehicle KAW 401H, which he had acquired. He arrived and observed the car which had a mechanical issue. That, DW2 received a call and he stepped aside leaving the appellant, only for DCI officers to arrive and arrest him as he was in the car.
 29. DW2, on the other hand, testified in a move to exonerate the Appellant, stating that he was a gas trader under the name Jiomo Gas Dealer. He mentioned that on the relevant day, he had invited the Appellant to his place of business and that the Appellant stayed at his shop until about 2.00 p.m. when he left. Later, he received a call informing him that his motor vehicle had been driven to the Parklands police station and that he was required to present himself there. He testified that he was a licensed gas dealer and produced copies of an undated letter from Pro Gas, one from National Oil Corp. dated 11th May, 2021, one from Rubis dated 3rd August, 2020, and another from Total Energy dated 15/10/2021 as proof of his authorisation to deal in LPGs. Additionally, he provided receipts and delivery notes from Proto Energy.
 30. In his cross-examination, he stated that EPRA licensed him but did not present the licence. Furthermore, he confirmed that he was the owner of motor vehicle registration no. KAW 401H.



31. Having considered the foregoing in its entirety, I cannot determine what evidential nexus tied the Appellant to the offences herein. The evidence, as tendered at the trial Court, was purely circumstantial at best, solely as against the Appellant.
32. In *Mnyonga v Republic* (Criminal Appeal E012 of 2024) [2024] KEHC 15136 (KLR) cited with approval the case, of *Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)* where the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. The Court of Appeal stated as follows;
 - a. “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
 - i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
 - ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
33. From the outset, the consistent piece of testimony from all prosecution witnesses was that the vehicle with registration number KAW 401H was recovered while carrying illegal LPG gas cylinders.
34. The ownership documents pertaining to the motor vehicle established that it is owned by one James Maina Kariuki, also known as DW2, and not by the Appellant. Furthermore, it was not established that the Appellant was employed or acting in the capacity of an agent for DW2.
35. More importantly, PW5, the Investigating Officer, testified that he did not witness the Appellant driving the subject motor vehicle at any time. In fact, it seems that the Appellant was merely arrested for being present at the scene.
36. It is peculiar that DW2 admitted he was the owner of the motor vehicle in question and that he owned the shop where the illegal gas cylinders were confiscated, trading under the name Jiomo Gas Dealers (sic). It baffles me why the prosecution bypassed DW2 and failed to prosecute him for the admitted illegalities. This was rightly, and correctly so, noted by the trial Court.
37. Further, DW2 testified that at no point did he authorize the Appellant to drive the subject motor vehicle, nor has he ever driven it. In fact, the Appellant was only at his shop by reason of his invitation to lobby his interest in having the said vehicle hired out.
38. I cede guidance to *R –vs- Kipkering Arap Koskei & Another 16 EACA 135* where the court held, inter alia, that: -
 - a. “In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”
 - b. In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are therefore, unable to uphold the conviction entered by the learned trial judge.



39. I believe the evidence did not adequately suggest the Appellant's guilt. None of the prosecution witnesses proved that he dealt, supplied, or refilled the seized illegal cylinders. These witnesses wrongly assumed that the Appellant's presence at the scene implied he was the mastermind behind the illegal operation. Moreover, despite the evidence glimmering on DW2, the prosecution ignored this fact.
40. In conclusion, it is clear that the Prosecution did not fulfil its legal burden of proof required to secure a conviction against the Appellant. The evidence presented was insufficient and failed to convincingly establish guilt beyond a reasonable doubt. Moreover, the trial court's decision appears to have been based on a fundamental misunderstanding of the applicable legal standards and principles. As a result, the conviction cannot be upheld.
41. Accordingly, I find the appeal successful, and I hereby quash the convictions and set aside the sentences against the Appellant on Counts I and II.
42. The Appellant, Charles Ngari Kamau, is to be released forthwith unless he is otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 24TH DAY OF FEBRUARY, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr. Omondi for the Respondent

