



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 75 OF 2019

MOSES KIMANI KURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the Honourable J.B. Kalo – CM

delivered on the 9th August, 2018 in Nakuru Criminal Case

No. 2303 of 2018, Republic Vs Moses Kimani Kuria)

JUDGMENT

1. This appeal arises from ***Nakuru Chief Magistrate’s Criminal Case No. 2303 of 2018***. The Appellant was charged in that case with four counts as follows:

Count I

Charge: Being in possession of uncustomed goods contrary to Section 200 subsection (d) part (iii) as read with Section 210 subsection (c) and Section 213 of the East African Community Customs Management Act of 2004.

Particulars of Offence: On the 16th day of July, 2018 at Pipeline area in Nakuru East District within Nakuru County, was found with uncustomed goods namely 3750 litres of Ethyl Alcohol (Ethanol) inside a motor vehicle registration Number KAW 243 B make YUE JIN lorry which is contrary to Section 200 subsection (d) part (iii) of EAST AFRICAN COMMUNITY CUSTOMES MANAGEMENT ACT 2004.

Count II

Charge: Conveying uncustomed goods contrary to Section 185 (ii) of the Customs and Excise Act Cap 472 Laws of Kenya as read with Section 199(a) of the East Africa Community Customs Management Act of 2004.

Particulars of Offence: On the 16th day of July, 2018 at Pipeline area in Nakuru East District within Nakuru County being the owner of motor vehicle Registration No. KAW 243 B Make YUE JIN was found conveying 3750 litres of Ethyl Alcohol (Ethanol) knowing the same to be uncustomed.

Count III

Charge: Selling Alcoholic Drinks without a license contrary to Section 37 (i) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010 Laws of Kenya.

Particulars of Offence: On the 16th day of July, 2018 at Pipeline area in Nakuru East District within Nakuru County was found selling alcoholic drinks namely Ethyl Alcohol (Ethanol) without a license for 2018 which contravened the said act.

Count IV

Charge: Being in possession of counterfeit goods contrary to Section 32(a) as read with Section 35(1) (a) of the Anti-Counterfeit Act No. 4 of 2008

Particulars of Offence: On the 16th of July, 2018 at Pipeline area in Nakuru East District within Nakuru County, was found being in possession of Counterfeit Ethyl Alcohol (Ethanol) to wit 3750 litres inside a motor vehicle Registration Number KAW 243B make YUE JIN lorry.

2. The Appellant pleaded not guilty to all the charges. The case proceeded to full hearing. The Prosecution called five witnesses – four were Police Officers who participated in the seizing of the contraband goods which formed the subject of the charges while the fifth witness was a Government Chemist Analyst. The Learned Trial Magistrate concluded that a prima facie case had been made out against the Appellant and put him on his defence. He gave a sworn statement and called one witness then closed his case. The Court concluded that the Prosecution had proved its case beyond reasonable doubt on Counts I and II but acquitted the Appellant on Counts III and IV.

3. The Appellant was dissatisfied by the verdict and has appealed to this Court raising five grounds of appeal as follows:

1) That the learned Magistrate erred in law and in fact when he held that Technical Alcohol and Industrial Alcohol were different substances while in actual sense it is the same substance but with different names.

2) That the learned Trial Magistrate erred in law and in fact when he disregarded the defence evidence especially evidence from DW2 which evidence explained the chain of handling of the technical alcohol and how the same was sold and delivered to the Accused Person.

3) That the learned Trial Magistrate erred in law and in fact when he held that the prosecution had proved its case beyond reasonable doubt when the prosecution failed to disclose which duty/tax had not been paid by the Accused Person.

4) That the learned Trial Magistrate erred in law when he found the Accused Person guilty for being in possession on uncustomed goods when it was not specified which tax and/or duty the Accused Person had failed to pay.

5) That the learned Trial Magistrate erred in law when he ordered for the forfeiture of the Motor Vehicle KAW 243B when prosecution did not prove that the said vessel was ferrying the alleged uncustomed goods.

4. The appeal was argued by way of written submissions followed by oral highlighting. Mr. Aim appeared for the Appellant while Ms. Mumbe appeared for the State.

5. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see **Okeno v Republic [1972] EA 32**).

6. During the hearing of the trial, the first three Prosecution witnesses were Police Officers who gave near-identical testimonies: They got a tip off that a certain vehicle at Hyrax Parking Yard had suspicious goods. They each went to the site and found Motor Vehicle Registration Number KAW 243B, a canter truck of the make Yue Jin. They checked the gate keeper's books and found that no particulars about the owner or driver had been entered. They became more suspicious and the leader of the group, OCPD Obare directed that the padlock which had secured the back of the truck be broken. Upon doing so, the officers discovered fifteen drums inside the truck. They suspected the clear liquid inside the drums to be ethanol. They seized the truck which was towed to Bondeni Police Station. They collected samples of the liquid in the drums and sent them to the Government Chemist for analysis.

7. Later on, the Appellant presented himself to the Police and identified himself as the owner of the Motor Vehicle and the cargo in it. Upon further investigations, he was charged with the offences enumerated above.

8. The last Prosecution witness, the Investigating Officer, produced the fifteen drums and Motor Vehicles and explained the chain of custody up to the point of production.

9. The fourth Prosecution witness was Eunice Wamuyu Njogu, a Government Analyst for purposes of section 77(1) of the Evidence Act. She testified that she received fifteen plastic bottles each marked "Bondeni Police Station, PCR 502/18, Accused Moses Kimani" – JA-1 to JA-15. The Exhibit Memo presented to her required her to identify the liquid in the samples. She examined the samples using GC-MS Spectrophotometry techniques. She concluded, in a report produced as Exhibit 3 during the trial, that the liquid in each of the 15 samples was industrial alcohol also known as ethanol. The ethanol concentration by volume in each of the fifteen samples ranged between 94.00% and 95.00% and between 91.01% and 92.40% by weight.

10. Upon being placed on his defence, the Appellant did not seem to contest the evidence by the Prosecution. His defence was that the ethanol which was found in his truck was actually "technical alcohol" which, he said, was exempt from duty and was, therefore, not uncustomed goods. He insisted that he did not intend to use the ethanol for human consumption as alcohol but, instead, intended to use it for food warmers in his eateries and to fumigate his *shambas* in Bahati and Kitengela. The Appellant testified that he had sourced the ethanol from his client, Jackmatuu Suppliers Ltd which had, in turn, procured it from Kibos Distillers Limited. Jackmatuu Suppliers Ltd, the Appellant told the Court, had been permitted by KRA to procure the "technical alcohol" without paying duties.

11. The Appellant's witness was Jackson Musembi, a director of Jackmatuu Suppliers Ltd. He testified that Jackmatuu is in the business of fumigation in flower farms. He testified that a company known as Trade Links Ltd, through the Appellant, made an order for 10,000 litres of "Duty Free technical alcohol" through an LPO dated 13/07/2018. The witness testified that this was part of the 80,000 litres of "industrial methylated spirit" which Jackmatuu Suppliers Ltd had been permitted by the KRA to purchase from Kibos Distillers Ltd vide a letter dated

04/07/2018. The witness tendered as evidence the LPO and the letter from KRA.

12. The Appellant complains, first, that he should not have been convicted on the second Count because it was based on a repealed law: he was charged to be in violation of a section in the Excise and Customs Act, Chapter 472 of the Laws of Kenya. That Act, the Appellant correctly submits, was repealed *vide* section 46 of the Excise Duty Act, No, 23 of 2015 which became effective on 01/12/2015. The DPP has wisely conceded the appeal with respect to conviction on Count II. A conviction cannot be proper when it is based on a repealed or non-existent law. There is no need to belabour that point. The conviction of the Appellant on Count II is hereby reversed and the sentence set aside.

13. Turning to the only remaining count, namely, Count I, the Appellant first complains that the charge sheet was defective. The Appellant argues that, from the definition of uncustomed goods in EACCMA and Customs and Excise Duty Act, the offence of being in possession of uncustomed goods has at least three elements which must be brought out clearly in the charge sheet. The three elements, according to the Appellant, are:

- a. The goods attracted duty to point out the exact duty which had not been paid by the Accused Person;
- b. The goods were either imported and/or were for export;
- c. The good had been carried coastwise.

14. The Appellant says that it is evident that the charge sheet did not bring out the elements as required by the law relied upon and that, therefore, the charge sheet was defective. On this score alone, the Appellant asks for a reversal of his conviction on Count I.

15. The Appellant's argument in this regard wilfully misreads both section 200(d)(iii) of EACCMA and the definition of uncustomed goods in the statute. Section 200(d)(iii) of EACCMA provides as follows:

200. Any person who:-

(a).....

(b).....

(c).....

(d) acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be:

(i) prohibited goods; or

(ii) restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise; or

(iii) uncustomed goods,

commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

16. From this definition of the offence, the elements for the offence of being in possession of uncustomed goods are:

- a. Acquisition, possession, concealing or keeping or procuring to keep or conceal;
- b. Goods which are uncustomed;
- c. With either the knowledge or reason to know that they are uncustomed.

17. For a charge sheet to be proper under section 200(d)(iii), only those elements need to be manifest. There is no requirement, as the Appellant argues to state the amount of duty that was payable and which was not paid. There is, equally no requirement to show that the goods were imported, meant for export or that they were being carried coastwise. The Appellant's insistence of these latter requirements appears to be a result of conflating the different offences created under section 200 of EACCMA.

18. The Appellant's confusion in this regard similarly taints his arguments that the Prosecution did not prove the elements of the crime beyond reasonable doubt and his reliance on ***Paul Otieno Musumba v R [2015] eKLR***. In this case, Makau J. found the charge sheet to be defective because the charge sheet misstated the section of the law; did not state where the uncustomed goods were found; and the particulars were at variance with the charge sheet. None of these is applicable in the current case.

19. Turning to the substance of the evidence, the Appellant insists that the ethanol he was found in possession of was exempt from duty and could, therefore, not be termed as uncustomed goods. To make this argument, the Appellant insists that the ethanol he was found in

possession of was purchased from Jackmatuu Suppliers Ltd and that the goods had been granted exemption from excise duty by Kenya Revenue Authority (KRA). To make this argument, the Appellant sought to rely on a letter dated 04/07/2018 by the KRA addressed to Jackmatuu Suppliers Ltd. The letter granted Jackmatu Suppliers Ltd exemption from excise duty for 80,000 litres of industrial methylated spirit sourced from Kibos Distillers Ltd. The Appellant's argument is that the 3,750 litres of ethanol he was found in possession of was the "technical alcohol" he had bought from Jackmatuu Suppliers Ltd through his company, Trendy Links Ltd. To this extent, then, the Appellant argues, he was not in possession of uncustomed goods but of goods which had been exempted from duty.

20. I have carefully assessed the argument by the Appellant and the documents he produced in support of this theory. I find the theory is so improbable that it cannot reasonably possibly be true. (See *S v Shackell (4) SA 1 (SCA)*). In my view, it is not possible to say that the Appellant's version of events has any reasonable inherent probability that it is true. As Ms. Mumbi points out, the theory does not add up for four principal reasons.

a. *First*, the documents produced by the Appellant show that the exempted alcohol was to be loaded onto motor vehicle registration number KBU 490F (see Defence Exhibit 2). There was no explanation how they ended up on the Appellant's motor vehicle.

b. *Second*, the letter of exemption by KRA is predicated on Jackmatuu Suppliers Ltd needing the exempted technical alcohol sourced from Kibos Distillers for its business (which is fumigation). The letter does not envisage that the exempted alcohol would be sold to a third party.

c. *Third*, there is no proof of such purchase of alcohol from the Jackmatuu Suppliers Ltd by the Appellant in the form of receipts, delivery notes, and so forth. The alleged LPO is not backed up by any evidence of payment or delivery.

d. *Fourth*, uncontroverted evidence by the Government Chemist showed that the goods found in the possession of the Appellant were ethanol. However, what was allegedly sourced from Kibos Distillers whose documentation was produced was "technical alcohol." There was no showing that the ethanol found in the possession of the Appellant was, indeed, part of the 10,000 Technical Alcohol delivered by Kibos Distillers Ltd to Jack Matuu Suppliers Ltd.

21. In the end, therefore, the Prosecution established its case beyond reasonable doubt that:

a. The Appellant was in possession of 3,750 litres of ethanol;

b. Applicable duty was not paid for the ethanol;

c. The ethanol was not exempt from payment of duty and was, therefore, uncustomed goods; and

d. The Appellant was aware or should have been aware that duty was payable on the ethanol.

22. Consequently, it is the finding of this Court that the conviction on Count I was safe. It is hereby affirmed. The sentence meted out - a fine of Kshs. 50,000/- and in default imprisonment for one year -- was eminently lawful and reasonable. There is no basis to interfere with it. It is equally affirmed. Finally, the order for forfeiture of the Motor Vehicle Registration No. KAW 243B which was ferrying the uncustomed goods is also lawful and mandated by section 211 of EACCMA. That order is also affirmed. As aforesaid, the conviction in Count II is reversed and the sentence set aside.

23. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.