



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL REVISION 7B OF 2020**

**JACKSON MURAYA KARIUKI.....APPLICANT**

**VERSUS**

**REPUBLIC (ODPP).....RESPONDENT**

**R U L I N G**

The applicant herein was charged in **Molo Criminal Case Number 1947 of 2018** on 24<sup>th</sup> August 2018 with two counts.

**(i) Manufacturing/offering for sale substandard goods Contrary to Section 9(2) and 9(4) as read with Section 170 of the Standards Act Cap 496 Laws of Kenya.**

**(ii) Contravening a measure Contrary to Section 140(b) of the Environmental Management Act Cap 387 Laws of Kenya.**

On 11<sup>th</sup> December 2018, the trial magistrate acquitted the applicant under **Section 215 of the Criminal Procedure Code**.

The grounds for the acquittal as set out in the judgment were;

**1) THAT the Kenya Bureau of Standards (KEBS) officer was not a gazetted inspector as required by Section 13 of the Standards Act Cap 496 which states; Appointment of inspectors**

***(1) The Minister may, at the request of the Council, by notice in the Gazette appoint as an inspector for the purposes of this Act any person who in his opinion is suitably qualified.***

***(2) Every person so appointed shall be either a public officer or a member of the staff of the Institute and shall be furnished with a certificate of appointment signed by the Director stating that he is authorized by the Minister to act as an inspector for the purposes of this Act.***

**2) THAT the police officers who seized and detained the goods did so in violation of Section 14 (1) of the same Act which states; Power of inspectors**

**(1) An inspector may for the purposes of this Act, at all reasonable times—**

***(a) enter upon any premises at which there is, or is suspected to be a commodity in relation to which any standard specification or standardization mark exists;***

***(b) inspect and take samples of any commodity or any material or substance used, or likely to be, or capable of being used in the manufacture, production, processing or treatment thereof, and cause any container within which there is or is suspected to be any quantity of any such commodity, material or substance, to be opened;***

***(c) inspect any process or other operation which is or appears likely to be carried out in those premises in connexion with the manufacture, production, processing or treatment of any commodity in relation to which a standard specification or a standardization mark exists;***

***(d) require from any person the production of any book, notice, record, list or other document which is in the possession or custody or under the control of that person or of any other person on his behalf;***

***(e) examine and copy any or any part of such book, notice, record, list or other document which appears to him***

*to have relevance to his inspection or inquiry, and require any person to give an explanation of any entry therein, and take possession of any such book, notice, record, list or other document as he believes may afford evidence of an offence under this Act;*

*(f) require information relevant to his inquiry from any person whom he has reasonable grounds to believe is or has been employed at any such premises or to have in his possession or custody or under his control any article referred to in this subsection;*

*(g) seize and detain, for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed;*

*(h) seize and detain any goods or documents which he has reasonable cause to believe may be required as evidence in any proceedings for any offence under this Act.”*

3) *That the KEBS officer who testified did not confirm to the court “if he was an inspector as laid down in the Act nor did he produce his certificate of gazettelement.”*

4) *That the police acted in excess of their jurisdiction in seizing the goods because their sole purpose was to offer security.*

5) *That the court did not have jurisdiction in determining the case in Count 1, on the basis that there is a tribunal established under Section 16A of the Standards Act.*

With regard to the 2<sup>nd</sup> Count the trial court found that no officer from NEMA came to testify as to how persons who had in their possession polythene bags before the ban were to destroy them. While acquitting the applicant the court stated that the **“Charges in the second count are defective as it arises out of transaction in the first count and as such do find that the charge therein is defective under Section 89(5) of the Criminal Procedure Code and as such the accused is acquitted under Section 215 of the Criminal Procedure Code.”** The trial magistrate went on to say **“Considering that the court lacked jurisdiction, I shall make no orders as to the seized goods.”**

It is on the basis of this last sentence that the applicant filed the undated Notice of Motion on 17<sup>th</sup> March 2020 brought under **Article 25(c) and 50 Constitution of Kenya 2010, Section 169 (3), 364 (1) (b) & (2), 366, 367, 382 and 383 of the Criminal Procedure Code and other enabling provisions of the law.**

The Notice of Motion is supported by the Certificate of Urgency of Larabi Lesantos Advocate and the affidavit of the applicant. He seeks orders that:-

**This Honourable Court be pleased to cause revision of the orders and or judgment of the Chief Magistrate’s Court delivered on 11<sup>th</sup> December 2019 by correcting the errors irregularities and omissions and grant an order for the release of exhibits in Criminal Case Number 1947 of 2018 currently held at Salgaa Police Post to the applicant/accused persons as follows: -**

- (a) 367 bags of sugar.
- (b) 16 bags of Jari Wimbi Flour
- (c) 20 Jerricans of 20 litres Crisco Cooking Oil
- (d) 5½ bales of polythene bags

The grounds for the application are that;

- **The 367 bags of sugar are on the verge of expiry, in mid May 2020 and also on the verge of destruction by the OCPP Salgaa Police Post.**
- **That the trial magistrate having acquitted the applicant unconditionally under Section 215 of the Criminal Procedure Code ought to have made an order for the destruction or release of the exhibits. Having failed to do so, there was an error, mistake or illegality on the face of the record. The applicant had not filed any appeal.**
- **That the trial court found no cogent evidence that the goods were unfit for human consumption.**

The application is opposed vide the affidavit of Vera Odera prosecuting counsel. She depones that the goods were seized by police officers, samples were extracted and tested by KEBS officers and found to be unfit for human consumption as seen by the report from the said officers that the reasons for the acquittal of the applicant were not supported by the record of the proceedings as the KEBS officer had properly identified himself and his certification and gazettelement.

That the tribunal alluded to by the trial magistrate did not have the powers to try a criminal case.

That the trial magistrate should have addressed the jurisdictional issue at the beginning of the trial, and downed her tools if she found she had no jurisdiction to try the case.

That the applicant should have addressed the court by way of Judicial Review.

That applicant was aware his goods were substandard and should not be seeking to release them to unsuspecting innocent Kenyans.

That the applicant had indicated the goods would expire by mid-May and they ought not to be released.

### **Analysis and Determination**

I heard oral arguments from counsel. The applicants position that having been acquitted, the goods ought to have been released. That the KEBS officer was found to be incompetent. The applicant relied on the following cases;

1. **Samuel Ndirangu Waruru vs Republic [2014] eKLR** where the lower court had failed after acquitting the applicant under s. 210 of the CPC, to make nay order with regard to the exhibits; a power saw, two hundred pieces of timber and twenty-five pieces of offcuts. This court (Wakiaga J) reviewed the orders and released the same to the applicant.
2. **State vs. Moses Macharia Kigo [2019] eKLR** where this court (**RPV Wendoh J**) in a similar application refused to revise an order of the lower court where it had released exhibits alleged to be contaminated, to the accused person.

Ms. Odero reiterated the contents of her affidavit and argued that the record clearly showed that the KEBS inspector produced his certification and gazettelement. That these were marked as MFI 10 during his testimony. These documents were annexed to her affidavit. She also submitted that the analysis report clearly showed that the food stuffs were unfit for human consumption.

I have carefully considered the law, the authorities, the affidavits and the arguments. **Section 362 of the Criminal Procedure** States:

#### **“S. 362. Power of High Court to call for records**

*The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”*

**Section 364** provides the power of the High Court on revision.

*(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*

*(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

*(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”*

**Section 382** provides that a finding, sentence or order passed by the court of competent jurisdiction can only be reversed or altered on account of error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial, where a failure of justice has been occasioned.

**Article 25 (c) and 50(2)** are about the right to fair trial.

In **State vs. Moses Macharia Kigo [2019] eKLR** cited for the applicant the judge stated;

*“In Joseph Ndubi case, the court cited the Malaysian case of **Public Prosecutor v Muhari bin Mohd Jani and another (1996) eLRC 728** where the court stated the object of revision proceedings as follows page (734-735):*

*“The powers of the High Court in revision are amply provided under Section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of ‘paternal or supervisory jurisdiction’ in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done, and whether any order made by the lower court should be interfered with in the interests of justice...if we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.”*

*In sum, revision powers are meant to prevent a miscarriage of justice.”*

Keeping the above in mind **the issue for determination is whether this application is tenable. Was there a miscarriage of justice?**

**The authorities:** I found them clearly distinguishable in their holdings.

1. **Samuel Ndirangu Waruru vs Republic [2014] eKLR:** The matter related to forest produce. The trial court had the obligation to either order a release to the accused or forfeiture to the state.

2. **State vs. Moses Macharia Kigo [2019] eKLR**: the trial court had made the order to release the exhibits. The State was aggrieved and sought to have the case transferred from the trial magistrate to another court, and to reverse the order releasing the exhibits. In that case, the report on the unfitness of the sugar for human consumption was done AFTER the sugar was produced as exhibit in court. The whole exhibits issue was riddled with its own shenanigans which are evident from the Judgment. That case is clearly distinguishable from this one.

**Then;**

**The judgment in the lower court-** The trial court found at the tail end of the trial that she had no jurisdiction to try the case, but she proceeded to acquit the accused person under **Section 215 of the Criminal Procedure Code**. At the same time, she applied the provisions of **Section 89(5) of the Criminal Procedure Code** to the 2<sup>nd</sup> Count and again proceeded to acquit the accused person.

**On Jurisdiction;** any judicial officer knows that jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1**. Where *Nyarangi J.A.* held as follows:

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

Hence, having found she had no jurisdiction the only option open to the trial magistrate was to down her tools. The curious thing in this case is that despite that finding she proceeded to make the order of acquitting the applicant but refrained from making any orders regarding the exhibits. If she found she had no jurisdiction, then she ought not to have made the order of acquittal as well.

**Secondly, Section 89 (5)** speaks for itself. It says;

*(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.*

It happens at the plea stage, before the plea is taken, the magistrate is expected to apply his or her mind to the charge sheet before taking the plea, and if it does not disclose any offence, refuse to admit it. That does not result in an acquittal. It can only be a discharge because no trial has been conducted. It frees the accused person, and does not stop the prosecution from cleaning up the charge sheet and charging the accused again.

Both the issue of jurisdiction, and the application of s. 89(5) of the CPC are intended to establish whether there ought to be a trial or not. Here the trial magistrate conducted the full trial only to decide that she ought to have rejected the second count under s. 89(5) and that on the 1<sup>st</sup> count she had no jurisdiction.

On this one the trial court was in grave error, and it is on the face of the record.

**Did she have jurisdiction?**

The Standards Act Cap 486 creates a tribunal under s. 16A. However, that tribunal is not clothed with the powers to conduct criminal trials. The Act refers to **'the Court'**, when it comes to offences under the Act. Tribunals settle disputes but do not have the powers of the deal with criminal cases. To that extent the trial magistrate was in error.

**Did the police act without jurisdiction in seizing the goods in the absence of the KEBS officer?**

Clearly again error. **Section 29** of the **Criminal Procedure Code** allows the police to arrest without warrant of arrest.

**"S.29. Arrest by police officer without warrant**

*A police officer may, without an order from a magistrate and without a warrant, arrest (inter alia) —*

*(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;*

*(d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;*

It is very clear from the above provisions the police have the powers to arrest any suspect and have the investigations conducted by the relevant authority. Nothing in this **Standards Act, Section 14** stops the police from doing their job, to detect and prevent crime.

Hence, the trial court had the jurisdiction to try the case. According to **Section 15 of the Standards Act**, the court would, if it had convicted, applied **Section 15(2)**, confiscate or order the destruction of the goods, the court however found it had no jurisdiction, albeit wrongly.

Not having made a specific finding as to whether the goods were unfit for human consumption did not in my view occasion a failure of justice. It also did not mean that the goods are fit for human consumption. The court simply abdicated its duty by failing to make a determination on the issue.

I have looked at the KEBS report. Counsel for the applicant in oral argument submitted that the goods would expire in August. Prosecuting counsel quickly drew his attention back to the application where it states the same were set to expire in mid May. I asked whether there was any document to support the date of expiry. The applicant had none except what is stated in the application. We are in mid-May. I must agree with the prosecuting counsel that an order of release the goods to the applicant be exposing innocent Kenyans to expired goods.

***So, what order should issue?***

One of the powers of the Inspector under s. 14(1) of the Standards Act is to

***(g) seize and detain, for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed;***

Upon being called by the police who had acted lawfully in the course of their duty, the KEBS officer had the goods tested.

Section 14A of the Act empowers the Inspector to order that the goods be destroyed;

***(1) An inspector may order the destruction of goods detained under section 14(1) if the following conditions are satisfied—***

***(a) testing indicates that the goods do not meet the relevant Kenya Standard; and***

***(b) it is reasonably necessary to destroy the goods because the goods are in a dangerous state or injurious to the health of human beings, animals or plants.***

In the circumstances, I think the reasonable thing is to leave it to the KEBS officers to deal with the exhibits in accordance with the law.

Hence, the trial had jurisdiction to deal with the charges against the applicant and ought to have allowed the law to take its course.

The Exhibits produced in Count 1 in Molo CMCR Case no 1947 of 2018 be dealt with in accordance with s. 14A of the Standards Act Cap 486.

The Exhibits related to Count 2 be dealt with in accordance with the measures set out under ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION Act No. 8 of 1999. To that end the ODPP to serve the Order on the local NEMA officers for compliance.

Orders accordingly.

**Dated 14<sup>th</sup> May 2020**

**Delivered and signed at Nakuru this 15<sup>th</sup> day of May, 2020.**

**Mumbua T Matheka**

**Judge**

In the presence of: VIA ZOOM

Court Assistant Edna

For Applicant: Mr. Larabi for applicant

For Respondent (State): Ms. Odero