



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 3 OF 2020

EMILY TUMBO..... APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of Hon. E. Muiru (SRM) in Kilungu Principal Magistrate's Court Criminal Case No. 31 of 2019 delivered on 26th November, 2019).

JUDGMENT

1. **Emily Tumbo** the Appellant is challenging a ruling by Hon. E. Muiru Senior Resident Magistrate Kilungu court issued on 26th November, 2019 ordering for the destruction of her 250 bags of rice.
2. The appeal is based on two grounds namely: -
 - a) That the learned trial Magistrate erred in fact and law when she ignored the Appellant's written submissions and further written submissions and she did not base her ruling on the evidence and facts before her, thus arriving at a wrong decision.
 - b) That the learned trial Magistrate erred in fact and law when she did not hear the Appellant and did not allow for an independent third party's opinion in respect of the exhibit thus arriving at a wrong decision.
3. A summary of what transpired before the lower court is that the Respondent filed an application dated 17th June 2019 seeking an order for the destruction of a consignment of 250 bags of rice found to be unfit for human consumption. The application was premised on the supporting affidavit of Richard Mulwa Mutiso a chief assistant public health officer attached to Makueni county, Kilome sub-county. Annexed to it was a certificate of analysis by J.K Kibuthi of the Government chemist; invoice from Alazlam solutions Ltd and a filled samples form.
4. The court directed that the application be served on the Appellant for hearing on 1st July 2019. The Appellant did not file a reply to the application and neither did she attend court on 1st July 2019. The application for destruction of the rice was then allowed. On 8th July 2019 the Appellant filed an application of even date. It was placed before the learned trial Magistrate who gave directions in the following terms:

“Notice of Motion application dated 8/7/2019 is noted together with affidavit in support and annexures thereto (sic). In light of said application, I do find that in the interests of justice, the Respondent has a right to be heard. I do, therefore, stay the orders for destruction of the rice issued on 1/7/2019 pending hearing and determination of this instant application.”
5. On 30th July 2019 one witness for the Respondent testified and was cross examined by Mr. Dola for the Appellant. The hearing continued on 13th November 2019 when one witness for the Respondent testified. Soon thereafter the court gave a ruling date with directions that the Appellant files submissions within 7 days. Mr. Dola did not comply with the filing of submissions as directed. The ruling was delivered on 26th November 2019. It is the said ruling that is the subject of this appeal.
6. The appeal was canvassed by way of written submissions. In his submissions Mr. Dola is asking this court to make an order for release of the 250 bags of rice to the Appellant.
7. The Respondent has opposed the appeal arguing that the decision by KEBS has not been challenged through a contrary opinion.
8. This is a first appeal and this court has the duty to re-analyse and re-consider the evidence on record to arrive at its own conclusion. See **Okeno –vs- Rep (1972) E.A 32; Boru & Anor –vs- Rep (2005) I KLR 649.**

9. I have considered the evidence on record, the grounds of appeal and the submissions filed. From the record, the ruling was in respect of the application dated 8th July 2019 filed by the Appellant. The application sought four specific orders namely:

- a) That the application be certified as urgent and be heard ex-parte in the first instance and service of the same be dispensed with.
- b) That the Hon. court be pleased to stay the order issued on 1/7/2019 for destruction of the vice consignment till the hearing and determination of the application.
- c) That this Hon. court be pleased to release the exhibit (vice) to the Applicants.
- d) Costs be in the course.

Prayer **(b)** was granted ex-parte

10. When the matter came for hearing it is not the Appellant who presented her case to the court. Instead the court took the evidence of the Respondent's two witnesses first. Worse still the Appellant who was the Applicant was not given any chance to present any evidence or witness to the court.

11. The trial court would still have made its ruling on the pleadings and supporting documents. Since she decided to call evidence to clarify a few issues, then both parties ought to have been given a chance to call witnesses and/or put their case forward.

12. The subject matter herein involves food which has issues surrounding its suitability for consumption by human beings and/or animals. The record has to be put straight through the correct procedure by allowing both parties to be heard as the learned trial Magistrate had directed on 8th July 2019. It is unfortunate that she disobeyed her own orders.

13. I find the conduct of the proceedings to have been unprocedural resulting in a mistrial. I set aside the ruling of 26th November, 2019 together with proceedings of 30th July 2019 and 13th November 2019. I order that the application dated 8th July 2019 be heard afresh by any other Magistrate at Kilungu Principal Magistrate's court besides Hon. E. Muiru SRM.

14. Parties to appear before the said court on 23rd July 2020 for directions.

Orders accordingly.

Delivered, signed & dated this 9th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge