REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.36 OF 2015

(Appeal arising out of the conviction and sentence of Hon. M. W. Kurumbu RM delivered on

13th November, 2014 in Nairobi CM City Court Cr. Case No.4934 of 2013 delivered on 13th November, 2014)

DIRECTOR/MANAGER

MANTRAC KENYA LIMITED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The Appellant, Director/Manager of Mantrac Kenya Limited, was charged with two counts of offences under the **Food, Drugs and Chemical Substance Act**.

2. In Count I the Appellant is charged with the offence of selling drugs contrary to **Section 9** and punishable under **Section 36(1)** of the **Food, Drugs and Chemical Substance Act** and as contained in the **Statute Law (Miscellaneous Amendments) Act** No.2 of 2002.The particulars of the offence are:

> **"That on 5th September, 2012, at Mantrac Kenya Limited offices situated on Plot No.371495 off Lusaka Road within Nairobi County, the Appellant was found in possession of drugs for sale namely; five pieces of non-woven eye sterile 80mm x 60mm with expiry date of 10th April 2009 and 2 pieces of triangular bandages 90 x 95 x 127 cm expiring on 10th April 2010."**

3. In Count 2 he is charged with the offence of **Removing seized articles** contrary to **Section 30(10)** and punishable by **Section 36(1)** of the **Food Drugs and Chemical Substances Act** and as contained in **the Statute Law (Miscellaneous Amendments) Act** No.2 of 2002. The particulars of the offence are:

> **"That on 5th September, 2012 and 3rd July, 2013, at Mantrac Kenya Limited offices situated off Lusaka Road, the Appellant removed seized articles without authority of an authorized officer who had seized the said articles."**

4. The Appellant was arraigned before the trial magistrate's court. He pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged in both counts. He was sentenced to pay a fine of Kshs. 15,000/- for each count and in default serve six (6) months imprisonment in each.

Petition of Appeal

5. The Appellant is challenging both his conviction and sentence. He filed Petition of Appeal dated 19th February, 2015 in which he raised seven grounds in which he faults the learned trial magistrate of having erred in both law and fact. I summarize them as follows:

> **1. For convicting the Appellant yet the prosecution had failed to establish the case against him to the required standard of proof beyond reasonable doubt.**

2. For failing to acquit the Appellant when:

a. the prosecution failed to establish that the Appellant had sold the items in question within the meaning of Section 9 **of the** Food, Drugs and Chemical Substances Act**.**

b. The learned trial magistrate found that the Appellant was not guilty of selling the seized items within the meaning of section 2 **as read with** section 9 **of the** Act**.**

3. For placing undue weight to the meaning of *deception* under Section 9 **of the** Act **yet she had already found that the Appellant was not guilty of selling the seized items.**

4. For convicting the Appellant even though the prosecution failed to provide any evidence to establish that the seized items had expired before the date of inspection.

5. For misdirecting itself on the facts of the case by finding that the Appellant was aware of the requirement not to interfere with seized items, yet there were no seized goods in the first place.

6. For holding that the Appellant ought to have raised the issue of whether or not there were any seized items as a preliminary issue.

7. For failing to consider the Appellant's submission in making its determination, and that the decision of the trial court was neither supported by facts of the case nor by applicable law.

Appellant's Submission

6. The Appellant filed written submissions on 10th November, 2020 in support of his appeal. Counsel for the Appellant, Mr. Mwihuri, did not wish to highlight the submission and opted to rely fully on the written submission. In his written submissions, counsel urged that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. He stated that the prosecution's case was that expired drugs had been recovered from First Aid Kits found in the Appellant's premises, yet the prosecution failed to adduce evidence to establish that the recovered drugs had indeed expired.

7. Counsel submitted that DW3, Gideon Ombogo, testified that he carried out a health and safety audit at the Appellant's premises in January 2012 and that he told the court that he did not find any expired drugs in the first aid boxes at the Appellant's premises. The Appellant's counsel urged that this evidence was not challenged by the prosecution.

8. Mr. Mwihuri, in his submissions faulted the trial magistrate for disregarding the testimony of DW3 and finding that the seized drugs had expired before the date of inspection. He urged that the trial court disregarded the invoices produced by the Appellant which established that the Appellant purchased First Aid Kit boxes in February 2010 and August 2011. He urged that the Appellant could therefore not have purchased First Aid Kits boxes containing expired drugs. He relied on the case of Stephen Musyoki vs Republic [2019] eKLR for the proposition that the court should never allow itself to be swayed by plausible possibilities that the accused may have committed the offence he is charge with, rather, the court must be satisfied beyond reasonable doubt that the accused committed the offence.

9. With regard to the offence of sale of drugs as detailed in Count I, the Appellant submitted that the trial court in its judgment held that:

"…to the extent that supplies are kept in a first aid box in an organization to be used in case of accident/emergency, I do not think that they are meant for sale but for consumption."

10. Mr. Mwihuri submitted that despite this finding, the trial court went ahead to convict the Appellant of Count I. Counsel urged that there was insufficient evidence to sustain the conviction in Count I since the prosecution failed to establish that the recovered drugs were expired, and secondly, that the said drugs were for sale.

11. Mr. Mwihuri urged that the learned trial magistrate found that the Appellant had deceived its employees and potential users of the recovered drugs by having expired drugs in the first aid kits. Counsel urged that since the prosecution failed to establish that the recovered drugs had expired, it follows then that there could not have been any deception attributable to the Appellant.

12. Counsel cited the case of Republic vs Fairview Hotel [2011] eKLR where the court held that the particulars of a charge have to suggest the element of deception, which was missing in Count I. He further stated that having failed to establish that the recovered drugs had not expired, the prosecution failed to prove deception on the part of the Appellant.

13. With regard to Count II, the Appellant submitted that the drugs recovered from the first aid kit boxes did not offend the provisions of the Food, Drugs and Chemical Substances Act. He urged that by virtue of Section 30(1)(e) of the Act, an authorized officer is allowed to seize any articles which he believes contravene the provisions of the Act. Mr. Mwihuri stated that for one to commit an offence under Section 30(10) of the said Act, they must have interfered with the seized articles. The Appellant stated that this was not the case in the instant case. He submitted that the prosecution failed to establish any interference of alleged seized drugs by the Appellant.

Respondent's submission

14. The Appeal was partly opposed by the Respondent. Ms. Kibathi learned Prosecution Counsel for the State gave oral submission. Counsel

submitted that a public health officer visited the Appellant's premises on 5th September, 2012, and was taken round the premises by DW1, Vincent Odhiambo, who was instructed to do so by the Human Resource Manager, DW2. Learned State Counsel submitted that PW1 and PW2, in their testimonies, told the court that they seized articles which were documented in a seizure form, which was received by DW1 on behalf of the Appellant. The said seizure form was produced into evidence by the prosecution. She stated that DW1 was not an employee of the Appellant, but was a cleaner from Parapet Cleaners which had been contracted by the Appellant for their cleaning services. She submitted that DW1's signature on the seizure form acknowledged the seized items in the Appellant's premises.

15. Ms. Kibathi, learned State Counsel further submitted that the Appellant's conviction in Count I was however unsafe to the extent that there was no proof that any of the seized drugs were for sale by the Appellant. She asserted that from the trial court record, the Appellant dealt with generator sets and not drugs. Further, the recovered drugs were found in the First Aid Kit boxes, and were meant for use during medical emergencies at the Appellant's company. She was of the view that this did not amount to a sale within the meaning of Section 2 of the Act.

16. Ms. Kibathi argued that the element of deception was not established by the prosecution. She urged that deception requires an active form of misrepresentation. She stated that the seized articles had expiry dates which established that they expired in 2009 and 2010 respectively. There was therefore no deception on the part of the Appellant since the dates clearly indicated that the drugs had expired.

17. Ms. Kibathi faulted the trial court for holding that since the drugs were contained in the First Aid Kit box, it follows that they were available for use, and thus deception on the part of the Appellant was established. She was of the view that there was no basis to prove that the seized drugs would have been used. She submitted that the Appellant's conviction in Count I was unsafe.

18. With regard to Count II, Ms. Kibathi submitted that evidence was led to prove that the Appellant removed seized articles from their premises. She urged that that was the reason why there were no exhibits to accompany the seizure form produced in evidence. She urged the court to uphold the Appellant's conviction and sentence in Count II.

Facts of the case

19. PW1, Sifuna Edgar, and PW2, Merceline Odhiambo, were Public Health Officers based at Makadara. They stated that they visited the Appellant's premises on 5th September 2012 for a routine health and safety inspection. They identified themselves upon entering the premises. They saw employees repairing machinery and others dealing with drugs. They testified that some of the drugs found in the Appellant's First Aid Kit were expired, which contravened the provisions of the Food, Drugs and Chemical Substances Act. PW1 and PW2 seized the said drugs. They produced a Seizure Form "B" into evidence. They explained that a Seizure Form "B" is used in cases where seized items are left at the premises where they were recovered.

20. PW1 and PW2 stated that the seizure form was signed and received by Vincent, who stated that he was a supervisor at the Appellant company. The Human Resource Manager at the Appellant company introduced them to Vincent who was instructed to show them around the premises. They cautioned him against any interference with the seized items. They thereafter made a statement at the Public Health Offices. PW1 and PW2 alleged that the Appellant removed the seized articles from its premises hence the said articles were not produced as exhibits before the trial court. On cross examination, they stated that they did not see anyone selling drugs at the premises, but however insisted that being in possession of the expired drugs was contrary to the Food, Drugs and Chemical Substances Act.

Defence

21. DW1, Vincent William Odhiambo, stated that he worked as a supervisor at Parapet Cleaning Services. The said company was contracted by the Appellant to offer cleaning services at the Appellant's premises. On 5th September 2019, he was at the Appellant's premises when he was called by DW2, Mr. John Kiri, to his office. DW2 introduced him to PW1 and PW2 who were public health officers. He instructed him to show PW1 and PW2 around the premises. PW1 and PW2 asked to inspect the first aid kit boxes. He took them to the workshop where the kits were stored. He afterwards escorted them to the reception area. DW1 stated that PW1 and PW2 did not have any drugs in their possession when he escorted them to the reception area. PW1 and PW2 asked him to receive a document on behalf of DW2. He stated that he informed them that he was not an employee at the Appellant company. They however insisted that he received the document nevertheless. He signed and received a copy of the said document on behalf of DW2. He however did not read the contents of the document.

22. DW2, John Kiri Mwaniki, stated that he was the Human Resource Manager at the Appellant company. He told the court that PW1 and PW2 visited the Appellant company on 5th September 2012. Since he was scheduled to attend a meeting, he instructed DW1 to show them around the premises. He however stated that DW1 did not have the authority to receive any documents on his behalf as only DW2 or the Managing Director had authority to sign any documents. Upon cross examination, DW2 told the court that in February 2012, an occupational health and safety audit was conducted at the Appellant company. He produced a report of the same into evidence. Attached to the report were two invoices for purchase of first aid kit boxes. DW2 also produced into evidence a letter from Parapet Cleaning Services addressed to Appellant confirming that DW1 was employed by Parapet Cleaning Services.

23. DW3, Gideon Bochichi Ombogo, stated that he was a Private Consultant dealing with Occupational Health and Safety. He testified that he carried out a health and safety audit at the Appellant company. He inspected the first aid kit boxes at the workshop in the Appellant's premises. He found that the first aid boxes were well stocked and manned by trained first aiders. The drugs in the first aid kit boxes were not expired at the time of inspection. On cross examination, DW3 stated that the inspection took place in February 2012. He told the court that the supplies in the first aid kit were meant for an emergency response within the Appellant's premises.

Duty of a First Appellate Court

24. I have considered the evidence that was adduced before the learned trial magistrate, the petition and grounds of appeal, the written and oral submissions by both counsels, together with the cited cases.

25. This is a first appellate court and that being the case, I have the duty to analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses and hearing their testimony. I am guided by the case of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic, Criminal Appeal No. 272 of 2005 where it was stated as follows:

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of** *Okeno vs Republic [1972] EA 32* **will suffice. In this case, the predecessor of this court stated:**
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> 'The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.' "

Analysis and determination

26. The Appellant was convicted in the two counts of offences he had been charged with, by virtue of being the Director/Manager of the Appellant company, Mantrac Kenya Limited. The State conceded the appeal on Count 1, but has maintained that the conviction in Count 2 was safe and should be sustained. The key issue for determination by this court is whether the prosecution proved its case against the Appellant in both counts facing the Appellant, to the required standard of proof beyond any reasonable doubt.

27. With regard to Count I, Section 9 of the Food, Drugs and Chemical Substances Act provides that:

> **"Any person who labels, packages, treats, processes, sells or advertises any drug in contravention of any regulations made under this Act, or in a manner that is false, misleading or deceptive as regards its character, constitution, value, potency, quality, composition, merit or safety, shall be guilty of an offence."**

28. The Appellant in the present case was alleged to have been found in possession of drugs for sale which were past their expiry date. PW1 and PW2 conducted a routine health and safety inspection at the Appellant's premises on 5th September 2012. They told the court that they discovered expired articles in first aid kit boxes at the Appellant's workshop. The articles included non-woven eye pad sterile whose expiry date was indicated as 10th April 2009, and triangular bandages which had expired on 10th April 2010. The prosecution produced into evidence a Seizure Form "B" which documented the seized articles.

29. The said Seizure Form was stamped and received by DW1, who told the court that he received the said form on behalf of DW2, the Human Resource Manager, at the Appellant company. He stated that DW2 instructed him to show PW1 and PW2 around the company premises since he was busy. This fact was not denied by DW2. However, DW2 stated that DW1 was not an employee of the company and therefore had no authority to receive the document on the company's behalf.

30. It is not disputed that PW1 and PW2 did conduct a routine health and safety inspection at the Appellant premises as alleged. Their testimony that they seized the stated articles from the Appellant's premises is corroborated by the information in the Seizure Form "B" produced into evidence, which was duly received by the Appellant. The prosecution therefore established that articles were indeed seized from the Appellant's premises. The submission by the Appellant that no items were seized from its premises is not correct.

31. As correctly held by the trial court, the seized drugs were not for sale. Section 2 of the Act defines the word 'sell' to mean:

> **"offer, advertise, keep, expose, transmit, convey, deliver or prepare for sale or exchange, dispose for any consideration whatsoever, or transmit, convey or deliver in pursuance of a sale, exchange or disposal as aforesaid"**

32. The seized drugs were recovered from First Aid Kit boxes at the Appellant's workshop. DW2 testified that the articles were to be used in case of any medical emergency at the Appellant's premises. This does not amount to a sale within the meaning of Section 2 of the Act. The prosecution failed to adduce evidence to prove that the recovered articles were intended for sale. PW1 and PW2 told the court that the Appellant company dealt with machinery and not sale of drugs. The particulars of the charge in Count I were therefore inconsistent with the evidence on record.

33. With regard to deception, no evidence was led by the prosecution to establish that the Appellant labelled, packaged, treated, processed, sold or advertised the seized drugs in a manner that is false, misleading or deceptive as enshrined under Section 9 of the Act. The seized drugs were indicated to have expired on 10th April 2009 and 10th April 2010. The Appellant did not give any misleading or deceptive information regarding the expiry date of the seized articles. There was therefore no deception on the part of the Appellant since the dates clearly showed that the drugs had expired. In any event, the principle issue which needed to be proved, before the issue of deception, was the issue that the articles, the subject of Count 1, were on sale. Having not proved that they were on sale, the deception dos not come in. In the premises, the Appellant's conviction in Count I was not safe and cannot be sustained.

34. With regard to Count 2, Section 30(10) of the Act provides that:

"Any article seized under this Act may at the option of an authorized officer be kept or stored in the premises where it was seized or may at the direction of an authorized officer be removed to any other proper place; and any person who removes, alters or interferes in any way with articles seized under this Act without the authority of an authorized officer shall be guilty of an offence."

35. There is no dispute that a healthy and safety inspection was conducted at the Appellant's premises on the date in issue. There is dispute whether the articles, as detailed in the charge sheet, were seized. PW1 and PW2 testified that they left the seized articles at the Appellant's premises. They told the court that Seizure Form "B" was used in instances where seized items were left in the premises where they were recovered from. This fact was corroborated by DW1 who stated that PW1 and PW2 did not leave the Appellant's premises with any items.

36. The fact that the seized items could later not be found at the Appellant's premises means that the Appellant had interfered with the same. PW1 and PW2 testified that they gave the Appellant a copy of the seizure notice. The said notice was received by DW1 on behalf of DW3. Even though DW1 was not an employee of the Appellant, he did not deny receiving a copy of the seizure form on behalf of DW3.

37. DW3 in his testimony told the court that he instructed DW1 to show PW1 and PW2 around the premises. He stated that DW1 reported to him. The Appellant was therefore aware of the Seizure Notice issued by PW1 and PW2. The Seizure Notice clearly indicated that removal or interference in any way with the articles seized as particularized in the Notice, without the authority of the authorized officer amounted to an offence under Section 30 (10) of the Act.

38. I find that the Appellant was put on notice, and therefore was aware that any interference with the seized articles amounted to an offence. The articles could not be found later. The only inference the court can make is that the Appellant removed them from the premises.

39. The only issue is whether, the articles not having been kept by the Appellant for sale, as contemplated under section 9 of the Act, removing them constituted an offence. The Appellant should have complied with the Notice of Seizure which gave a penal notice if the articles were removed. They ought not to have removed them.

40. The defence was arguing that the articles were not expired, and they brought DW3 to say as much. That evidence is not dependable for the simple reason that the Seizure Notice is proof beyond doubt that the articles were expired as shown on the document, when PW1 and 2 saw them. The evidence of DW3, attempting to vary documentary evidence contrary to section 83 of the Evidence Act, is not tenable.

41. In the result the conviction in Count 2 was safe and is accordingly up held.

Sentence

42. The trial court sentenced the Appellant in the present appeal to pay a fine of Kshs. 30,000/- for both Count I and 2, and in default serve a custodial sentence of six (6) months. The learned trial magistrate did not indicate what fine was to be paid in satisfaction of each count of offence. That is a serious error in sentencing. To explain, supposing the Appellant could not be able to meet the fine until a subsequent time. How would the fine payable after lapse of time be computed.

43. The learned trial magistrate should have pronounced a specific fine for each count of offence. No law allows for imposition of a composite fine for several counts of offences. For that reason, the sentence of the trial court was bad in law for being erroneous. The same is set aside under section 364 of the Criminal Procedure Code.

44. The offence committed by the Appellant is a technical one. He removed articles which were under a Seizure Notice. That said, it has not escaped the court's attention that the reason for the seizure was mistaken, as the possession of those articles by the Appellant did not constitute the offence for which they were seized, or at all. In the circumstances, I find that the sentence the Appellant should serve is an unconditional discharge under section 35(1) of the Penal Code.

45. In the result, in substitution of the order of sentence made by the trail court, I order for an unconditional discharge of the Appellant. The appeal succeeds to that extent.

46. Those are the orders of this court.

DATED, SIGNED AND DELIVERED THROUGH TEAMS THIS 3rd DAY OF DECEMBER, 2020.

LESIIT, J.

JUDGE

In the presence of

Mr. Kinyua, ……Court Assistant

Mr. Mwihuri …….For the Applicants

Mr. Mutuma …….. For the State

LESIIT, J

JUDGE

3rd December, 2020