



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 46 OF 2015

DAVID KAMAU.....APPLICANT

VERSUS

REPUBLIC.....ACCUSED

JUDGMENT

The appellant David Kamau was charged and convicted of practicing veterinary medicine without being registered as a veterinary surgeon contrary to **Section 15(7) of the veterinary surgeons and veterinary Para-professional Act 2011**. He was sentenced to a fine of Kshs.20,000/= in default to serve three months imprisonment. He was charged before Chief Magistrate's Court at Kerugoya Cr. Case No. 249/2014.

The appellant was dissatisfied with the conviction and sentence and filed this appeal which raises the following grounds:-

1. The learned trial Magistrate erred in law in failing to address himself to the full meaning, purport and tenor of section 40 of the Veterinary Surgeon and Veterinary Para-professionals Act 2011 in so far as Count 2 was concerned.
2. The learned trial Magistrate erred in law and fact when he made a finding that the appellant was in charge of all the operations of the premises, hence arrived at a wrong conclusion.
3. The learned trial Magistrate erred in law and fact for not making any finding that the veterinary section was being manned/superintended by one Mary Kagwana who was neither arrested nor made a prosecution witness.
4. The learned trial Magistrate erred in law and fact in not making a finding that the appellant was not found practicing or selling/dispensing veterinary medicine, and hence count 2 was not in any way supported by the evidence on record, and the learned trial Magistrate failed to consider the evidence tendered in defence of the case.
5. The conviction was against the weight of the evidence adduced.

He prays that the appeal be allowed, conviction be quashed, sentence be set aside and the fine paid be refunded.

The State opposed the appeal and filed written submissions on 22/5/18. They urge the court to find that the appeal lacks merits and dismiss it.

The facts of the case are that on 14/5/14 officers from Kenya Veterinary Board Doctor Indraph Mugambi Ragwa and Doctor Rispah Orwe and Doctor Livingstone Kibunja who is the District Veterinary Officer Kirinyaga were on inspection exercise in Kirinyaga County. One of the premises they visited was Medikam Agrovvet which had a chemist and Agrovvet outlet. They introduced themselves to the owner and that they were inspecting on compliance with the **Veterinary Surgeon and Veterinary Paraprofessionals Act 2011** as well as the **Pharmacy and Poisons Act Cap 244 Laws of Kenya**. The owner of the Chemist was the appellant in this case and on enquiries he said he is the one who was dispensing veterinary drugs. On being asked whether he was registered by the Kenya Veterinary Board as required under Section 15(7) of the Act the appellant stated that he was not registered. He was promptly informed that he had committed an offence. Upon inspection the officers found that there were part -1- poison in the Agrovvet which were not kept as provided under the Act. The appellant was arrested and charged.

In his defence the appellant stated that he could only be held accountable for acts of omission or commission with the human section of the Chemist but not the veterinary section.

I have considered the evidence which was adduced before the trial court. The appellant was charged based on the fact that he admitted that he is the one who dispenses the veterinary drugs and yet he was not registered. The appellant admitted that the Chemist had a section for

human medicine and another for veterinary medicine. There was evidence that the appellant was the one in charge of the operations in the Chemist. This the appellant also admitted.

It is my finding that the evidence tendered proved that the appellant had not complied with Section 15(7) of the **Veterinary Surgeons and Veterinary Para-professionals Act (to be referred to as the 'Act')**.

I make this finding in line with the holding in **Okeno –v- R(1972) E. A 32** where it was held that a 1st appellate court has to reconsider the evidence, re-evaluate it and makes its own independent finding but bearing in mind that it did not see or hear the witnesses when they testified and leave room for that.

The appellant faulted the court on various grounds which I will now consider.

Prosecution without sanction of Director of Public Prosecution. Whether the trial was vitiated by non-compliance with Section 40 of the 'Act'.

Section 40 of the Veterinary Para-professional Act 2011 provides:

- 1. Prosecution for an offence under this Act shall not be instituted without the sanction of the Director of Public Prosecutions.*
- 2. Without prejudice to the provisions of subsection (1), the Director of Public Prosecutions, may give consent to inspectors or other officers designated by the Board under this Act.*

The appellant claims that a prosecutor has to have sanction of the Director of Public Prosecution and the Director of Public Prosecution ought to have given consent.

In response, the prosecution stated that on institution of proceedings, officers from the office of the Director of Public Prosecutions Act under the authority of the Director of Public Prosecution. In respect of any documents for authority to act then it was an oversight. That an officer from the office of the Director of Public Prosecutions is sufficient to represent him in court since state counsels from Office of Director of Public Prosecutions have authority to represent the Director of Public Prosecution in court. It is submitted that **Section 40 of the Act** was fully complied with as the prosecutor I P Limo was gazette by Director of Public Prosecution to undertake prosecutions and thereafter prosecution was taken over by Joan and Mr. Sitati who were prosecutions counsels in the office of the Director of Public Prosecutions.

Section 2 of the Office of the Director of Public Prosecutions Act, 2013 provides:

“Prosecution Counsel” means the Director of Public Prosecutions, every legally qualified member of the office and any other legally qualified person appointed by the Director under this Act to undertake any prosecution under his or her general or special instructions

“prosecutor” means a person appointed under section 29 and 30 as a prosecutor and shall include Private Prosecutors;

“public prosecutor” means the Director and such other persons exercising the delegated powers of the Director under Article 157(9) of the Constitution.

[Article 157(9) of the Constitution - *The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.]*

Section 29 of the Office of the Director of Public Prosecutions Act, 2013 provides:

- 1. The Director may appoint any qualified person to prosecute on his or her behalf.*
- 2. A person appointed under subsection (1) shall be known as a public prosecutor.*
- 3. A public prosecutor appointed under subsection (1) shall be responsible to the Director and shall be bound to comply with all guidelines and instructions issued by the Director in respect of prosecutions.*

In view of all the above provisions, the prosecution of this case was being undertaken by prosecutors who were exercising delegated powers of the Director of Public Prosecutions and are responsible to the said Director. It is therefore clear that there was compliance with the provisions of the **Act** and this ground is without merits.

The appellant submitted on ground 2,3,4 & 5 together. His contention is that there was a lady in the shop one Mary Kangwana who was on the side of Animal Medicine and was not arrested nor was she made a prosecution witness to explain the circumstances under which she was found in the Agrovet shop.

From the evidence tendered, the lady who was in the shop was not qualified. She was not dispensing medicine. The appellant acted fast to shield her when he admitted to the witnesses that he is the one who was dispensing the veterinary medicine. The witnesses did not need to go further after the appellant admitted that he is the one who was dispensing medicine. The appellant was then asked for a certificate from

the board and he had none. There was cogent evidence that the appellant stated that he was the one in charge of the veterinary section. He was indeed the owner of the Chemist. I find that once the accused admitted, the prosecution did not have to belabour by arresting the lady who was in the shop. The fact that the appellant had no certificate from the veterinary body is intact, has not been rebutted or disapproved. The prosecution discharged the burden to prove that fact.

Section 15(7) of the Veterinary Para-professional Act 2011 provides:

“Any person who practices veterinary medicine or surgery without having been registered under this section or otherwise contravenes any other provisions of this section commits an offence and shall be liable, on conviction, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding twelve months, or to both.”

The appellant was dealing in veterinary medicine without a certificate. The appellant cannot back-track and say that he was not the one in charge. It was proved that veterinary medicine was being sold in the chemist, a fact not in dispute. He was therefore required to have been registered by the Kenya Veterinary Board.

Whether the prosecution proved its case.

PW 1, PW 2 and PW 3 stated that they were on an inspection of Agrovets shops in Kerugoya. They proceeded to Medikam Agrovets which had section for humans and veterinary. On inquiry of who was in charge of the Agrovets, the lady by the name Mary Kagwana who stated she was not qualified to operate the veterinary section. The appellant came forward and stated he was in charge of all operations of the premises. He confirmed that he did not have a license and he was arrested.

The prosecution proved that the appellant as the owner of the premises was dispensing veterinary medicines which were found at his premises. The appellant duly confirmed to the officers that he was the owner of the premises and that he was not registered to dispense the said veterinary medicines. Therefore he is stopped from claiming that the trial magistrate made wrong conclusion that he was in charge of all operation of the premises Therefore the charge was proved beyond any reasonable doubt and the appellant was rightfully convicted.

The appeal is without merits and is dismissed.

Dated at Kerugoya this 1ST day of November 2018.

L. W. GITARI

JUDGE