



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

HIGH COURT CRIMINAL APPEAL NO. 99 OF 2008

(Arising from Nairobi Chief Magistrate Cr. Case No. 447 of 2007)

REPUBLIC.....APPELLANT

VERSUS

HARISH PATEL.....RESPONDENT

JUDGMENT

Harish Patel the appellant herein was charged with the offence of failing to issue printed original receipts to the purchaser contrary to **Regulation 5(e)(ii)** as read with **Regulation 9 of the Value Added Tax (Electronic Tax Register) Regulations of Legal Notice 110 of 2004 of Value Added Tax Act Cap 476 Laws of Kenya**. The particulars of the offence were that on 9th day of March 2007 at Kings Ware Limited within Nairobi Area failed to issue Electronic Tax Register fiscalised receipt to Elizabeth Njeri upon sale of twelve paper bags and six towels.

He was convicted on his own plea of guilty and was sentenced to a fine of Kshs. 500,000/= in default to serve one year in jail. He appealed only against the sentence stating that the fine was manifestly harsh, excessive and oppressive, that the trial court did not take into consideration the appellant's mitigating factor when sentencing him and that the trial magistrate did not also take into account the circumstances under which the offence was committed.

The appeal was canvassed before me on 9th July 2015. Learned Counsel Ms. Samnaki appeared for the appellant. She submitted that the appellant was a first offender and in pleading guilty he had informed the court the circumstances under which he failed to use the Electronic Tax Register. She pointed out that the appellant had bought the ETR Machine by 20th March 2007 and that he took the plea on 11th May 2007. As at the time the machine was procured, there was uncertainty in the market on whether they would be used. Furthermore, some of the machines that were imported were faulty hence leading the appellant not to install the same for use in his business. She further submitted that given those circumstance it was not the appellants intended fault not to use the ETR machine. In that respect, the maximum penalty meted against him was punitive in the circumstances.

Learned state Counsel Ms. Atina opposed the appeal stating that the learned trial magistrate had taken into account the appellant's mitigating factor before sentencing him and had given reasons why she thought that those factors were not plausible. In particular, she cited **Regulation 5(f) of Legal Notice No. 10 of 2004 of the Value Added Tax Act** which provided that if the ETR machine was not available the Commissioner for Customs ought to have been informed. Furthermore, the appellant bought the machine

after he had been arrested. Ms Atina further submitted that the sentence handed to the appellant was lawful and the appeal ought to be dismissed.

In rejoinder, Ms Atina submitted that although the ETR machine may have been bought after the appellant was arrested, the court should take into account that he had already put in place the use of the ETR machine and was complying with the Law. Under Section 348 of Criminal Procedure Code:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on the plea by a subordinate court, except as to the extent or legality of the sentence.”

Given this provision, the onus of this court is to address itself as to the legality of the sentence as the appellant was convicted on his own plea of guilty. Under ***Regulation 9 of the Value Added Tax (Electronic Tax Registers) Regulations*** as gazetted under Legal Notice No. 110 of 2004;

“Any person who fails to comply with these Regulations shall be guilty of an offence and shall be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.”

In the present case, the appellant was only sentenced to a fine and not to both a fine and an imprisonment term as provided by the said Regulation 9. In that case, the sentence would be said to be reasonable. However, the court ought to have taken into account that the appellant was a first offender and that it is never prudent to impose the maximum sentence unless where the law provides for a mandatory sentence.

The learned trial magistrate under the provision had a window of varying the sentence depending on the circumstances of the case. Although the appellant failed to inform the Commissioner of Customs of his failure to install the ETR Machine, given that he was a first offender, the imposition of a maximum fine was not only excessive but also harsh in the circumstances. To that extent, this appeal shall succeed partially with the following orders. I substitute the sentence of a fine of Kshs. 500,000/= that was paid with an order that the appellant be and is hereby sentenced to pay a fine of Kshs. 300,000/=. The excess of Kshs. 200,000/= paid should be refunded to him forthwith. It is so ordered.

DATED AND DELIVERED THIS 8TH DAY OF OCTOBER, 2015

G. W. NGENYE – MACHARIA

JUDGE

Saini holding brief for Ms. Samnaki for the Appellant

Ms. Atina for the Respondent