



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 105 OF 2015

(CORAM: J. A. MAKAU – J.)

PAUL OTIENO MUSUMBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 580 of 2015 in Ukwala Law Court before Hon. R.M. Oanda – S.R.M.)

JUDGMENT

1. The Appellant **PAUL OTIENO MUSUMBA** faced three counts of **being in possession of uncustomed goods c/s 200 (d)(iii) as read with Section 210 (c) and Section 213 of the East African Community Customs Management Act 2004**. The particulars are that on 11th day of November, 2015 at Udira Kamrembo Market in Ugenya Sub-county within Siaya County was found being possession of a twenty bundles Super match Kings Cigarettes valued at Shs.20,000/= in contravention of the East African Community Customs Management Act 2004. He faced Count II of being in **possession of counterfeit goods contrary to Section (32) (a) as read with Section 35(1) (a) of Anti- counterfeit Act No. 13 of 2008**. The particulars are that on 11th day of November, 2013 at Udira Kamrembo Market in Ugenya Sub-county within Siaya County without authority of Mastermind Tobacco Kenya Limited the owner of intellectual property right was counterfeiting twenty bundles of Supermatch cigarettes valued at Kshs.2000/= by removing labels of packages to conceal the identity and the origin of the said products of Mastermind Tobacco Kenya Limited. The appellant was also charged with count III **conspiring to contravene provisions of the East African Community Customs Management Act 2004 contrary to Section 193 of the East African Community Customs Management Act 2004**. The particulars of the offence are that on the 11th day of November, 2015 at Udira Kamrembo Market in Ugenya Sub-county within Siaya County conspired to contravene provisions of the East African Community Customs Management Act 2004 contrary to Section 193 of the East African Community Customs Management Act 2004 by unlawfully having twenty bundles Ugandan Cigarettes.

2. That when charge was read to the appellant he replied, true. The prosecution proceeded to give the facts of case and stated:

“---- facts as per charge sheet the exhibits are proof in Court – exhibit P1”

3. The learned trial Magistrate did not seek admission or rejection of the facts but proceeded to convict the appellant on what he termed as appellant's own admission.

4. The learned trial Magistrate then sentenced the appellant on count 1 to pay a

fine of Kshs.10,000/= in default to one (1) year imprisonment, on Count II he discharged the appellant under Section 35(1) of the Penal Code and on Count III the Appellant was imprisoned to serve six (6) months imprisonment and sentence to run consecutively.

5 Aggrieved by the conviction and sentence the appellant was provoked to prefer the appeal setting out 4 grounds of appeal as follows:

“a) The Learned Magistrate erred in law and in fact and misdirected himself by sentencing the accused based on an unequivocal plea.

b) The Learned Magistrate misdirected himself in fact and in law by not appreciating that the charge against the Appellant was defective.

c) The Learned Magistrate erred in law and in fact by failing to indicate in writing the language of the Court at the time the plea was taken.

d) The Sentence imposed by the Learned Magistrate is manifestly excessive.

6. Mr. Ojuro Learned Advocate appearing for the appellant while State was represented by M/s. Odumba Learned State Counsel.

7. Mr. Ojuro on behalf of the Appellant submitted that the trial Magistrate was in error in convicting the Appellant and sentencing him on an unequivocal plea; and/or a defective charge. That the Court was in error in failing to indicate the language of Court at the time of plea taking and in imposing a manifestly excessive sentence.

8. The Learned State Counsel M/s. Odumba on her part conceded the charge sheet was defective on all counts and conceded the appeal.

9. On Count I under Section 200 of the Act, deals with imports or Coastwise or exportation or puts goods on board any aircraft, vehicle or vessel. Section 213 deals with Police powers seize and detain any aircraft, vessel, vehicle, goods etc. The particulars of the charge do not state that the goods were found in any of the condition set out in Count 1. There is variance between the charge sheet and the particulars. In my view the charge is defective.

10. On Count II, the appellant was allegedly counterfeiting twenty bundles of Super Match cigarettes, by removing labels of packages to conceal identity and origin of the said products of Mastermind Tobacco Kenya Limited. That other than removing labels the particulars do not state that the appellant was in possession or control in the course of trade any counterfeit goods. The removing of labels of packages to conceal the identity and the origin may be unlawful but that do not make the goods counterfeit goods in terms of **Section 32 (a) of Anti-Counterfeit Act No. 13 of 2008 and Section 2** which deals with counterfeiting. The charge should have stated that there was labeling or making after removing of the label in the course of trade. Particulars of the charge did not comply with Section 2 and 32 of the Anti-Counterfeit Act and as such it is defective.

11. On Count III on conspiring to contravene **Section 193 of the East African Community Customs Management Act 2004**, the particulars do not indicate with whom the appellant had conspired to contravene the provisions of relevant Act. Section 193 of the East African Community Customs Management Act 2004 is very clear that a suspect must conspire with another person or persons to contravene provisions of the Act. One cannot consider alone. The charge in my view was also defective.

12. The State Counsel conceded the Appeal and rightly so as the charges were defective. That being the case the plea taken was based on a defective charge and was not unequivocal plea of guilty. The Learned trial Magistrate was in error by failing to appreciate the charge against the appellant was defective and as such no plea could be taken against the appellant.

13. It is significant in this appeal to note facts of the case were not given in regard of the three counts. That should have been done instead of the prosecution stating facts as per the charge sheet. Facts in criminal cases are details of the particulars of the charge which are usually a summary as per charge sheet. A party who is charged is entitled to full details of the charge so as to reconsider them and respond to them either admitting or denying them. The trial Court cannot in my view convict the accused until facts are given and admitted.

14. In the instant case facts were not given nor the appellant given an opportunity to admit or deny the facts but was erroneously convicted without admitting the facts. The appellant was in my view sentenced by trial Court erroneously.

15. The trial Magistrate also made an order that the sentenced to run consecutively. In Count I, he had fined the appellant Kshs.10,000 in default to serve imprisonment for 1 year and in Count III to serve six months imprisonment. That if the appellant had failed to pay the fine did it mean sentence in the second count would start running from that he would have paid the fine or serving the 1 year imprisonment. The offences arose out of one transaction and on conviction the sentence should have been ordered to run concurrently. The longest sentence that the appellant should have been ordered to serve should have been 1 year but not 1 ½ years as ordered.

16. In the instant case the Court did not make an order for forfeiture or payments of duty upon conviction of the appellant and that was an error on the part of the trial Court. **Section 201 of The East African Community Customs Management Act** – provides:

“201. Where on conviction for an offence under this Act, a person is liable to pay a fine, that person shall, unless the goods are prohibited goods or are ordered to be forfeited under this Act, pay duty on the goods in addition to the fine.”

The Court's judgment is silent or what become to the goods found in possession of appellant contrary to Section 201 of the East African Community Customs Management Act.

17. Having come to the conclusion, I have, I find that the conviction and sentence imposed upon the appellant was unsafe and unsatisfactory. That as the goods found with the appellant were not proved to be prohibited goods or attracted unpaid duty, I therefore order the same to be released to the appellant forthwith. I hereby quash the conviction and set aside the sentence on all counts. The Appellant is set at liberty forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 3RD DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 3RD DAY OF DECEMBER, 2015.

In the presence of:

Mr. Odumba State Counsel – present

Appellant – Present

Court Clerk - O. K. Akwany

Court Clerk - Mohammed Akideh

J. A. MAKAU

JUDGE