REPUBLIC OF KENYA
Karanja v Republic
High Court, at Nairobi
September 25, 1985

Joseph Butler-Sloss J

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Criminal Appeal Nos 1680 and 1681 of 1984 (Consolidated)

JUDGMENT

On October 19, 1984, John Thika Mbugua and James Njuguna Karanja appeared before the district magistrate's court at Kajiado in Criminal Case No 887 of 1984.

They were charged jointly ng regulated produce without a permit contrary to rule 6(a) of the Agricultural Produce Marketing (Maize and Produce Board) (Movement of Regulated Produce) Regulations as read with rule 6(c) of the said regulations. These regulations are made pursuant to section 16 of the Agricultural Produce Marketing Act, cap 320 of the Laws of Kenya.

Regulation 6(a) reads:

> ***"A person who moves, or causes or permits to be moved, any regulated produce contrary to the provisions of these Regulations."***

Regulation 6(c) reads:

> ***"A person who fails without reasonable excuse to carry a permit issued under these regulations with the regulated produce in respect of which it has been issued or to produce the permit on request being made under regulation 4."***

Then there follows a general provision applicable to Regulation 6(a), 6(b) and 6(c) to the effect that such a person shall be guilty of an offence and liable to a fine not exceeding two thousand shillings, and the court may in addition order that any regulated produce in respect of which that person is convicted shall be forfeited to the Board, which is the Marketing Board established under section 3 of the Act.

The particulars of offence alleged that the accused on October 15, 1984, at about 6.00 pm along the Pipeline Road, Loitokitok in Kajiado district of the Rift Valley province, jointly moved 22 bags of beans and 14 bags of pigeon peas in a motor vehicle registration No. KVJ 967, make Canter, without a permit issued from the National Cereals and Produce Board.

At first, both accused pleaded not guilty but on October 25, 1984 both accused changed their pleas and admitted there was no permit from the Board. The prosecutor outlined the circumstances in which the accused were intercepted by the police, and were found to be moving, with their lorry, the produce

referred to in the charge, and had no permit for doing so. Each accused said “I admit the facts as presented”.

The prosecution then invited the court to treat the accused as first offenders but asked that movement of produce without a permit should be viewed with the seriousness it deserves.

In mitigation, both accused begged forgiveness, and claimed to have recorded a letter which was dated September 28, 1984 and was signed by EO Machogu, district officer at Kikuyu, as being a permit.

In sentencing the accused, the learned magistrate considered the letter to be selfexplanatory in the sense that the person to whom it was addressed, Robert Njoroge Gathimba, should have obtained a permit, and the accused ought to have seen the permit before they undertook to move the produce.

The magistrate then fined each accused a sum of Kshs 1,500 and ordered that, in default of paying the fine, each should be liable to detention for a period of three months. He further ordered that twenty-two bags of beans and fourteen bags of pigeon peas should be forfeited. Both accused now appeal against the sentence passed by the learned magistrate in appeals numbered 1680 and 1681 of 1984. Since, as appears from their respective petitions of appeal, the appellants rely on the same grounds of appeal, the two appeals have, with the consent of the appellants and the respondent, been heard together. Mr Kamaara has appeared on behalf of the appellants. The respondent has been represented by Miss Mbrarine.

The first point taken by Mr Kamaara is that this offence is punishable with a fine not exceeding Kshs 2,000, and that the fines imposed by the learned magistrate exceed, in the aggregate, this amount by Kshs 1,000, and, in consequence, are manifestly excessive.However, a careful reading of Regulation 6, or even just a reading of it, would reveal that it provides for a person being guilty of an offence, and that person being liable to a fine not exceeding two thousand shillings. In the present case, each appellant is guilty of an offence under Regulation 6, and each appellant is therefore liable to a fine of two thousand shillings, and it is of no significance that because there is more than one offender the fines imposed amount to more than could be imposed in the case of there being only one offender. What is, however, significant is that the fines imposed by the learned magistrate were well below the maximum figure which might have been imposed.

Mr Kamaara also took a related point. He contended that the learned magistrate had no jurisdiction to impose a period of detention if the appellants defaulted in paying the fine.Regulation 6, he pointed out, contained no express provision for imprisonment or detention in default of payment. It would, of course, be highly unsatisfactory if the magistrate, in imposing the fine, had no effective or realistic means of enforcing it. I am satisfied, however, that that is not the case. The matter is covered by the ample provisions of section 28 of the Penal Code, cap 63 of the Laws of Kenya. Sub-section 2 of section 28, omitting irrelevant parts, is as follows:

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of a fine shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale.

For an amount exceeding Kshs 500 but not exceeding Kshs 3,000, the maximum period is three months.

I accordingly hold that the alternative penalty imposed by the learned magistrate in default of payment of a fine was lawful, and can not be objected to on appeal.

It was further argued by Mr Kamaara that the appellants should have been punished less severely because they had mistaken the significance of the letter to which I have already referred. In passing sentence, the learned magistrate himself made reference to the letter.It is in my judgment quite obvious that that letter was no permit, and I find it incredible that the appellants should have believed it to be a permit. The letter makes no reference to any particular quantity of produce or to the occasion when any

particular quantity may be moved but only to the need for Robert Njoroge Gathimba to obtain supplies of beans and green vegetables. There is, in my judgment, no merit in this point.

It was further argued by Mr Kamaara that the appellants should not have been fined without enquiry being first made as to their ability to pay a fine. In this connection, I was referred to the case of The Republic v Benjamin Ogweno Koyier which was an application for revision made by the Attorney-General to the High Court in Nairobi, and is reported at page 158 of the Kenya Law Reports under the date July1 4, 1978. At page 160, Sachdeva, J quoted from a circular to magistrates (No 13 of 1956) which was headed "Notes for the Guidance of magistrates" and was issued on the instructions of the then Chief Justice. It states:

Before sentence of fine (other than a trivial amount) is passed, the magistrate should make enquiry as to the means of the convicted person to pay a fine. It is a first principle in inflicting fines that the capacity of the accused to pay should be considered.

The record of the hearing before the magistrate does not indicate that any such enquiry was made, and it could hardly be said that a fine of Kshs 1,500 was a trial amount. Miss Mbrarire, advocate for the respondent, conceded that the fines in this case were what she called "a bit on the high side". I, of course, have no means of enquiring into the financial resources of the appellants, but, in the absence of specific information on the point, I take them to be working men and typical wage-earners. On that basis, I am inclined to the view that the fines are excessive, and I propose to reduce them.

Mr Kamaara argued that the fines were excessive because the magistrate had allowed himself to be influenced by remarks of the prosecutor. It is, of course, quite wrong, and indeed, entirely unacceptable for the prosecution to make any attempt to encourage severity in sentencing. In this case, however, all that the prosecutor appears to have said was that the offence should be viewed with the seriousness it deserves. That appears to me to be an entirely innocuous observation and not to amount to such an irregularity as to justify quashing the sentences altogether.

Finally Mr Kamaara urged that the forfeiture order made by the magistrate should be revoked. The regulations, however, expressly provide for forfeiture and I see no reason why that sanction should not be imposed in this class of case, nor can I see anything harsh or excessive in implementing the regulations as they stand. The matter of forfeiture lay within the discretion of the learned magistrate who, in my judgment, exercised that discretion correctly.

The consequence is that these appeals will be allowed in part, and that, for the fines of Kshs 1,500 imposed by the magistrate there will be substituted fines of Kshs 500, and it is ordered that payment made by the appellants in excess of the sum of Kshs 500 shall, in each case, be remitted to the appellants.