



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 838 of 1994

**GABRIEL DE MELLO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT**

JUDGMENT

Gabriel De Mello was originally the second accused person in the subordinate court together with Peter Mburu Njoroge who was the original first accused person.

They were jointly charged with five counts

Count No. 1 - Conspiracy to defraud contrary to section 317 of the Penal Code.

Count II)

Count III) Forgery contrary to section 349 of the Penal Code

Count IV)

Count V - Being knowingly in fraudulent evasion of duty contrary to section 187 (f) of the

Customs and Exercise Duty Act Cap 472 Laws of Kenya offences are said to have been committed between January and July 1989.

Mr. Njoroge, the Original first accused died a month before the deliver of the judgement of this case. Mr. De Mello the original second accused was found guilty as charged. He was sentenced to 12 months imprisonment -suspended sentence on the first count for conspiracy.

He was fined Kshs.50,000/- fine in default six months imprisonment in count II, III and IV on the forgery and Kshs.50,000/- and in default six months imprisonment on count V evasion of duty.

The original first accused used to work for the Kenya Tea Development Authority/herein referred to as (KTDA) as a factories operation manager, he managed 39 factories owned by KTDA, he looked after the personnel, the tea quality control, the planning and implementation of any capital project within the factories department. He also procured services necessary for the factory operations.

Mr. Njoroge was also involved in dealing with tender received from known manufacturers of machinery and contractors. He would submit tenders to a committee who would in turn chose the appropriate tender. There after the procurement process would be left to Mr. Njoroge once the approval of the tender has been given. He would then make arrangements From the order, shipping and clearing through customs at Mombasa harbour. He would also deal with various agent on this aspect.

Ms Marshall -.... was one such agents who dealt with tea manufacturer machines. The second original accused and now appellant in this case was the managing director of the said company for over 20 years.

KTDA AND M/s Mashall..... had a business relationship. In 1989orders were made through them for the supply of seven boilers and their spare parts.

When the consignment was finally shipped from abroad, the local newspaper "The Standard" exposed a story that KTDA was involved in a scandal whereby the Organisation had imported goods into the country illegally.

The police moved in to investigate. It seems that KTDA were only aware of official imported items only. They made provisions to pay for this. Nonetheless when the consignment was inspected, it was found that there were extra consignment in the department that had not been

approved or sanctioned by KTDA. These were in the four of hard new tyres, carpets and extra spare parts not required for the shipment.

After investigations it was found that the spare parts illegally imported was worth Kshs 1,059,450/-, the duty on them was worthKshs.2,0236,602.75. Both the action of the two accused was to ..conspire to defraud and evade payment of duty.

The two were duly charged with the offences as earlier outlined above.

The trial Magistrate found that it had been proved by the prosecution case that the original accused No.1 an engineer besides being in operation meted that KTDA installed boilers in 1958. The boilers use either fuel oil or firewood The make that use oil fuel is known as runaway and the make that use wood fuel is known as HARMWO RT17 brushes. The technicians were trained to use New-way brushes.

He then notified the manufactures that KTDA would refine New - way-buses only.

The trial magistrate found stated

"he made the decision to change theunits without first original to the KTDA,tender committee that as Hamothylines are- more costly he wrote to the manufacturers and their local agent to the effect that KTDA should be compensated in price differentiated by supplying of accessories and spares."

It seems that the original second accused complied to these changes. It was established that the extra accessories and spare parts did not form part of the original consignment and order. It was also established that the parts were not refined in the installation of the seven boilers. The two accused stated that they made no claim on the consignment. That other-items found such as the new tyres and carpets were used to the consignment so as to protect it. The trial magistrate did not believe their story. He duly convicted the two on all counts before court.

The second original accused now appeals against this conviction and sentence, this advocate filed fifteen grounds of appeal, he submitted no list of authorities as he said he had none to submit.

A summary of the fifteen grounds of appeal are as follows.

That the magistrate erred on facts not prove.

That the appellant was charged with other not before the court.

That the ones to prove the case was not to be placed on the appellant.

That the goods said to be imported lacked proper documentation.

That the magistrate held there was an appeal of forgery' instead of finding them to be forgery.

That the appellant had no part in the evasion of duty.

That he had no control over the ...

There was no proof that M/s Mashall-Fonter were infact the owners of the illegal consignment although their names were on the goods.

There was no claim by the appellant over the extra goods.

That the fact that the goods were in the KTDA container with the appellant label should be proof that everything in the container belongs to the KTDA.

That there was no endure of fraud.

That a report during the trial, not audited in ... was accepted seen and perused by the first trial magistrate.

That the conviction of the appellant was done against the weight of the

Another ground (no. 6) was that the case was heard by two magistrates. The first magistrate had heard the case then disappeared. The proceedings were taken over by a second magistrate. At the time of hearing of this appeal the appellants advocate did not refer to his grounds of appeal in giving his argument. He addressed the court generally stating that magistrate gave a fine that there would be no appeal.

This was an incorrect conclusion as the trial magistrate sentenced the appellant to 12 months imprisonment although it was a suspended sentence.

The other aspect brought up by the advocate for the appellant is that the appeal is ... to be allowed as the appellant has originated to Canada, he .. to therefore have a clear record in order to settle there.

I believe that the appeal ought to have been argued on merits and that the clear provision of the facts and Law appealed against should have been put forward

The advocate also stated that the original accused no. 1 was legally authorised to order the

shipment but failed to get authorisation for the extra goods found in the containers. He also dealt with the change of magistrate in the middle of the trial.

The State Counsel conceded it the appeal based on the change of magistrate in the middle of a trial.

Let me first look briefly at this point. Mr. Omondi-Tunya began this trial and took down all the evidence and hear all the witnesses including the original accused no. 1. Mr. Bain Ochieng then heard the evidence of the original accused no. 2.

This is in order as it is permitted under section 200 of the criminal procedure code. This is especially so where the former magistrate was not available to continue with the case.

What the new succeeding magistrate should have done in taking over the case is to inform the two accused of their rights to demand if they so wish to recall the witnesses. The witnesses would be reheard. This is not mandatory.

I am satisfied that the appellant had an able advocate who could have demanded for the recalling of the witnesses but did not.

Another aspect concerns a report the former magistrate had in his possession. I believe this was not seen by the latter magistrate and as such the appellant was not prejudiced in any way. Be as it may the main issue before me is whether the changes against the appellants were proved beyond any reasonable doubt.

From the evidence before the court I find that all the times registered to be ordered by the accused no. 1 was so ordered by accused no. 2. Some items most certainly had the appellants name on them. Was there conspiracy to defraud KTDA of their goods?

The trial magistrate found from the evidence before him that the accused no. 1 had made orders which was within his authority to do. Unfortunately he did not refer the change of such orders to the ... or necessary committee for approval. If he had the ... would have approved the payment of import duty and expenses incurred.

This was irregular. Did the appellant have "Mens Rea?" I believe that he may not. From letters of his company which had nothing to do with this case (except on the issue of known signature.) he most certainly tried his level best to pay any extra costs on import duty. As to this case the items all belonged to KTDA even though the extra items were delivered irregularly in the course of business by accused no. 1.

I also find that telex machine was denied by defendants to belong to any of them. That the new tyres and carpets were to benefit KTDA after being used as cushion.

I would nevertheless rule that, the issue of "mens Rea" had not been fully dealt with. I also find that proof of forgery of documents was lacking. The documents were in order but the extra items found in the container were ordered by accused no. 1 through accused no.2 but no clarification or sanction was sort from the main KTDA Committee.

I hereby allow this appeal. I quash ..the conviction set the sentence aside. The fine paid is to be refunded to the appellant.

Dated this 11th day of October 1998 at Nairobi.

Mary A. Ang'awa
Judge