REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NOS 111, 112, 113, 114 & 115 OF 1993

ENOCK OTIENO OTIENO

OTIENO JACERO

JOSEPH ORWA OBONYO

SAMSON NYAKWA ODEYO

ZACHARY OPIYO MATEWA…..…….. APPELLANT

VERSUS

REPUBLIC…….. RESPONDENT

(From Original Conviction and Sentence in Criminal Case No 70 of

1993 of the Chief Magistrate's Court at Kisumu:

C O Ong'Udi Esq CM)

JUDGMENT

Appeals Nos 111, 112, 113, 114 and 115 all of 1993 have been consolidated. The appellants therein hereinafter referred to as 1st to 5th appellants respectively were convicted in the lower court of two counts of transporting petroleum products without a licence contrary to rule 7(1) of the Petroleum Rules as read with section 7 of the Petroleum Act cap 116 of the Laws of Kenya, and failure to exhibit words "motor spirit kerosene" or any other words indicating the nature of the contents, contrary to rule 8(d) as read with section 6 of the Petroleum Act cap 116 of the Laws of Kenya.

They were each fined 400/= on count 1 and 450/= on count 2 and ordered in default to serve a month in prison on each count.

In addition the proceeds of the paraffin giving rise to the prosecution and the lorry that was carrying them were ordered forfeited.

Mr Ouma who appeared with Ombija for the appellants in this appeal has put up a spirited submission in urging this Court to allow the appeal and quash the orders of the learned Chief Magistrate who tried the appellants in the lower court.

He contends that section 2 of cap 116 defines what petroleum product is and the appellants having pleaded not guilty it was incumbent upon the prosecution to prove beyond reasonable doubt that the stuff that formed the subject of the charge was indeed petroleum product. There having been no evidence to that effect, the Court should not have assumed that this was a petroleum product.

He further submits the stuff not having been proved to fall under rule 3 of the Petroleum Rules, the appellants should have been acquitted.

Rule 3 of the Petroleum Rules states:

> "(1)These Rules shall apply only to petroleum having a flashing point below 150 F and the word 'petroleum' shall be construed accordingly.
>
> (2) For the purposes of these Rules, petroleum is divided into -
>
> petroleum class A having a flashing point below 73 F; and Petroleum Class B having a flashing point of 73 F or above."

Mr Ouma's contention is that even if these were shown to be a petroleum product it was not shown or proved to be one to which the Rules applied. It was further submitted that no quantity was specifically proved which was necessary before a conviction in view of rule 6 of the Petroleum Rules which provides that the Rules shall not apply to Class A petroleum not exceeding twelve gallons in quantity or Class B petroleum not exceeding twenty gallons.

Of course, there is no doubt that this was a criminal charge which was subject to the standard of proof applicable to most criminal charges. The burden of proof was on the prosecution throughout and the standard of proof was beyond reasonable doubt. The charge was based on the premises that the stuff was a petroleum product. It is obvious that the actual quantity of the stuff was not determined, there is no doubt that it was in excess of the amounts that rule 6 of the Petroleum Rules talks of namely twelve gallons in case of Class A and twenty gallons in case of Class B.

I have no doubt that everybody presumes that everybody else knows what kerosene is. That may be so and kerosene may be a product of petroleum. The question is, is it such a product that provisions of cap 116 applies to? Section 2 of the Act states:-

> "Petroleum' includes any inflammable liquid made from petroleum; coal schist, shale, peat or any other biluminous substance or from any product of petroleum"

and rule 3 says that the rules only apply to petroleum having a flashing point below 150 F and so on. This means of course that there are other petroleums which have flashing points above 150 F. Where does kerosene lie? The burden of proving that the rules apply to it was on the prosecution. But first they had to prove that the stuff was kerosene. It is no use, with respect, saying that the appellants admitted that it was kerosene. With their pleas of not guilty, the prosecution had to prove each and every ingredient of the charge. The defence has no duty to help prove the charge against themselves. In any case by stating or admitting that the stuff was kerosene did not necessarily prove that it was such product that the petroleum Rules applied to. The submissions by Mr Ouma in this regard are not without merit. From the recorded evidence, I find that the prosecution failed to prove that the stuff was one to which the rules applied. I have on a previous decision on a similar matter held as much ad I have been given no reason to hold otherwise.

Appellant No 1 in his defence said that he was only a casual engaged to load the jerricans as did appellant No 5. Their stories were not controverted and they ought to have been acquitted of both charges. The people who were concerned with transportation were the driver, the turnboy and the owner of the stuff and if the charges had been proved, these were the three who were liable to convictions.

The learned Chief Magistrate complied with the law regarding forfeiture. The owner of the lorry who was

allowed to adduce additional evidence in these appeals does not seem to have had the notice brought to his attention. His driver – should have let him know. However, that is neither here nor there considering the finding of this Court that the stuff was not established to be a petroleum product to which the Act applies.

The orders of this Court on appeal are these:-

1. The appeals against convictions in respect of all the Appellants in each count are allowed and the convictions accordingly quashed.

2. The sentences are set aside and the fines if they had been paid, must now be refunded.

3. The orders of forfeiture are set aside and the lorry is to be released to its registered owner Edward Adero Kobe and the proceeds from the sale of the stuff be released to appellant No 5 Zachary Opiyo Matewa.

Orders accordingly.

Dated and delivered at Kisumu this 17th day of September, 1993

J.A. MANGO

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JUDGE