REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO 34 & 33 OF 1990

KAMAU MUCHIRI

SAMMY MACHARIA …..…….APPELLANTS

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

Two appeals have been consolidated for the purpose of hearing. These are Criminal Appeal No 33 of 1990 filed by Sammy Macharia and Criminal Appeal No 34 of 1990 filed by Kamau Muchiri.

The two appellants are appealing against their conviction and sentence as well as the subsequent forfeiture order in Criminal Case No 577 of 1990 at Winam Resident Magistrate's Court. The charge before the court was not carefully drafted. It stated;

"Transporting maize/ scheduled agricultural produce without a permit C/sec 3(1) of the National Cereals and Produce Board Movement of Maize Regulations 173 of the National Cereals and Produce Board Act cap 338 Laws of Kenya Legal Notice No 198 of 1987." Particulars of the offence followed stating:

"1. Samwel Macharia 2 Kamau Muchiri on the 11th day of February, 1990 at about 7.00 am at Kibuye market within Kisumu Municipality in Kisumu District of the Nyanza Province, jointly were found transporting maize produce to wit 90 bags in M/V Reg No KZM 949 Mutsubishi lorry white in colour without a valid permit from the National Cereals and Produce Board."

Rule 3(1) of the National Cereals and Produce Board (Movement of Maize, Wheat and Scheduled Agricultural Produce) Regulations 1987 contained

in Legal Notice No 198 states:

"Subject to subparagraph (2), no person shall move any maize, wheat or scheduled agricultural produce as a head load or by a park animal, vehicle or vessel and no owner of any maize, wheat or scheduled agricultural produce shall cause or permit the same to be moved except under and in accordance with a permit issued by the Board or by a person authorised by the Board in writing (whether named or specified by reference to his office or to his duties or functions in a particular place) for the purpose."

Subparagraph (2) applies to movement of maize, wheat or scheduled agricultural produce within the boundaries of the producing form. It also apply to the movement of those produced if not exceeding 900

kilogramme in weight and accompanied by the owner. It also applies to the movement of certified seed maize, certified seed wheat or certified seed of scheduled agricultural produce. All these produces mentioned in subparagraph (2) are exempted from the operation of rule 3(1).

When the charge and its particulars before the court were read and explained to the appellants each replied:

"It is true I was found transporting maize without a permit."

The court entered a plea of guilty for each appellant. Facts were stated which were clear that on 11.2.90 at Kibuye market found a lorry registration No KZM 949 Mitsubishi being driven by Samuel Macharia with Kamau Muchiri as a turnboy and carrying 90 bags of maize concealed under bags of cabbages and that the maize bags were being transported from Molo without a permit. Each appellant accepted those facts and he was convicted.

In his grounds of appeal the learned counsel for the appellants has stated that the facts did not support the offence charged hence the conviction was not proper. He also stated that the plea was equivocal.

At the hearing of the appeals, the learned counsel, Mr Olago-Aluoch has submitted that although the appellants purported to plead guilty, the charge was defective in that it did not disclose the enabling provisions of the National Cereals and Produce Board Act. The charge also referred to Regulations 173 which were non-existent. It was therefore made impossible for the appellants to know what type of offence they were faced with and the mistake is not curable.

For the state, Mrs Muindi replied that a reference in the charge to Regulations No 173 which was non-existent did not bring any confusions. The charge was under rule 3(1) of the Rules in Legal Notice No 198 and it was clear to the appellants that the offence they were facing was transporting maize without a permit and any mistake in the charge was therefore curable.

From the above, it is clear that nothing has been said about particulars of the offence as contained in the charge sheet Mr Aluoch did not attack this. Although the charge itself was not framed carefully, particulars of that offence were stated fully and clearly without any mistake which could bring a confusion in the mind of the appellants. When the appellants were answering before the Court therefore, it is difficult to see that they were answering to anything different from what is contained in the particulars of the offence. Their answers are very clear and to the point indicating that they understood very well the offence which was facing them.

If that was so, can it be said that the mistakes such as were in this charge vitiated the trial to the extent that it should not be maintained? In my mind, a properly drafted charge could have been something like:

"Transporting maize without a permit contrary to rule 3(1) of the National Cereals and Produced Board (Movement of Maize, Wheat and Scheduled Agricultural Produce) Regulations; Legal Notice No 198 of 1987 of the National Cereals and Produce Board Act cap 338 Laws of Kenya."

Thus the word "rule" would replace the word "section". The words

"Scheduled Agricultural Produce" would not come as early as they came in the charge but would appear about then middle with the words "Wheat and" added.

The number 173 would be dropped but the words "Legal Notice No 198 of 1987" inserted immediately after the word "Regulations" instead of coming last.

The word "Act" not in the charge would be added although it could as well be omitted.

However reading both versions of the charge one would still come out with the knowledge that the only offence being alleged is transporting maize without a permit. There is no doubt about that fact. The

question of any other offence being inferred does not arise nor does the question of a confusion arise. There is therefore no room for saying that it was impossible for the appellants to know what type of offence they were faced with.

In other words, the essential elements or ingredients of the offence in the charge was

"transporting maize without a permit". That was what the trial magistrate put to the appellants and asked for their plea. Each one returned a plea of guilty in very clear terms admitting that he had transported maize without a permit. In my opinion that was an unequivocal plea of guilty. It was not necessary at that stage and the appellants were not required at that stage to read, and indeed, did not read a section 3(1) and regulations 173, cap 338 and Legal Notice 198 of 1987 in order to answer the charge. I do not therefore see how a mere mention of those words and figures, when the charge was being read, created any confusions in their mind rendering it impossible for the appellants to know what type of offence they were faced with.

I have in mind the case of *Adan v Republic* [1983] EA 445 which sets out the manner in which a plea should be recorded when the accused is admitting the charge. The Court of Appeal for East Africa held in that case that when a person is charged, the charge and the particulars should be read out to him. The magistrate should explain to the accused person all the essential ingredients of the offence charged. If the accused admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete should give the accused an opportunity to dispute or explain the facts or add any relevant facts. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to the sentence.

From the record before me, the learned trial magistrate in this case strictly complied with what was said in *Adan's* case as stated above and there is nothing to show that there was failure of justice occasioned by the existence of the mistake pointed out in the charge. Those mistakes were therefore curable under section 382 of the Criminal Procedure Code. The facts stated did support the charge and I see no reason to interfere with the conviction of the appellants. Section 382 of the Criminal Procedure Code states:

"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry the trial or in any inquiry or other, proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the questions whether the objection could and should have been raised at an earlier stage in the proceedings."

Of course I am satisfied that the objection being raised now in this appeal could not have been raised at an earlier stage in the proceedings becausethe appellants, laymen in law, were not represented by an advocate before the trial magistrate. However, that fact does not change the position. In the case of *Abdulrasul G Sabur v R* [1958] EA 126 the charged cited a wrong section of the ordinance. The charge which charged the appellant with exceeding the speed limit was brought under section 39(1) instead of section 40(1) of the ordinance. Although the High Court of Uganda accepted that the charge was defective, it held that since the particulars of the offence were adequate to inform the appellant of the offence with which he was charged, there had been no failure of justice and the defect was curable under section 347 of the Criminal Procedure Code. The Uganda section 347 was similar to Kenya's section 382 of the Criminal Procedure Code quoted above.

In another Uganda case *Avone v Uganda* [1969] EA 129 the situation was even more awkward than in *Sabur's* case. The appellant was charged in court one under a section which had three subsections each spelling out a completely different offence from the others. That court mentioned the section but did not

specify the subsection spelling out the particular offence the appellant was charged with. Similarly in count two the offence was brought under a section 326(1) which did not exist. It should have been under section 326 which did not have subsections. Also in count three the charge did not specify under which one of the two subsections of section 360 the offence was brought.

The High Court of Uganda overlooked those serious lapse in the procedure before the trial court, the then Chief Justice, Sir Udo Udoma, stating that he was satisfied that the appellant was in no way prejudiced by those lapses as the appellant fully understood the substance and the essence of the charges against him. He ruled that no miscarriage of justice had been occasioned by those lapses.

The Court, however sounded a reminder to magistrates that it is the primary duty of a magistrate to satisfy himself that the section of the Penal Code, and I should add to that any other law, under which an accused is charged is correct before assuming jurisdiction to try the case. These Uganda authorities are, of course, only a persuasive authority to this court. I have not been able to come across a Kenya authority or a Court of Appeal authority. But the *Ugandan* cases cited above are not only quite to the part but are also in line with section 382 of our Criminal Procedure Code.

The case of *Uganda v Keneri Opidi* [1965] EA 614, another *Uganda* case is distinguishable. Here the same Chief Justice Udo Udoma, held that the error in the charge was not curable under section 347 of Uganda Criminal Procedure Code because the error was a fundamental one of law in that the accused was charged with a non-existent offence and the stated facts in themselves could not create an offence. The facts were not supporting any existing offence. Also from the record, with regard to the second count, it was impossible to ascertain whether the second count was laid under the Traffic Ordinance or Traffic Regulations.

Moving on the question of forfeiture, counsel for the appellants submitted that the order for forfeiture of 90 bags of maize was uncalled for, and the discretion of the Court in so making the order was injudiciously exercised without inquiry. It was argued that the order for forfeiture was not supported by law as the National Cereals and Produce Board Act or the regulations made under it did contain provisions for such forfeiture. It was further argued that even if forfeiture was authorised, the magistrate by failing to call upon the appellants to show cause why the maize should not be forfeited had acted injudiciously. It was not enough to hear the owner of the lorry only as that person was not the owner of that maize. In reply the state counsel argued that since the magistrate heard the owner of the lorry which had carried the maize and the owner of the lorry did not claim the maize the forfeiture order for the maize was proper.

I find that it is not in dispute that the National Cereals and Produce Board Act and the regulations made under it had no provisions for forfeiture. But it appears to me that what made the magistrate think of a forfeiture order affecting the maize and the lorry was the fact that it had not been disclosed to him as to who was the owner of that maize and the lorry. Appellants had merely appeared as employees on the lorry. At least that could be presumed from the facts before the court. There was nothing to indicate the appellants owned the lorry or the maize. But the lorry and the maize were in the hands of the Government following the arrest and subsequent successful prosecution of the appellants. How could the maize and lorry be disposed off?

Maybe a reasonable course of action was to have the lorry and maize forfeited to the Government if there were no people claiming ownership. The magistrate made an order giving the owners opportunity to appear before him and show cause why the lorry and maize should not be forfeited. Although the order stated that the owner of the lorry to show cause why maize and lorry should not be forfeited, that order did not preclude the owner of the maize to appear if he was not the owner of the lorry, and claim his maize. The appellants aware of that order as it was made in their presence at the sitting in which the court had convicted them and during the continuation of the same proceedings as it is apparent from the Court record of the proceedings of that day.

The owner of the lorry or his representative, who was also present, appeared before the magistrate and claimed the lorry showing cause why his lorry should not be forfeited. From what he told the magistrate,

the appellants were employees on the lorry as driver and conductor who had been instructed to transport cabbages only. Their employer did not know anything about the maize or the maize owner. The lorry owner asked for the release of the lorry to him and added:

"As to the maize, court may make any order it sees fit."

That, was on 12th February, 1990 the day the appellants pleaded guilty and were convicted and sentenced and therefore the lorry owner was speaking in the Court before the magistrate in the presence and hearing of the appellants who made no effort to claim the maize. The magistrate recorded that no one had come up to claim the maize which had no permit for transportation. He ordered release of the lorry to the owner and ordered forfeiture of the maize to the Government. This was before the court rose at the sitting in which the appellants were convicted.

In the circumstances I do not see how it was fairly be said that the learned trial magistrate acted injudiciously when what he did was actually judicious. To whom could he have released the maize and how could that person transport that maize since there was no permit?

Even upto today before me, there has not been evidence to show who the owner of that maize is and it will not be proper for me to work on assumption as to that ownership for the purpose of ordering release of that maize to anybody.

The National Cereals and Produce Board Act and its regulations have no provisions for forfeiture and this is unlike the repealed maize marketing Act which provided for foreiture under section 43. It appears to me that failure to include such provisions in the new Act meant that no forfeiture should be ordered unless there are provisions in the Criminal Procedure Code is section 389A. But that section deals with the procedure for forfeiture only. The procedure under section 389A is to be followed where a written law authorises forfeiture and not otherwise. In the circumstances of this case, I do not think section 24(f) of the Penal Code provides a way out when the provisions of the National Cereals and Produce Board Act are silent.

In the last analysis therefore, it appears to me that however well-intentioned the act of the learned trial magistrate may have been in undertaking the forfeiture proceedings in this matter, he had no legal basis for doing so and to order forfeiture of the maize was therefore wrong. Since the maize was in the hands of the police and had not been produced before the Court as an exhibit, it is my opinion that the magistrate could have made no order affecting its disposal so that whoever claimed ownership of the maize could have settled the matter with the police.

With that in mind, I hereby order that the forfeiture order made by the learned trial magistrate be and is set aside. On the sentence, the maximum penalty is a fine of shs 20,000/- or two years imprisonment or both.

Each appellant was fined shs 3,000 or in default six months imprisonment. The quantity of maize the appellants were transporting from Molo upto Kisumu without a permit was 90 bags hidden under cabbages which cabbages the appellants were permitted to transport. Although counsel for the appellants argued that the maize was put under cabbages because to carry the two otherwise would have meant the maize damaging cabbages, I take that to be an argument of convenience and I am therefore not amused.

Employers of the appellants had not instructed the appellants to transport that maize nor did the employers know anything about the maize what happened was deliberate act on the part of the appellants who have no excuse. The fine of shs 3,000/- is not in my view harsh in the circumstances of this case even if one of the appellants is a mere driver and the other a turnboy and were not the owners of the maize. In fact if they were the owners of that maize then I would feel that they should have been given a more severe sentence than what they got because dealing in such business made them people able to pay a heavier fine than what they paid. Forfeiture of that maize should not therefore have the effect of reducing the fine even if that forfeiture order were to stand.

In any case the order has been set aside.

The conclusion is that, with the exception of the forfeiture order made by the learned trial magistrate, which order I have set aside, this appeal is dismissed.

Dated and Delivered at Kisumu 12th Day of April, 1990

J.M. KHAMONI

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Ag JUDGE