

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1419 OF 1984

GORDHANDAS DHARAMSHI &

BROTHERS LIMITED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Second Class District Magistrate's Court at Nairobi, Miss B L Obayo)

JUDGMENT

Gordhandas Dharamshi and Brothers Ltd were convicted by a learned District Magistrate II, Nairobi, of seven counts of manufacturing for sale steel wire nails, contrary to section 9(2) and section 9(4) read together with section 15(1) of the Standards Act (cap 496). PW 1, Fida Gulam, a Senior Controller with the Kenya Bureau of Standards, testified that he visited the appellant's factory on March 12, 1983.

The appellant company manufactures steel wire nails and the witness took samples of different sizes of nails which did not appear to conform to the required standard. He visited the factory again several times and lastly on the April 12, 1984. He took samples of nails of seven different sizes, and it is in respect of these samples that the charges were laid. He took about a quarter kilogram of each size of nail and showed them to the director of the company. He then took them for testing and received a report, G43.

This report was prepared by the only prosecution witness, PW 2, George Odera who is a quality controller with the Kenya Bureau of Standards. He testified that he received some nails and compared them with the specifications laid down by the Kenya Bureau of Standards. He produced his report and also produced to court the remains of the samples and explained to the court the faults he found in the nails. That argument was put to the learned magistrate who dealt with it in this way :

“The defence counsel also argued about the claim of possession of the nails. The nails were produced in court as exhibits by PW 2 and the defence not having objected to their production as exhibits then cannot later on allege that the claim of possession was not established.”

By failing to object to the production of the nails the defence cannot have been said to accept that they were the nails taken as samples from the appellant's factory. The defence did not know at the stage of their production if other witnesses were to be called to establish the claim of possession. The defence cannot anticipate what witnesses are to be called by the prosecution.

PW 1 the person who took the samples did not testify that he was present at their examination by PW 2. He was not shown the nails exhibited by PW 2 in court. There was no proof that the nails examined by PW 2 were the nails taken as samples by PW 1. In the absence of that proof the convictions are unsafe. I quash the convictions in all seven counts. The sentences and orders passed thereon are set aside and the fines, if paid, must be repaid. Orders accordingly.

Dated and delivered at Nairobi this 18th day of February, 1985.

D.SCHOFIELD

JUDGE