



REPUBLIC OF KENYA

Osman v Republic

High Court, at Nairobi September 27, 1985

Butler-Sloss J

Criminal Appeal No 541 of 1985

(Appeal from the Ag Resident Magistrate's Court at Nairobi, U V P Kidula Mrs)

Advocates

K D Thuo for Appellant

Z Gathara for Respondent

**September 27, 1985, Butler-Sloss J delivered the following Judgment.**

On November 1, 1984, the appellant, Asha Ahmed Osman appeared before the chief magistrate's court at Nairobi in criminal case No 4063 of 1984. The appellant was there charged with the offence of the importation of restricted goods contrary to section 185(a) (ii) of the Customs Act as read with section 14 and the 8th schedule part (b) of the said Act, cap 472 of the Laws of Kenya.

In the particulars of the offence it was alleged that on October 31, 1984, at Jomo Kenyatta International Airport, Nairobi, within Nairobi area the appellant imported from Jeddah restricted goods to wit 42 brassieres and 59 pieces of dress materials all valued at Kshs 10,950 contrary to conditions regulating the importation of such goods.

The appellant pleaded not guilty, and was tried before Mrs U P Kidula, acting resident magistrate, who, on February 26, 1985, convicted her and fined her Kshs 9,000 or, in default of payment, sentenced her to five months imprisonment. On April 29, 1985, a petition of appeal was filed in which the appellant claimed that the entire conviction was against the weight of the evidence, and that the fine of Kshs 9,000 was manifestly, excessive.

Mr Thuo has appeared on behalf of the appellant, and Mr Gatheru on behalf of the respondent. Mr Thuo conceded, and said it was common ground, that the appellant went to the airport to collect these goods. He contended that there was no evidence that the appellant had asked for the goods to be consigned to her or that she was actively involved in getting the goods into this country.

For the respondent, Mr Gatheru argued that the consignment in question was a very large one which was obviously imported for commercial purposes. It was addressed to the appellant, and the accompanying documents were made out to the appellant. Notwithstanding the commercial purpose of the importation, the goods had been labeled "personal effects" in order, as Mr Gatheru suggested, to mislead the authorities. The appellant was aware before hand that the consignment was coming to her. It would not have been sent to her without her consent.

In section 2 of the Customs and Excise Act, which is the definition section, "import" is defined as meaning

"to bring or cause to be brought into Kenya from a foreign country".

It is not suggested that the appellant herself brought these goods into Kenya but the prosecution will have proved its case if it can prove that the appellant caused the goods to be brought into Kenya. An obvious

way of causing goods to be brought into Kenya would be to send a written order for them. There is no proof that the appellant ever sent a written order. However, orders for goods are not necessarily made in writing. They can be sent by telephone or even by word of mouth through a messenger. The question that must be answered is whether or not there was sufficient evidence to justify the magistrate coming to the conclusion that, one way or another, the appellant ordered these goods, and thereby caused them to be brought in to Kenya. In my judgment, the answer must be “yes”. It would be absurd to suggest that a consignment such as this one was, could have been sent merely as a voluntary, unsolicited gift to the appellant, and, to her credit, the appellant abandoned an earlier theory that it was a present sent to her by her sister. All the circumstances of the importation point to it being a commercial transaction or piece of business done between the appellant and her distant relative Mahamoud Idris Imamu.

It is consistent with the commercial character of the transaction that the appellant should have approached PW 3 Mohammed Asif Mohammed and asked him to clear the parcel for her at the airport, and that she had furnished him with the flight details. The learned magistrate simply disbelieved the appellant when the appellant said that she had no prior knowledge that the goods were being sent to her until she was informed by the airport authorities. The learned magistrate was satisfied that the appellant was the owner of the goods and that she was the importer of the goods as defined in the Customs and Excise Act. I agree with that finding, and accordingly dismiss the appeal against conviction.

As to the appeal against sentence, which appears in paragraph (4) of the petition of appeal, I am not persuaded that the fine of Kshs 9,000 is manifestly excessive. It is noticeably less than the value of the goods in question. If the appellant had been prepared to act within rather than outside the law she would only have had to apply for an import licence.

Accordingly the appeal against sentence is also dismissed.