



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 962 OF 1981

VERONICA WANJIRU GICHURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Senior Resident Magistrate's Court, at Mombasa)

JUDGMENT

On July 13, 1981 the appellant, Veronica Wanjiku Gichuru, arrived at the Moi International Airport Mombasa, aboard a Kenya Airways Flight No KQ 717, from London. She was met at the airport by her husband, Mr Gichuru, who is the Kenya Airways station manager at Moi International Airport. Unknown to her and her husband, two other gentlemen were waiting for her. These two were Chief Inspector of Police Michael Munyoke Kaminde, who is attached to CID Headquarters, Mombasa and Senior Sergeant of Police Gilbert Omolo also from the same CID Branch. The two police officers were interested in what the appellant had carried home from London. Immediately on arrival of the flight the two police officers looked for Veronica and after identifying her they kept her under close surveillance in the arrival hall where she was to collect her luggage up to the Customs Department where her luggage was to be checked.

Veronica had two suitcases in which she carried different types of clothing for women, children and men. When her luggage arrived, she showed it to a porter, John Ngala, who assisted her in taking it to the custom's table/ desk. At the customs' desk, Veronica was asked what she was carrying and according to her, she said that she was carrying her clothes and clothes for her family. There were no more questions and the customs officer marked her luggage with a chalk and allowed her to go. When the appellant, the porter and her husband left the arrival hall, Senior Sergeant Gilbert stopped them and introduced himself as a police officer and demanded to know what was in the two cases. Veronica did not answer but her husband asked Gilbert to accompany them to his (husband's) office and he could check whatever he wanted. The two cases were taken to where the police car was and Chief Inspector Michael joined them. They all drove to the CID Headquarters at Mombasa where the two police officers opened the two cases for search and found in them a large quantity of various items of clothes mainly ladies dresses, shoes and handbags. They took possession of these items plus some spirits that Veronica had carried in her hand luggage. She was arrested and charged with being in possession of uncustomed goods contrary to section 185(d) (ii) of the Customs and Excise Act (cap 472) after she had told Chief Inspector Michael that she did not pay any duty. She was prosecuted, convicted as charged and fined Kshs 200,000 in default of paying the fine to serve six months' imprisonment and her goods ordered to be forfeited to the Department of Customs and Excise. She has appealed against both the conviction and sentence.

Section 185 (d)(ii) of the Customs and Excise Act provides that:

“185 (d)(ii) Any person who acquires, has in his possession, keeps or conceals or procures to be kept or concealed, any goods which he knows, or ought reasonably to have known to be restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise, shall be guilty of an offence and liable to imprisonment for a term not exceeding three years.”

Where an accused is charged with being in possession of uncustomed goods, as is the case here, the ingredients of the offence are:

- (a) possession of restricted goods;
- (b) Knowledge that the goods are restricted.

The prosecution must prove these two ingredients.

There was no dispute that the appellants had in her possession some goods, but whether those goods were restricted or not was at issue. When the appellant arrived at the airport, she informed the Customs Officer on duty that she was carrying her own clothes and clothes for her family. The officer then passed her. He did not inform her that what she was carrying were restricted goods. The subsequent evidence of the Customs Officer who valued the goods that they were restricted could not go against the appellant as she had declared the goods and been allowed in with them. Her declaration was not false for the two suitcases contained clothes for women, and, she is a woman, men (her husband is a man) and children. Regardless of one's family the Act does not limit the number of clothes one may carry home from overseas accompanying one. The discretion is left with the proper officer. Third Schedule paragraph (5) (a) says that:

Item 8. “(5) (a) Subject to paragraphs (a) and (2) the following goods may be exempted under this item when imported as baggage by a person who the proper officer is satisfied is a resident of Kenya returning from a visit to any place outside Kenya of less than six months

– wearing apparel.”

Paragraph (1) (c) of the same item provides that:

“Goods imported by passengers arriving from places outside Kenya subject to the limitations and conditions specified in the following paragraphs:

“(1) The goods shall be

“(c) of such kinds and in such quantities as the proper officer may allow.”

Who is the “proper officer”?

Section 2 (1) of the act defines “proper officer” as

“an officer whose right or duty to require the performance of, or to perform, the act referred to.”

The officer who has the right or whose duty it is to require payment of duty under the act is a customs officer. We have used the term customs officer to mean and include the Commissioner of Customs, his deputy and assistants and the collector. A police officer is in our view not a proper officer under Customs and Excise Act. He has no powers under the Act to require the payment of duty. He may seize goods and arrest an offender under the Act, where the law is violated, but that is as far as he can go for to determine whether the goods he has seized are dutiable and demand duty thereon he must bring in the proper officer ie customs officer.

We are not satisfied that the prosecution proved that the goods were restricted.

The learned trial magistrate in arriving at the conclusion that the appellant knew that the goods were dutiable said:

“I have looked at the passport of the accused which shows her to be a seasoned traveller. She has made a number of visits abroad. She is also the wife of the station manager of the Airport. I do not accept for one moment that she did not know these goods were dutiable.”

With respect to the learned magistrate, though knowledge may be inferred, but the prosecution must lay before the court relevant proven facts from which the inference can be made. The frequent visits overseas by the appellant was not a relevant fact for she could have been a student abroad and not a dealer in any goods: nor was the fact that she was the airport manager’s wife material. The trial magistrate misdirected himself and hence arrived at a wrong conclusion on this point.

The appellant herself said in answer to the question by the police whether she had paid duty:

“I told him “No”. He asked me why and I told him I was not told to pay anything. I had the keys to the cases and I was not told to open or to pay. I told him I did not know what is dutiable or not dutiable and I was ready to pay if I was told to.”

On our own assessment of the written word we find that the prosecution has not proved that the appellant knew or ought to have known that the goods were restricted or dutiable: and there was a total absence of proved facts from which such inference could be drawn.

When the appellant presented her suitcases containing the goods the customs officer marked them with chalk and allowed her to go. Thus the customs officer, if the goods were dutiable, had exercised a discretion under paragraph (1) (c) of items I of The Schedule. There was no evidence that the proper officer wrongly exercised that discretion but the learned Senior Resident Magistrate said:

“I cannot imagine any customs officer doing his job diligently and honestly could possibly allow this quantity of new clothes into the country as wearing apparel under the 3rd schedule.”

With respect to the learned Senior Resident Magistrate, the law does not leave room for his opinion. The decision as to the kind and quantity lies with the proper officer i.e. the customs officer. The court is not the proper officer under the Act. Once the proper officer had allowed the appellant’s goods in, the police had no powers to ask her why she had not paid and to pay duty. They had no powers to search her cases which had already been passed by the proper officer. Section 171 of the Act provides as follows:

“171. Any person entering or leaving Kenya shall answer such questions as the proper officer may put him with respect to his baggage and any article contained therein or carried with him.”

So we emphasise that only the proper officer could question the appellant and not the police as to her baggage and what was therein or carried with her.

Section 172 (1) of the Act provides that,

“any officer may, if he has reasonable grounds to believe that any person has in his possession, whether upon his person or in his baggage, any uncustomed goods or excisable goods in relation to which any offence under this act has been committed, search such person; and such officer may, for such purpose, use all reasonable force.”

We do not know whether the appellant was besides her baggage searched. If she was we do not have any evidence that being a female she was searched by a female as required by section 172 (2) of the Act.

What do the words “any officer “ in section 172 (1) of the Act mean? Do they include a police officer? Section 2 of the Act says:

“ ‘Officer’ includes any person, other than a labourer employed in the service of the Customs or for the time being performing duties in relation to the customs;”

With this restrictive definition the two police officers were not “any officer” under the act as they were neither officers in the service of the customs department nor performing duties in relation to the customs. It was never proved they were doing the latter. We are left wondering where Chief Inspector Michael Kaminde and Senior Sergeant Gilbert Omolo got their powers from to arrest and search the appellant and her luggage for uncustomed goods. Only they can answer that question.

Counsel for the appellant Mr Vohra and Mr Gathenji have strongly complained at the way their client was mishandled by the police and the adverse publicity attached to the police action. We note this and apart from saying that it was an unfortunate incident, there is not much we can do as a court. We are certain the relevant authority and the Commissioner of Police are capable of looking into the matter, especially whether there was any abuse of power by the two police officers concerned.

When sentencing the appellant the learned trial magistrate said:

“I do not consider that accused was acting other than for gain. I am of the view that she was using her husband’s position in a deliberate and cynical endeavor to smuggle goods to the detriment of the State. I have considered carefully whether imprisonment is appropriate, but feel she must be allowed the opportunity to pay a fine. Fined Kshs 200,000 or 6 months imprisonment.”

With respect, the learned trial magistrate misdirected himself by taking into account extraneous matters that were neither in evidence nor proved in sentencing the appellant. There was no evidence nor were there any proven facts from which he could draw the necessary inference that the appellant had acted for gain, and, that she had used her husband’s position. Even at the arrival hall the husband did not interfere with the customs officer who passed her goods. The appellant had entered the country legally and had been legally allowed by a proper officer to bring into the country her luggage.

There was not even an iota of evidence to suggest that she had smuggled goods into the country to the detriment of the state. It was this wrong approach to the whole case and exaggeration of words that led the learned trial magistrate into imposing a manifestly excessive and harsh sentence of a fine of Kshs 200,000 on the appellant. He never conducted an inquiry into the appellant’s means and ability to pay such excessive fine before imposing it. In the result, he in practice left the appellant no alternative to the custodial sentence. The learned state counsel had, before considering the position of the two police officers under the Act indicated that he would support the conviction, but would not support the sentence. He, however, was unable to support both on appreciating that the police officers were not proper officers under the Act.

For the reasons we have given, we allow the appeal, quash the conviction and set aside the sentence and order of forfeiture of the goods. The fine, if paid shall be refunded to the appellant and so shall all the exhibits taken from her by the police. Order accordingly.

Dated and Delivered at Nairobi this 22nd day of January 1982.

Z.R.CHESONI

A.M.COCKAR

JUDGE

JUDGE