IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL NO. 61 OF 1983

BETWEEN

KENYA BREWERIES LTD ……...…..……APPELLANT

AND

REPUBLIC……RESPONDENT

JUDGMENT OF THE COURT

The appellant, Kenya Breweries Ltd, manufactures and sells beer under various trade marks and its products are governed by The Food, Drugs and Chemical Substances Act (Cap 254, (The Laws of Kenya)) hereafter referred to as "the Act"), section 3(c) and (d) of that Act prohibits selling of unwholesome, poisonous or adulterated food. It is an offence for any person to sell any food that consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance or foreign matter; or is adulterated. Section 5 of the same Act provides that where a standard has been prescribed for any food any person who sells any food which does not comply with that standard, in such a manner that it is likely to be mistaken for food of the prescribed standard, shall be guilty of an offence. These sections are read with section 36 (1) which prescribes the penalties for the offences committed under the said sections.

The appellant was alleged to have sold three bottles of beer containing visible foreign matters and dirt to Wilson Mugwe, a Nyahururu bar owner. An authorized officer then filed a complaint on 21st May 1982, in a Nyahururu District Magistrate's Court under section 3(c) and (d) of the Act. After the appellant had been charged, appeared in court and pleaded to the charge the articles were sent to Mr Omukoolo for analysis. That was on 8th June, 1982. It appears the second count was added after Mr Omukoolo had given his report which showed that each of the three bottles contained green plastic coil, several fruit flies and unidentified black particles and 0.8% alcohol instead of the required standard of 3.4%. The appellant's objections at the trial that the proceedings were not properly before the court and the Certificate of Analysis was not in the prescribed form failed. The trial proceeded and the appellant was convicted of contravening sections 3(c) and (d) and 5 of aforesaid and fined Kshs 1,000 on each count. The High Court (Abdullah, J) dismissed the first appeal and the appellant still being aggrieved appealed to this court on six grounds, namely, that the learned Judge erred in law in holding that under section 35(1) of the Act the obtaining of a certificate of analysis is not a condition precedent to a prosecution under the Act and that it does not enjoin the authorized officer to prosecute only after the public analyst has given his certificate and consequently the prosecution was not premature or a nullity; he also erred in law in holding that a Certificate of Analysis which is not in a prescribed form is admissible or could be

relied on in a prosecution under the Act; he further erred in not evaluating specifically the evidence relating to the pressure test and in particular in failing to consider the wrong observation for the trial magistrate; he failed to appreciate that taking into account the method of production one could only have 0.8% alcohol in an isolated bottle if that bottle had been tampered with ; Livingston Caleb Omukoolo was not a duly appointed public analyst for the purposes of the Act and could not analyse the samples and give a certificate of analysis and consequently his evidence was inadmissible or could not be relied on in a prosecution under the Act, and the method used by Omukoolo to test whether or not the bottle had been tampered with was unreliable and the benefit of doubt should and ought to be construed in the appellant's favour.

Section 35(1) reads as follows:-

> "Where a public analyst having analysed or examined any article to which this Act applies or any regulations made thereunder apply, has given his certificate and from that certificate it appears that on offence under this Act has been committed, an authorized officer may take proceedings under this Act before any magistrate having jurisdiction in the place where any food or drug sold was actually delivered to the purchaser or the sample taken."

This section comes under the heading "PART IV LEGAL PROCEEDINGS". It is this that governs prosecutions under the Act. Mr Wako for the appellant argued that the obtaining of the certificate of a public analyst is a condition precedent to a prosecution under the Act and the Act must be interpreted strictly. In his judgment the learned Judge had this to say:

> "Having considered all the provisions of our Act, particularly Section 30(11) and Section 35(1), I am of the view that in a case where the authorized officer has submitted a sample to the public analyst for analysis or examination under section 30(11) and upon receipt of the certificate of analysis, it appears to him that an offence under the Act is committed, he may take proceedings under the Act. Section 35(1) is not mandatory and the obtaining of certificate of analysis is not a condition precedent to prosecution for offences under the Act. In my view, the proceedings were properly taken before the trial court, as section 35(1) of the Act does not enjoin the authorized officer to take proceedings before a magistrate only after the public analyst has given his certificate."

Mr Gatonye, State Counsel, comparing Section 3(1) of the Act and sections 131 and 133 of the Public Health Act (Cap 242) contended that since no analysis is required under the Public Health Act before a prosecution can be instituted the obtaining of a certificate of analysis was not a condition precedent to a prosecution under the Food, Drugs and Chemicals Substances Act. He added that had Parliament intended it to be otherwise it would have said so. We do not think there is any need to interpret the provisions of the Food Drugs and Chemical Substances Act with the aid of the Public Health Act.

Section 30 of the Act deals with the powers of authorized officers and it does not authorize the taking of any legal action under the Act. Section

> 30 (11) provides that:
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> "An authorized officer may submit any article seized by him or any sample therefrom or any sample taken by him to a public analyst for analysis or examination; and a public analyst shall as soon as practicable analyse or examine any sample sent to him in pursuance of this Act and shall give the authorized officer a certificate specifying the result of the analysis or examination, and such certificate shall be in such form as may be prescribed by the Minister on the advice of the Board."

The Certificate of Analysis has been prescribed by the Minister under Regulation 10(2) of the Regulations to the Act.

The marginal note to section 35 of the Act is "prosecution", and we think this is so because that is the

section under which the prosecution of offenders under the Act is brought. That section sets out the procedure to be observed, which procedure is as follows:

> (a) the public analyst analyses or examines the article (usually this will have been submitted to him by the authorized officer);
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> (b) he issues a certificate; and
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> (c) if the certificate discloses an offence the authorized officer may prosecute the offender.

It is apparent from the wording of the section that the authorized officer can commence legal proceedings only if the public analyst's certificate shows that an offence under the Act appears to have been committed.

Thus, it would be imprudent and risky for the authorized officer to take proceedings against a suspect before he has the public analyst's certificate because the analysis may disclose no offence under the Act has been committed. The certificate of a public analyst is, therefore, a condition precedent to a prosecution under the Act. We agree with Mr Wako that the wording of our section 35(1) is in material particulars similar to the English Sale of Food and Drugs Act, 1875 (38 & 39 Vict c.63) and the case of *The Queen v Smith* [1896] 1 QB 596 at p 601 is relevant. The first ground of appeal succeeds as the learned judge erred in law when he held that obtaining a certificate of analysis was not a condition precedent for the prosecution of offences under the Act.

Regulation 10(2) of the General Regulations to the Act provides as follows:

> "(2) The public analyst's certificate specifying the result
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> of his analysis or examination of a sample sent to him
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> by an authorized officer in accordance with paragraph
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> (1) shall be in the form set out in the schedule."

It is mandatory for the certificate of analysis to be made in the prescribed form as required by section 30(11) of the Act and Regulation 10(2). The Judge admitted that the report of Omukoolo in Exhibit 6 was not in the prescribed form, but justified the admission of the exhibit in evidence by agreeing to Mr Gatonye' argument that what mattered was the substance and not the form of the certificate. With respect, the appellant's attack was not directed at the substance but the form and the matter should have ended when the Judge found that section 30(11) and regulation 10(2) had not been complied with.

As to the third ground of appeal this being a second appeal we are unable to engage in any re-evaluation of the evidence relating to the pressure test to establish whether or not the bottles had been tampered with which is a question of fact. This ground fails.

We take the same view and arrive at the same conclusion as regards the fourth ground.

A "public analyst" means a person appointed by the Minister, or by a Municipal Council, with the approval of the Minister, to act as an analyst for the purposes of the Act: See section 2 of the Act. The respondent conceded that Mr Omukoolo was not then a public analyst within the meaning of the Act. It goes without saying that his evidence and the reported certificate, Ex 6, were inadmissible. As a certificate of analysis was an essential requirement to the prosecution and there was none, no offence was disclosed as required by section 35(1) so legal proceedings should not have been taken against the appellant. The purported proceedings were a nullity.

Even if Mr Omukoolo used a reliable method to test whether or not the bottles had been tampered with the result of that test would have been inadmissible as he was then not a public analyst. It is therefore

unnecessary to consider fully the sixth ground of appeal.

Ground 1, 2 and 5 succeed but grounds 3 and 4 fail. On the whole this appeal must succeed and is allowed, the conviction is quashed and the sentence set aside. The fine, if paid or deposited in court, shall be refunded to the appellant. We accordingly so order.

Dated and delivered at Nairobi this 5th day of October, 1984.

A.A. KNELLER

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

J.O. NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR