

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEALS NOS 753, 754 & 755 OF 1982 (CONSOLIDATED)

KECHELAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Upon Mr. Makhecha's application, these three appeals 753 of 1982, 754 of 1982 and 755 of 1982 were consolidated all having arisen from one case in which all the 3 appellants were co-accused. The original 6 accused were directors and an employee of Lokwet Traders Limited, a company that was charged as well. Mr. Makhecha had filed a petition of appeal consisting of nine grounds of appeal. Before arguing the other grounds he was granted leave to argue ground 6. His view being that if the court upheld his submission on ground 6 then the appeal would be disposed of on that ground alone. On the other hand if he was not upheld by the court he would then go on and argue the rest of the appeal. Ground 6 of Petition reads as follows:

“The learned magistrate erred in law in convicting all the accused of the alleged offences without the goods in respect of which the offences were alleged, having been properly before the court.”

Mr. Makhecha, who conducted the defence in the lower court, drew the court's attention to the written word. The charge against the 6 accused was brought under section 27(1)(c) as read with section 30(1) and 30(2) of the Price Control Act, cap 504 Laws of Kenya. Under the particulars of the charge the appellants are alleged to:

“On the 12th June at 10.30 a.m. at Kericho .. being persons carrying on business in the course of which goods beer and stouts are supplied and who had in their possession 273 x 25 Tusker beers, 246 x 25 White Cap beers, 124 x 25 Pilsner beers and 81 x 25 Guinness Stouts, 84 x 25 Export beers and 3 x 25 Premium beers of such goods falsely denied that they had the said goods in their possession.’

The records show that after the particulars of the charge had been read to the accused and their pleading not guilty, the hearing date was set for June 16, 1981 and an order for bond made. Next is the order by the court:

“The beer produced in court to be sold. The proceeds to be deposited with the police for safe keeping.”

It would appear from the evidence that the order was immediately obeyed and the seized beers disposed off. This would be under the provisions of section 24 of the Act:

“Where any goods have been seized under any of the sections 21, 22 and 23 of this Act, the person who has seized such goods shall forthwith report to a magistrate the fact of such seizure and if a magistrate is satisfied that such goods are of a perishable nature or that, by reason of the fact that the market of such goods is seasonal, or of other good reason to delay the disposal of the same would otherwise unduly prejudice the owner thereof, he may authorise the Price Controller to sell or otherwise dispose of such goods.”

The learned magistrate acting under the section ordered for the beer to be sold. Although it was not perishable or a seasonal goods, he from the evidence could have justified the disposing of the beer. For instance because as PW 2 stated there was no storage space. I find that there was nothing wrong with the actual disposing of the beer. This was legally done under the provisions of section 24 of the Act. But in Mr. Makhecha's view, the mode and manner in which section 24 was complied with has prejudiced the case for the defence and that he did make this preliminary submission over before the trial started. Not at the time he was making the application anything could have been salvaged since the beer had been disposed of already. Mr. Kinyanjui has conceded this matter in that the disposing of the beer or seized goods before they had been exhibited was fatal to the prosecution's case. There is nowhere on the record to show that that beer was ever seen by the court produced as an exhibit or merely marked for identification before the court and therefore evidence in court upon which the defence could examine the prosecution witness. There wasn't even an inventory taken as the beer was being taken out upon which the appellant signed to confirm what had been taken from the shop. This oversight resulted in a criminal trial going on to the end without the exhibits or any evidence as to the identity of the exhibits being produced before the court or any record to the effect that the defence had been allowed to view the goods and cross examine the producer of the goods.

Prosecution cannot be heard to say that they proved their case beyond all reasonable doubt. The omission to take evidence of the identity of the goods subject matter of the charge against the appellant in the absence of the actual goods being produced before the court was fatal to the prosecutions' case. There was no way in which they could have proved their case beyond any reasonable doubt. Without even other grounds of appeal being argued and the fact that the learned State Counsel has conceded, this court finds itself with no alternative but to allow appeal, quash the conviction and set aside the sentence.

Dated and delivered at Nairobi this 3rd day of December, 1982.

E.OWUOR

Ag. JUDGE