



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
(Coram: Kneller & Hancox, JJA & Chesoni, Ag JA)
CRIMINAL APPEAL NO 31 OF 1983

BETWEEN

THOMAS OCHIENG AJWANG APPELLANT

AND

REPUBLIC RESPONDENT

(appeal from a judgment of the High Court of Kenya at Kisumu (Patel J) dated 20th August, 1982

**in
Criminal Appeal No 582 of 1982)**

JUDGMENT OF THE COURT

The appellant Thomas Ochieng' Ajwang was convicted of being in possession of uncustomed goods contrary to Section 185(d) (iii) of the Customs and Excise Act (Cap 472) and was sentenced to pay a fine of Kshs 8,000 to serve six months' imprisonment if he failed to pay the fine.

The subject-matter of the charge were 68 gas cylinders which it was agreed were brought into Kenya from Uganda by boat. They were first landed at Uyoma, were then transported to Uholo market and from there the appellant transported them to Kisumu in his motor vehicle registration No KLY 010.

The appellant's first appeal in the High Court (Patel J) was against the conviction and sentence of a fine. The trial magistrate's order of forfeiture of the motor vehicle was set aside as the learned Judge found that the gas cylinders were not imported into Kenya by the motor vehicle, which was correct, as the evidence had it that they were brought into the country by boat. Thomas has now appealed to this court from the High Court decision.

Although Thomas admitted bringing the cylinders to Kisumu it appears when they were seized by the police they were at the M P S transport company office and not in Thomas' possession. They were with Musembi (PW 6) who had stored them pending their transportation to Nairobi.

Section 185(d) (iii) of the Act provides as follows:

“185(d)(iii) Any person who acquires, has in his possession, ..., any goods which he knows, or ought reasonably to have known to be uncustomed goods, shall be guilty of an offence ...”

The prosecution must prove the following ingredients of the offence under the foregoing provision that –

(a) the accused was in possession of the goods,

(b) the goods were dutiable,

(c) he knew or ought reasonably to have known the goods were uncustomed I e duty had not been paid.

The two lower courts found that the appellant was in possession of the goods on his own admission, and the prosecution proved that the goods in question were dutiable. The defence agreed that no customs duty had been paid but argued that duty was exempted under Section 143 of the Act. The trial magistrate rejected the forms tendered in evidence by the defence to prove exemption because they were not in the appellant's name and they contained alternations. Being a criminal case the appellant did not have to prove his innocence but he produced evidence, the forms, which were a matter specially within his knowledge. He was therefore to show that the forms related to him. The magistrate considered the forms with the whole evidence without placing any burden of proof on the appellant, and it was not indeed suggested that he had done otherwise in this appeal. It is apparent from the line of defence adopted by the appellant that he knew the goods were uncustomed. The case against the appellant was therefore proved as required by law and we order this appeal to be dismissed.

Dated at Nairobi this 19th day of July, 1983.

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF THE COURT

The appellant Thomas Ochieng' Ajwang was convicted of being in possession