



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 20 OF 1981

BETWEEN

ESMAIL K. TUNEJA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA The appellant was acquitted of the following offence in the District Magistrate's Court, Mombasa.

“Charge: Carrying on business as a radio dealer without a valid dealer's licence contrary to Section 5(1) of the Broadcast Receiving (Apparatus) Act Cap 224.

Particulars Of Offence:

Esmail K Tuneja, trading under the firm and style of M/s Salim Motors at Plot No 181/182 Section XXI on Moi Avenue in the Municipality of Mombasa on May 3, 1979 you sold one factory fitted radio in a Datsun 120Y Reg No KQG 773 without a valid dealer's licence.”

Kneller J, accepted the Republic's appeal against the magistrate's verdict, quashed the appellant's acquittal and remitted the case to the magistrate with a direction to enter a conviction and to proceed according to law. Now the appellant has appealed. A 'dealer' is defined in the Broadcast Receiving (Apparatus) Act (Cap 224) as follows:

“Dealer' means a person who by way of trade or business buys, offers for sale, sells, lets on hire or otherwise deals in sets.”

The learned judge said in his judgment that the section and definitions did not exclude secondhand radio sets or cars with factory fitted radios or of any sort; they clearly included a secondhand radio set in a secondhand vehicle sold by a car dealer. It was a revenue Act and the offence with which the appellant was charged carried a penal sanction but on the law and the facts in the trial the appellant as Salim Motors when he sold the radio in the Datsun had no licence to do so and he should have had one.

We note the particulars of offence stated the appellant sold one factory fitted radio in a Datsun car without a dealer's licence. He did not do so, and there was no evidence that he was a dealer in radio sets. As a dealer in only used motor vehicles he sold a secondhand motor vehicle with its attendant factory

fitted equipment which happened to include a radio. One test of a dealer is whether he deals in the article referred to. The appellant did not deal in radio sets, he dealt in motor vehicles. He did not offer for sale or sell a radio, and no separate invoice or a cash sale was issued for the price of the radio. Like other items the radio was included in the price of the car. The only and overall transaction which the appellant entered into was a deal for the sale of a motor vehicle, and the radio was incidentally included as one of the many items in the car. The purpose for which the business is conducted arises from the overall operations (Woodhouse, J in *Raino v Police* [1963] NZLR 702 at 703). A licensed rag flock manufacturer who complied with British Standards was held not to be a "dealer in rags" (*Walter Chadburn and Son v Leeds Corporation*, 20 P and CR 241, 1967-1970 English and Empire Digest, 980). Being a revenue measure it must be strictly construed. The interpretation favoured by the learned judge would require additional words to be written into the definition of 'dealer' which only Parliament can do.

We allow the appeal, quash the order made by the learned judge and restore the magistrate's order of acquittal.

As **Miller** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Mombasa this 14th day of May 1981.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of
the original.

DEPUTY REGISTRAR