REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. E144 OF 2024

MARY GATHONI MUNGAI ..... 1ST APPELLANT

MOSES NGARI GITAU.....2ND APPELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(Being an appeal against the Judgment dated 26th September, 2024 before Hon. B. Ochoi at the Chief Magistrates Court of Kenya at Nairobi, Milimani Law Courts, in Milimali Magistrates Criminal Case No. 1624 of 2020)

BETWEEN

REPUBLIC ..... …….PROSECUTOR

VERSUS

MARY GATHONI MUNGAI ..... 1ST ACCUSED

MOSES NGARI GITAU.....2ND ACCUSED

JUDGMENT

INTRODUCTION

1. The appellants were charged with 7 Counts of the offence of illegally refilling L.P.G cylinders of other brands without authority from brand owners to fill contrary to section 99(1)(m) of the petroleum Act 2019 and section 13(1) and

14(a) of the petroleum(liquified petroleum gas) regulations as read with section 99(1)(ii)of the petroleum Act of 2019.

2. The particulars of the charges read respectively that they allegedly refilled L.P.G Cylinders of K-GAS, E-GAS, OILIBYA GAS, EDA GAS, TOTAL GAS, SUPA-GAS and AFRI-GAS.

3. The trial court convicted the appellants of all the charges and sentenced them to serve a period of 5 years for each count however the court suspended sentences for Count 2 to 7 and directed that they serve the sentence in Count 1.

4. The appellants aggrieved by the decision of the learned Honorable magistrate appealed against both the conviction and sentence on the following grounds;-

a) THAT the learned magistrate erred in law and in fact in convicting the appellant when the ingredients of the offences charged were missing and/or not proved.

b) THAT the learned magistrate erred in law and in fact in convicting the appellant without evidence of preservation or establishing the scene of alleged offences.

c) THAT the learned magistrate erred in law and in fact in convicting the appellant without any evidence of ability of the appellant to commit the offences.

d) THAT the learned magistrate erred in law and in fact in convicting the appellant without any evidence of chain of custody of alleged exhibits and without any evidence of nexus of the exhibits and the appellant.

e) THAT the learned magistrate erred in law and in fact in convicting the appellant by failing to give appropriate and least weight to exhibits that were improperly documented, preserved and produced by an incompetent prosecution witness.

f) THAT the learned magistrate erred in law and in fact in convicting the appellant on the basis of evidence not led before the Court and on the basis of alleged exhibits not produced before the Court during trial.

g) THAT the learned magistrate erred in law and in fact in convicting the appellant when material prosecution witnesses were not called.

h) THAT the learned trial magistrate erred in fact and in law in convicting appellant on non-existent and/or flimsy and unreliable prosecution evidence

i) THAT the learned trial magistrate erred in fact and in law in convicting the appellant when the prosecution did not prove the offences to required standard.

j) THAT the learned trial magistrate erred in fact and in law in convicting the appellant by failing to critically evaluate the record of evidence that in all the circumstances does not support commission by appellant of the offences charged.

k) THAT the learned trial magistrate erred in fact and in law in failing to accord the appellant the benefit of doubt more so based on the exonerating evidence led by the prosecution in favour of the appellant.

l) THAT the learned trial magistrate erred in fact and in law in convicting the appellant by shifting the burden of proof to the appellant and misapplying the principle of presumptive guilt.

m) THAT the learned trial magistrate erred in fact and in law in meting out a harsh and unlawful sentence against the appellant.

5. The grounds of appeal raise the following issues for determination:

a) Whether the learned honorable magistrate misdirected himself in convicting the appellants against the weight of evidence

b) Whether the prosecution discharged the burden of proof having failed to call the brand owners to testify.

c) Whether a donee of a power of Attorney could testify on behalf of the complainants

d) Whether the learned honorable magistrate shifted the burden of proof to the accused persons.

e) Whether the chain of custody of evidence was properly maintained.

DUTY OF THE FIRST APPELLATE COURT

6. The duty of the first appellate was enunciated in the case of **Okeno Vs Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

7. At the hearing of the appeal the appellants are entitled to an exhaustive re-evaluation of evidence in order for the court to satisfy itself that the conviction was safely arrived at before deciding whether or not to uphold the same. The appellate court is not bound by the conclusions reached by the trial court but must draw its own conclusions based on the evidence available.

THE LAW RELATING TO THE OFFENCE

8. The appellants in the statement of offence were charged with the offence of illegally refilling L.P.G cylinders of other brands without authority from brand owners to fill.

9. The offense is provided for under Section 99(1)(m) of the Petroleum Act 2019 and section 13(1) and 14(a) of the Petroleum (liquified petroleum gas) Regulations as read with section 99(1)(ii)of the Petroleum Act of 2019.

10. The relevant provisions of the law state as follows :-

99 (1) A person who—

(a) contravenes any provisions of section 93 On offences. maintenance of minimum operational stock of petroleum;

(b) being the owner or operator of a refinery, pipeline, bulk liquefied petroleum gas or natural gas facility, service station, filling station or storage depot or transporter of petroleum, fails to institute appropriate environmental, health or safety control measures;

(c) being the owner of a pipeline, refinery or bulk liquefied petroleum gas or natural gas facility, contravenes the provisions of this Act or any regulations made thereunder relating to the construction or operation of a pipeline, refinery or bulk liquefied petroleum gas or natural gas facility or regulations thereof;

(d) vandalises, destroys, or interferes in any manner or illegally interconnects with such pipeline;

(e) illegally acquires, handles or is in possession of any petroleum products;

(f) maliciously misinforms the public leading to economic sabotage;

(g) who not being an owner of any petroleum pipeline plant equipment or auxiliaries illegally acquires, handles or is in possession of any petroleum pipeline plant, equipment auxiliaries;

(h) who trespasses or encroaches on to any petroleum pipeline wayleaves or installations;

(i) who illegally acquires any interest in public land set aside for petroleum infrastructure projects;

(j) being the owner of a retail dispensing site or storage depot, contravenes the provisions of this Act relating to the construction or operation of a retail dispensing or site storage depot;

(k) being the owner or operator of a bulk storage facility for petroleum products, service station or storage depot, or being the owner of any petroleum stocks, hoards petroleum products;

(l) owns or operates an unlicensed petroleum or gas storage, filling or handling facility;

(m) refills, rebrands, trades or otherwise deals with liquefied petroleum gas cylinders of another licensee for gain without the said licensee's prior written consent;

(n) being the owner of a retail dispensing site, under dispenses or sells above any price that may be recommended by licensing authority Cabinet Secretary from time to time;

(o) constructs any facility defined in section 86 without obtaining a construction permit;

(p) is in charge or in control of a petroleum tanker transporting or carrying adulterated petroleum or discharges export petroleum in the country;

(q) **owns a petroleum tanker transporting or carrying adulterated petroleum; commits an offence and shall on conviction, be liable to a fine of not less than:**

(i) one million shillings, or a term of imprisonment of not less than one year, or to both such fine and imprisonment; if the offence relates to paragraphs (a), (h), (k) and (p) or (ii)

(ii) ten million shillings, or a term of imprisonment of not less than five years, or to such fine and imprisonment, if the offence relates to paragraphs (b), (c), (d) (e), (f), (g), (i), (j),

(1), (m), (n), (o) and (q). commits an offence and shall on conviction,.

PETROLEUM (LIQUIFIED PETROLEUM GAS) REGULATIONS

13. Filing of liquefied petroleum gas

(1) A person shall not fill liquefied petroleum gas into cylinders unless he is the brand owner or has prior written consent from the brand owner.

14. Prohibition against unauthorized refilling

The following acts constitute the unauthorized refilling of cylinders and any person who commits these acts shall be liable to the fine set out in the Fifth Schedule —

(a) refilling of a cylinder by a person or entity other than the brand owner or refilling of a cylinder without the prior written consent from the brand owner provided that such consent shall have been submitted to the Authority;

11. A reading of the provisions reveals that the offence of illegally refilling L.P.G Cylinders as the following key ingredients :-

i. **refilling,**
ii. **rebranding**
iii. **trading**
iv. **or otherwise dealing with liquefied petroleum gas cylinders of another licensee for gain without the said licensee's prior written consent;**

12. An accused person shall be guilty of an offence if he engages in any of the acts identified above without the authority of the licensee.

13. The appellants contend that the prosecution did not discharge the burden of proof placed upon them and that the trial magistrate shifted the burden of proof to the appellants.

14. The appellants and the state filed written submissions in support of their respective positions which this court has duly considered as well as the brief highlights made by their respective counsel at the hearing of the appeal.

SUMMARY OF THE PROSECUTION'S CASE

15. PW1 Clive Mutiso testified that he was an employee of the Petroleum Institute of East Africa and his job entailed Investigations and compliance.

16. According to Mr. Mutiso, Petroleum East Africa is a limited liability company with a membership of 11 licensed traders in L.P.G who own various brands in cylinders.

17. The witness went on to state that the 11 members had issued Powers of Attorney to Petroleum East Africa allowing them to carry out enforcement on their behalf. The witness testified that as an employee of Petroleum East Africa, he was acting under the authority of the Powers of Attorney granted to the company when he lodged the complaint with the police regarding this matter.

18. He also stated that in the course of his duty he would undertake investigation on behalf of the members upon receipt of complaints. He would refer the matters to the DCI and the Anti -Counterfeit for onwards transmission to court.

19. According to him, he undertook investigations in January, February and March of 2020 and his investigations revealed that there was illegal refilling of gas cylinder within Ruaraka and Kawangware Nairobi.

20. The witness testified that his investigations led him to a licensed L.P.G refilling facility within Kikuyu Township, near Kikuyu Police Station operating in the name and style of Cresent Energy Limited. According to him the facility had consent to refill their own cylinders and none of their members had authorized the facility to sell their cylinders. The witness did not however say what was the brand name of the cylinders Cresent Energy Limited was authorized or licensed to sell.

21. On 5th of March 2020, Pw1 accompanied by the police raided the facility and made recovery of cylinders that had been illegally refilled. Despite their action, the witness stated that the facility continued operating. It is important to highlight that the witness did not specify the brand names of the illegally refilled cylinders that they were able to recover during that raid.

22. The witness did not also indicate what happened to the recoveries that they made during that raid. It was also not clear whether those cylinders were ever disposed or they remained in the custody of the police.

23. Mr. Mutiso went further to testify that on 10th of April 2020 he made another complaint to the police and they raided the premises and found 5 vehicles at the parking bay filled with various cylinders of their members. Again, the witness did not specify the brand names of the cylinders found onboard those vehicles.

24. Further PW1 stated that there were various workers at the facility when they visited and that the LPG pump was working. The witness did not say whether he witnessed any of the cylinders they found aboard the vehicles being refilled.

25. The witness further informed the court that inventories were prepared and that all the cylinders found in the motor vehicles KCG 986Z, KCU 966S, KCR 406R, KCE 713F were taken away to the DCI headquarters.

26. Pw1 told the court that a man by the name Moses Morgan together with other people who were found at the scene who included drivers of the vehicles were arrested.

27. PW1 further testified that all the cylinders ***"we comment have seals. To date letter of authority to trade with cylinders have never been given to us. I was informed by the Investigating officer that she presented herself as the director/ owner of the facility. The 4th accused was the one we met at the facility and showed us a letter of employment by Cresent. I had never seen the accused before. That is all"***

28. Upon cross-examination PW1 Confirmed that the power of Attorney he relied was donated to Petroleum Institute East Africa which was his employer. He also went on to state that he was authorized by the Institution to undertake enforcement.

29. PW1 confirmed that in his statement he had not recorded that they found the pump running neither did he say that the 2nd accused Moses Ngari Gitau was the one in charge of refilling. Notably, the witness stated **"I did not know where the cylinder found in the four vehicles were from or being taken."**

30. PW1 concluded his evidence by stating that he did not know EPRA Officers visited the scene that day and that he did not get a warrant from the court to do what he did. In Cross examination he stated that he was testifying on the authority of specific brand owners of the specific brands they found illegally reopened.

31. PW2 was Corporal Andrew Odeyo of DCI Parklands who testified that 10th April 2020 their team under the command of Chief Inspector Kathurima were in the company of Petroleum Institution of East Africa and proceeded to Cresent energy limited.

32. The witness said that they were acting on the tip off that that the facility was engaged in refilling of LPG cylinders of other brands without their consent or authority. He went on to state that at the scene they arrested Kevin Kariuki, Moses Ngari Gitau, Joseph Mbugua Mwangi and John Kihiko Nderitu and confiscated assorted cylinders which they carried in four motor vehicles.

33. According to the witness they summoned Mary Gathoni (1st appellant) who was the director and owner of the plant. The 1st appellant therefore was not found at the scene.

34. The witness went on to produce a letter from KRA detailing the ownership of the motor vehicles as hereunder:-

a) Vehicle

M.V KCU 966S- Absa bank and David Kinuthia Mungai

(MFI - 5a)

b) M.V KCG 986Z - Maureen Nyugichulu Wanjau & National Industrial Credit Bank Ltd
(Marked MFI-5b)

c) KCE 731F- Phylis Nyamusi Mageke
Copy of records marked MFI-5c

d) KCR 406R- Nobel Trading co. ltd & Evan Kariuki Njoki
copy of records marked MFI-5d
e) KCS 094T - KCB Bank ltd and Donald Kinuthia Munga
A copy of records marked MFI-5e.

35. The witness further stated :

> **"The motor vehicles were released to the owners. The cylinders are in our custody and DCI headquarters. On 1/9/20 I wrote to the registrar of companies seeking to know the directors of crescent energy limited. (Letter dated 1/9/20 marked MFI-6). I received a respond on 18/9/20 and the directors are John Njiru Mungai and Mary Muthoni Mungai (letter marked MFI 7). The company was registered on 20/12/2014.**
> **MFI 6 & 7 produced as p - exhibit 6 & 7 respectively.**
> **I then charged the suspects with the offence before court and the two of them are the accused before court, the others absconded. I did not know the accused before. That is all."**

36. The evidence above basically was the basis upon which the appellants were convicted by the trial court.

ANALYSIS AND DETERMINATION

37. The duty of this court as a first appellate court is to analyze and re-evaluate the evidence tendered before the low court and draw its own conclusions as to whether the case against the appellants was proved to the required standard of proof beyond a reasonable doubt.

38. The court in doing so should bear in mind that unlike the trial court it did not have the opportunity to hear or see the witnesses thus due allowance must be given to that. The appellate court further is not bound by the conclusions reached by the trial court and must make its own independent decision. Simply put, the appeal is in the nature of a rehearing of the matter. **See Okeno Vs Republic (1972) E.A 32**

39. The appellants have contended that the prosecution was not able to prove the case against them beyond a reasonable doubt thus the conviction against them is unsafe. The appellants have urged this court to quash the conviction and set aside the sentence against each one of them. This court is minded to agree with the appellants.

40. The cylinders that form the basis for the prosecution's case were not found being refilled at the premises of the appellants. The vehicles onto which they were loaded none of them was registered in the appellants name. The release of the motor vehicles to their respective owners without the owners providing any statements and or being called to testify, was an act that was detrimental to the prosecution's case. The appellants were not in actual possession of the cylinders. At best one could argue they were in constructive possession of the cylinders.

41. The immediate question that would arise therefore is, if the appellants were charged on the basis of constructive possession with refilling the cylinders,

why then were the persons who were in direct possession let loose? The prosecution was under duty to prove beyond a reasonable doubt that the appellants were engaged in the refilling of gas. The learned Hon Magistrate therefore erred by drawing the inference of guilt against the appellants when the primary fact of refilling had not been proved and that other persons who were potential suspects were released without charge.

42. The owners would have been better placed to state whether they had bought the cylinders from the appellants or that they had brought the cylinders for refilling at the appellants premises. The failure to call that evidence left the court to speculate on what exactly was the reason for their being at the appellants premises.

43. The section under which the appellants are charged envisages a situation where a person could as well be charged for trading or rebranding thus the lorry owners and their drivers should not have been released without sufficient inquiry as to what exactly they were upto at the time they were found at the appellants premises.

44. The investigator bungled his own case by failing to call them or even charge them together with the appellants if at all he believed in his own case. The burden was on the prosecution under Section 107 of the Evidence and they failed miserably to discharge the same. It was incumbent upon the prosecution to lead evidence of refilling against the appellants but that did not happen.

45. The court cannot convict on the basis of suspicion however strong the suspicion may be. In **Mary Wanjiku Gichira Vs Rep.Criminal Appeal No. 17 of 1998** the Court of Appeal held that

'' suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life".

46. Since Pw1 had testified that he did not know where the cylinders found aboard the motor vehicle were from and to where they were being taken, only the owners of the lorries or their drivers would have explained to the court. One cannot rule out the possibility of the owners of the vehicles having brought them into the premises of Cresent Energy ltd with or without gas.

47. The importance of the testimony of the lorry owners or the drivers becomes unerringly important when one looks at the section of the law that the appellants were charged. Section 99(1) (m) of the Petroleum Act 2019 envisages a situation where a person could be charged refilling, trading or branding the product of another without authority.

48. It would have been necessary therefore to call the evidence of the lorry owners or drivers to inform the court how exactly they happened to be in the premises of the appellants and if at all the cylinders they had were refilled at the premises or that they were engaged in trading with the appellants.

49. The prosecution failed to lead that evidence thus the trial court was left to speculate on what may have happened and it is no wonder that the court shifted the burden to the appellants to prove that they had not refilled the cylinders found in their facility. The trial court erred in paragraph 23 of the judgment by concluding that the cylinders must have been refilled at the facility without evidence to support such a conclusion.

50. The case against the appellants becomes even more complex when one looks at the evidence of Pw2 during cross-examination. Upon cross examination PW2 stated: **"we were acting on intelligence there was no complaint at the station on any of the counts. We received a tip off from the Petroleum Institute of East Africa …. In Count 1 is K-Gas, Mutiso complained on their behalf. I did not see a list from K-gas of dealers authorized to deal with their gas. I did not visit any of the offices of the complainants in Count 1 to 7. PW1 has the power of Attorney to act on the behalf of the complainants in counts 1 to 7. Witness referred to MFI -2, the donor of**

the power of Attorney is Vivo energy donating the power to Petroleum Institution of East Africa not to Clive Mutiso. <u>There is no document transferring power to Clive Mutiso.” (emphasis mine)</u>

51. Counsel for the appellants Mr Mbugua Mureithi strongly argued that the complainant in this matter did not tender evidence and Pw1 who lodged the complaint on their behalf did not have the authority of the brand owners to do so thus the prosecution had failed to establish his case.

52. The witness Pw1 was admittedly not the donee of the Power of Attorney but an employee of the Company Petroleum Institute of East Africa which had the Power of Attorney. Mr Mbugua contended that there was no instrument tendered in court by Pw1 or any of the prosecution witnesses to demonstrate that Pw1 had the authority of the done company to engage in the enforcement activity for and on behalf of the brand owners.

53. Counsel cited the case of **Jack J Khanjira $ Another vs Safaricom Limited{2012}KEHC 5508 (KLR)** where Justice Mwongo at paragraph 23 of the decision stated***;-‘’ in determining the scope of the mandate of a recognized agent acting under a Power of Attorney, careful scrutiny of the instrument itself is essential. In the present case, the donor granted Mr Kalama powers to;-a) represent him in court for all intents and purposes in connection with the suit. This is a power only properly available to an advocate.***

(b)give evidence -this is obviously impossible as no person can substitute his evidence for another…’’

The prosecution in this case relied on the evidence of Pw1 who purportedly was testifying on behalf of the brand owners and that precisely is the complaint by counsel for the appellants.

54. This court agrees with the position taken by the appellants in that Pw1 was not a competent witness for the brand owners. He did not have any Power Attorney granting him authority to act on behalf of the brand owners and his

job identity card showing that he was an employee of the Petroleum Institute of East Africa could not suffice as sufficient basis for him to testify.

55. The institute did not assign him the authority to specifically lodge complaints on behalf of brand owners and to testify. This court concurs with the position taken by Justice R. Mwongo that no one can substitute his own evidence for that of another. The testimony of Pw2 raises the question, was Pw1 acting as a recognized agent of the brand owners or was he an employee of Petroleum Institute of East Africa acting on a frolic of his own since there was no complaint to the police by the brand owners?

56. Pw2 stated that he did not visit any of the brand owners' offices and he did not produce the list of authorized dealers for the brands.

57. The omission to tender that evidence dealt a fatal blow to the prosecution's case in that one of the key ingredients of the offense that the appellants were charged with was the lack of authority to deal with the product. The burden of proof lay on the prosecution to establish that the appellants were not authorized to deal with the products of the brand owners. the failure to establish that created doubt as to the propriety of the charge and the benefit of doubt should have gone to the appellants.

58. On further cross examination, Pw2 stated that his colleague Hillary who went to the scene did not mention that he did find a refilling pump. The fact that there was no refilling pump at the facility casts doubt on the entire case because it would follow therefore that no refilling could have taken place without a refilling pump.

59. Further, P2 admitted that Cresent had authority to run the facility. He further went on to testify that the arresting officers were the only ones who could explain **"whether the act was for filling the cylinders."** It is clear from the testimony of this witness that the prosecution's case was purely based on conjecture because even the police officers did not seem to know what it was that they were prosecuting the appellants for.

60. PW3 Corporal Hillary Kimuyu of DCI Operations support unit testified that together with other officers from Petroleum Institute of East Africa they conducted an operation at Kikuyu Township suspected to be refilling gas cylinders in contravention of the Energy and Petroleum Act. The officer attempted to produce an inventory marked MFI-8 but the court ruling on an objection raised by the defense disallowed the production of the document by the witness since his name did not appear on the document and secondly for the reason that the document referred to recoveries of 5th March 2020 yet the witness was testifying on the events of 10th April 2020.

61. The witness was therefore found to be incompetent to produce all the inventories related to the recoveries.

62. PW2 was later recalled to produce the gas cylinders that had been recovered from the motor vehicles and confirmed that the motor vehicle abode which the cylinders were recovered were all released to the owners by Inspector Kathurima. The witness stated that he believed that there was chain of custody forms that could help in identifying the cylinders since each cylinder has a serial number. However, the issue that was central to the proceeding was whether the appellants were guilty of refilling the cylinders.

63. It should not be lost on anyone that possession of the gas cylinders under Section 99(1) (m) of the Petroleum Act of 2019 is not ipso facto a crime. The offensive act would be refilling, trading or rebranding without authority of the brand owner.

64. The prosecution in this case only managed to prove that the cylinders were recovered from vehicles that were parked in the appellants premises and nothing more. The ingredients of the offence charged were therefore not proved. The Oxford Learners Dictionary defines “refill’’ to mean to fill something again or to a new supply of something. There was absolutely no evidence from any of the prosecution establishing that fact.

65. The appellants in law are under no duty to say anything or to prove anything. The prosecution is bound to prove its case beyond a reasonable doubt. No amount of worthless evidence raising the greatest degree of suspicion against the accused should form the basis of a conviction.

66. In R v Lifchus (1997) 3 SCR 320 the Canadian Supreme court gave the following direction;

''The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. The term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must giver the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.''

67. The appellants, did not tender any evidence in defense for they elected to remain silent. The defense of silence is a constitutionally underpinned defense under Article 50 (2) (i) which allows an accused person to remain silent and not to testify during the proceedings.

68. The right to silent cannot be taken away under the pretext of invoking the provisions of section 111(1) of the Evidence Act. It is important to state here that for a court to invoke the provisions of section 111(1) of the Evidence Act, the prosecution must have in the first place proved its case beyond a reasonable doubt before the burden can shift to the accused.

69. The accused cannot be expected to jump in and testify to dislodge a worthless case presented by the prosecution. The initial burden must burden of proof must be discharged. In the instant case the prosecution failed to prove even the most basic element of refilling and also the element of lack of authority of the brand owners. See **The Supreme Court in the case of Republic vs. Ahmad Abolfathi Mohammed & Another [2019]eKLR** upon construing the above section expressed itself as follows:

"[46] In the above context, it is our view that, while confessions under Section 25A are often made to the Police during investigations, as counsel for the respondents argued, Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only "within the knowledge" of the accused person so that if he does not offer an explanation, he risks conviction. Such a situation would arise, for instance, in a murder case where part of the prosecution case is that, prior to the deceased's death, the accused person is the one who was last seen with him. This being our view, we find that the Court of Appeal erred in its decisions in the said cases of Douglas Thiong'o Kibocho vs. Republic [2009]eKLR, and Milton Kabulit & 4 Others vs. Republic [2015]eKLR that admissions made to Police in the course of investigations are admissible under Section 111(1) of the Evidence Act. As stated, that section cannot be invoked at the investigation stage but in the hearing of the defence case in the course of the trial when necessary.

While, as stated, a confession can of itself found a conviction, when a court is confronted with an admission, which does not amount to a confession under Section 25A of the Evidence Act, it should not base its conviction

solely on such an admission. Instead, it should look for clear and credible corroboration of such an admission."

70. The burden could therefore not be said to have shifted to the accused as held by the learned honorable magistrate.

71. The prosecution was under duty throughout the trial to establish the case beyond a reasonable doubt. The ingredients of the offence under Section 99 1 (m) required the production of evidence to establish any of the following in order for the court to return a finding of guilt.

i. The prosecution was under duty to establish refilling of gas cylinders, or
ii. Trading in gas that was refilled without the authority of the brand owner or
iii. Rebranding of gas cylinders without authority of the brand owner.

72. For instance, the prosecution led evidence to the effect that the premises from which the exhibit gas cylinders were recovered was a licensed premise to deal with gas but the prosecution did not adduce any evidence to show the type of gas that the appellants through Cresent Energy Limited were licensed to sell. That evidence was important in order for the prosecution to demonstrate that in respect of any other gas cylinder found in the premises of the appellants, Cresent Energy Limited required authority of the brand owner. That duty was not discharged and such a critical element was not sufficiently established.

73. The prosecution having decided to charge the appellants with illegal refilling of the gas, they were under duty to lead evidence to show that the appellants were engaged in the illegal refilling of gas.

74. The failure to lead that evidence left a gaping hole in the prosecution's case and it was not the business of the appellants to assist the prosecution by calling any evidence to show that they were licensed or not licensed to deal with any of the brands recovered from the lorries found in their yard

considering that the lorries did not belong to them and the known owners of the lorries were not charged.

75. The learned honorable magistrate stated the following in the judgment;'

'' The accused persons chose to remain silent in defence and therefore did not discharge rebuttable presumption of guilt and consequently I find both the accused guilty of all the counts seven counts and convict them under section 215 CPC.''

76. It is this statement that the appellants argued amounted to shifting the burden of proof to the appellants. Mr Mureithi advocate argued that the appellants were under no duty to say anything in defense and that the defense of silence is a constitutionally and legally recognized defense. The fact that the police and Pw1 found cylinders loaded onto vehicles cannot have lawfully invited a rebuttable presumption that the cylinders had been refilled at the *locus in quo.*

77. To suggest that once a person is found directly or constructively in possession of gas cylinders that they would be presumed to have refilled them, is to render the rest of the acts criminalized under Section 99(1) (m) of The Petroleum Act redundant yet trading and rebranding of gas cylinders without authority of the owner are specific offences and punishable under the law. It would be very dangerous to presume that any gas cylinder that is found in the hands of an individual who has no authority from the owner must have been refilled by them.

78. In **Woolmington Vs DPP {1935} AC 462 UKHL1** the court reaffirmed the presumption of innocence as a fundamental in criminal law. It emphasized the need for the state to prove the guilt of an individual beyond a reasonable doubt in order to avoid arbitrarily depriving individuals of their liberty or the imposition of criminal sanctions without proving beyond a reasonable doubt the guilty of an individual.

Viscount Sankey L.C. enshrined what would become the foundational principle of criminal justice, declaring that: "Throughout the web of the English Criminal

Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''

79. The prosecution bears the burden of proving each and every element of the offence in order to secure a conviction. The failure to establish the fact that the appellants were not authorized to refill, trade or rebrand the gas cylinders created a reasonable doubt as to the guilt of the appellants thus they ought to have been acquitted.

80. PW1 Clive Mutiso, who testified as a representative of the brand owners, did not produce any document to show the persons or companies authorized by the eleven brand owners that he purported to represent and whom he claimed to have had issued powers of attorney to Petroleum Institute of East Africa to undertake enforcement on their behalf in order to enable the court determine whether Cresent Energy Limited had authority to deal with the brands whose cylinders were found in their yard.

81. Further, PW1 and PW2 clearly indicated that the cylinders were found in motor vehicles that did not belong to the two appellants thus the prosecution was under duty to ensure that the owners of the motor vehicles were held to account in order to explain the circumstances under which the cylinders came into their possession and also inform the court who had filled the gas in the said cylinders.

82. It is important to note that none of the owners of the motor vehicles or any of their drivers was called to give evidence yet PW1 was emphatic that he did not know where the cylinders were from or were to.

83. The omission to call the owners of the motor vehicle rendered the prosecutions case weak in that other than the fact that those motor vehicles were found in the parking yard of Cresent Energy Limited there was no evidence that Cresent Energy Limited had refilled or in any other manner handled the cylinders. In fact, there was no evidence that the two appellants handled the cylinders at any stage.

84. Further, PW1 in his testimony did not say that he witnessed anyone refilling the cylinders thus the prosecution as submitted by Ms Ogega basically relied circumstantial evidence to support their case that the appellants were responsible for the refilling.

85. It is the finding of this court that the circumstantial evidence presented by the prosecution was so weak to lead the court to drawing an irresistible conclusion that the two appellants were the persons responsible for the refilling of the cylinders.

86. The argument by the prosecution that there was circumstantial evidence to support their case cannot be sustainable. The prosecution by the act of releasing the lorry owners and failing to call them as their witnesses in support of their case weakened the case.

87. In **Republic v Mohammed & another (Petition 39 of 2018) [2019] KESC 48 (KLR) (15 March 2019) (Judgment) (with dissent - MK Ibrahim & SC Wanjala, SCJJ):-**Circumstantial evidence was like any other evidence. Though, its probative value should be reasonable, and not speculative, inferences ought to be drawn from the facts of a case. In contrast to direct testimonial evidence, it was conceptualized in circumstances surrounding the disputed questions of fact. Circumstantial evidence should never be given a derogatory tag**. For a conviction to be sustained on the basis of**

circumstantial evidence, the chain of events had to be so complete that it established the culpability of the respondents, and no one else, without any reasonable doubt.(emphasis supplied). The prosecution in this case broke the chain of events thus creating a doubt as to the genuineness of the complaint as well as the culpability of the appellants.

88. The argument by the prosecution that the mere fact that the vehicles were found in the yard of Cresent Energy Limited where the 1st appellant was a director, should invite the inference that they were guilty of refilling the cylinders is against the well settled principle that a conviction can only be based on the weight of actual evidence and not mere suppositions or suspicion. In **OKETHI OKALE & OTHERS VS. REPUBLIC (1965)EA page 555** where it was held inter alia as follows:

"(I) In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in court speeches."

89. It is this kind of invitation that the prosecution has extended to this court which I politely decline to accept the prosecution's case did not bring out any evidence of refilling of cylinders by the appellants and also the prosecution failed to call witnesses who would have shed light into the circumstances leading to the presence of the cylinders in the parking yard.

90. The release of the motor vehicles that were found carrying the cylinders without taking statements from the owners and calling them as witnesses amounted to a botched trial and the evidence left, was to say the least, worthless for none of the prosecution witnesses could point to anything connecting the appellants to the cylinders.

91. For a court to rely on circumstantial evidence in order to convict an accused person the circumstances of the case should be inconsistent with any other

reason hypothesis than that of guilt pointing directly to the accused person's involvement in the commission of the alleged offence.

92. In **Abanga alias Onyango v R Cr. App. No 32 of 1990**, this court set out the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

93. The prosecution failed to connect the appellants to the cylinders when they omitted to lead evidence from the drivers of the motor vehicles that were found carrying the cylinders or their owners. None of the prosecution witnesses testified to the fact that they found anyone refilling gas cylinders at Cresent Energy Limited as such the only evidence that they led was to the effect that motor vehicles carrying gas cylinders were found within the yard.

94. It is this court's view that that evidence was insufficient to lead the court into a conclusion that the cylinders had been refilled at Cresent Energy Limited and that the refilling happened with the knowledge or participation of the appellants.

95. The appellants contended that the chain of custody of the exhibits was broken. This court upon analyzing the evidence noted that the inventories prepared at the scene of crime did not bear the serial numbers of the cylinders and the cylinders having been removed from the motor vehicles that they were found in the prosecution failed to tender the photographic evidence that was

taken at the scene as well as evidence of transfer of the cylinders into the containers that were kept at the DCI.

96. It is important to state that PW3 testified that there were many gas cylinders at the DCI Headquarters thus it would have been necessary to call evidence that would clearly prove that the cylinders found at Cresent Energy Limited were the same cylinders at the DCI and eventually produced in court. That degree of precision could not be achieved without producing evidence logs that would establish an unbroken chain of custody from the point of collection, transit, storage and production in court.

97. The chronological presentation of evidence assists the court in determining the weight to attach to the evidence because of the dangers of tampering, integrity or contamination of evidence.

98. In the end this court finds that the appeal has merits, the conviction is quashed and the sentence against the appellants is set aside.

99. The court hereby directs that the exhibit cylinders that were produced in evidence since the appellants did not lay a claim to them and the owners of the lorries from which they were recovered were neither charged nor gave evidence during the trial, the investigation officer should organize the disposal of the exhibit cylinders by destruction on a day to be agreed between the investigator the Office of the Director of Public Prosecutions and NEMA officials but not later than 60 Days from the date hereof.

100. The destruction shall be supervised by a Deputy Registrar of this court who shall thereafter file a report in this file.

101. It is so ordered.

DATED, SIGNED and **DELIVERED IN VIRTUAL COURT** at **NAIROBI** this **11th** day of **DECEMBER 2025.**

A. M. MUTETI

JUDGE

In the presence of:

Ombuna: Court Assistant

Mbugua Muerithi for Appellant

Ms Ogega for state