



**Kingori & 9 others v Republic (Criminal Appeal 8 & 9 of 2019
(Consolidated)) [2024] KEHC 7959 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL 8 & 9 OF 2019 (CONSOLIDATED)**

RC RUTTO, J

JUNE 28, 2024

BETWEEN

**CAROLINE NYAWIRA KINGORI 1ST APPELLANT
SUSAN WANGARI WAITHO 2ND APPELLANT
PATRICIA WANJIKU WANJUGU 3RD APPELLANT
MBESSY KINYA JOSES 4TH APPELLANT
GRACE WAMUYU 5TH APPELLANT**

AND

REPUBLIC RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL 9 OF 2019**

BETWEEN

**SHANTEL WANJIRU GITAU 1ST APPELLANT
NINA GATWIRI DAVID 2ND APPELLANT
NARAKWA BEATRICE NINA 3RD APPELLANT
JOSEPH WACHIRA MUHORO 4TH APPELLANT
LUCY WAIRINU WANJIRU 5TH APPELLANT**

AND

REPUBLIC RESPONDENT



JUDGMENT

1. This is an appeal against the conviction and sentencing of the appellants in Nyeri Chief Magistrate Court Criminal Case No 192 of 2019 and 201 of 2019. The appellants were charged with the offence of serving food without a valid medical certificate contrary to section 15(1) (h) as read together with section 17 of *Food, Drugs and Chemical Substance Act*. The particulars of the offence in Criminal Case No 192 of 2019 were as follows “on the 11th day of February 2019 at about 2100hrs at Viceroy bar in Nyeri township within Nyeri County, (the appellants) were jointly found serving drinks without valid medical certificates contrary to the law”. The particulars in Criminal Case No 201 of 2019 were as follows “on the 11th day of February 2019 at about 2100hrs at Jubilee bar in Nyeri township within Nyeri County, (the appellants) were jointly found serving drinks without valid medical certificates contrary to the law”.
2. Each of the appellants pleaded guilty to the charges and were subsequently convicted and sentenced to pay a fine of Kshs.20,000/-, or in default, to serve 6 months imprisonment.
3. Aggrieved by that decision, the appellants lodged this appeal on grounds that they were convicted on a defective charge not supported by any provision of the law. In particular, they urge that the cited provision did not disclose any offence, and that the sentence exceeded the maximum allowed by the correct legislation.
4. The appellants have faulted the trial court for convicting them based on a defective charge. It is their submission that, according to the particulars of the charge, they were charged under the wrong provision of law. Specifically, they were charged under section 15(1)(b) of the *Food, Drugs and Chemical Substances Act*, which does not pertain to selling alcoholic drinks without a medical certificate and section 17 of the same *Act*, which does not prescribe the penalty for the offence created by section 15.
5. The appellant further submitted that the prosecution intended to charge the appellants under Regulations 15(1)(b) and 17 of the *Food Drugs and Chemical Substances (Food Hygiene) Regulations*, and section 28 of the *Food Drugs and Chemical Substances Act*.
6. The appellants submit that, even if they had been charged under the correct provisions of the law, the sentence imposed, which is a fine of Kshs. 20,000/- or in default, an imprisonment of six months, was illegal and manifestly excessive.
7. The respondent concedes to this appeal. They urged this court to find that the charge sheet was heavily defective as particulars of the charge did not support the offence charged. Further, that the defects are not curable under section 382 of the *Criminal Procedure Code*.
8. The respondent relies on the case of *Sigilani v Republic* (2004) eKLR which held that “the principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will enable the accused to prepare his defence.”
9. In support of the appeal the respondent also rely upon section 134 of the *Criminal Procedure Code* and make reference to the cases of *Njoroge vs Republic* (1987)KLR,19; *Okeno v Republic* (1972) E.A and *Kiilu & Another v Republic* (2005)1 KLR 174. They urged the court to look afresh at the evidence presented and determine whether the appellant was properly convicted.



10. They submit that it is apparent that the intention was to charge the appellants under the *Food Drugs and Chemical Substances (Food Hygiene) Regulations* and not section 15 of the *Food Drugs and Chemical Substances Act* which pertains to a completely different offence.
11. Consequently, they urge the court to allow the appeal by finding that the charge sheet was heavily defective as the particulars of the charge did not support the offence charged and that the defects are not curable under section 382 of the *Criminal Procedure Code* and the sentence imposed was illegal, harsh and excessive.

Issue for determination

12. In determining this appeal, this court has a duty to analyse, evaluate and assess the evidence before it so as to come up with its own conclusions despite the appeal being supported in its entirety by the respondent's.
13. The only issue for determination is whether the charge sheet was defective and incurable and if so, what are the consequences.
14. The Court of Appeal in the case of *Benard Ombuna v Republic* (2018)eKLR held that "the test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of charges preferred against him and as a result, he was not able to put up an appropriate defence."
15. Similarly in the case of *Peter Ngure Mwangi v Republic* (2014)eKLR the Court of Appeal addressed itself on the issue of a defective charge when it set out two factors for consideration namely; whether or not the charge sheet is indeed defective and whether or not even with such defect justice will still be met.
16. The substantive law on a defective charge is section 134 of the *Criminal Procedure Code* which provides that; "every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged."
17. In this instance case, the appellants allege that they were charged with a heavily defective charge sheet as the particulars of the charge did not support the offence charged. They contend that the offence they were charged with falls under the *Food Drugs and Chemical Substances (Food Hygiene) Regulations* and not section 15 of the *Food Drugs and Chemical Substances*. They further urge the court to consider Regulation 17, which sets the maximum sentence for a first offender for the offenses committed under the Regulations as a fine not exceeding two thousand shillings or imprisonment for a term not exceeding three months, or both.
18. The said Section 15 of the *Food, Drugs and Chemical Substances Act* provides that:

"Any person who sells, prepares, preserves, packages, conveys, stores or displays for sale any cosmetic under insanitary conditions shall be guilty of an offence."
19. On the other hand, Section 17 of provides as follows;

"Any person who labels, packages, treats, processes, sells or advertises any device in contravention of any regulations made under this Act, or in a manner that is false, misleading or deceptive as regards its character, value, composition, merit or safety, shall be guilty of an offence"



20. While Regulation 15 of the *Food, Drugs and Chemical Substances (Food Hygiene) Regulations* provides

15(1) Every person who owns, operates or is in charge of a food plant shall take all reasonable measures and precautions to ensure that—

- a. no person suffering from any disease in a communicable form or having boils, sores or infected wounds works in a food plant in any capacity where there is a reasonable possibility of food ingredients becoming contaminated by such person or the disease being transmitted to the other employees
- b. thorough medical examination is carried out in a Government medical institution or by a medical officer of health on all employees prior to their employment and at regular intervals of not more than twelve months; and the health certificate and health records of each employee showing the dates and results of the health examination are kept at the food plant;
- c. all persons while working in direct contact with food, food ingredients or food contact surfaces comply with requirements as to general cleanliness set out in Part B of the Second Schedule;
- d. the personnel responsible for identifying sanitation failures or food contamination are properly trained to provide a level of competency necessary for the production of clean and safe food, and in the case of food handlers and supervisors, proper techniques and food protection principles to make them cognisant of the danger of poor personal hygiene and insanitary practices; and
- e. proper supervision is provided so that responsibility for ensuring the compliance by all employees with the requirements of these Regulations (copies of which shall be prominently displayed in all appropriate places in the plant) is assigned to competent supervisory personnel.

15(2)a The owner, operator or the person in charge of a food plant shall, in pursuance of the provisions of paragraph (1)(b), apply to the health authority for a medical examination of all persons employed at the food plant.

(b) ...

21. On its part, Regulation 17 provides

Any person who contravenes the provisions of these Regulations shall be guilty of an offence and liable —

- a. In case of a first offence, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment and
- b. In the case of a second or subsequent offence, to a fine not exceeding four thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.

21. Without a doubt, as conceded by the DPP, the appellants were charged under the wrong provision of the law. Section 15 of the *Food, Drugs and Chemical Substances Act* does not pertain to selling alcoholic



- drinks without a medical certificate and section 17 of the same Act does not provide a penalty for an offence under section 15.
22. The appellants ought to have been charged under the provisions of Regulations 15 and 17 of the *Food Drugs and Chemical Substances (Food Hygiene) Regulations*. Regulation 15 mandates a person operating, or in charge of a food plant to undertake certain health measures while Regulation 17 makes it an offence and sets out the penalty for failing to adhere to the provisions of the Regulations. It is therefore evident that the appellants were charged under the wrong provision of law.
 23. The appellants also allege that even if they had been charged under the correct provisions of law, the sentence meted out, a fine of Kshs. 20,000/- in default to serve six months imprisonment, was illegal and manifestly excessive. Notably, as demonstrated above, Regulation 17 sets out the penalties as follows “ in the case of a first offence, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months or both such fine and imprisonment.”
 24. A plain reading of the quoted legal provisions clearly demonstrates that the appellants were charged under the wrong provisions of law, and further, that the sentence meted on them was excessive. The reliance on the wrong provision of the law was prejudicial to the appellants because the provision relied upon did not in any way relate to the offense charged thus failing to communicate to the appellants the basis for the charge as well as the likely consequences upon a finding of guilt so as to enable them to adequately prepare for their defense. It’s no wonder that the sentence imposed on them was beyond the prescription provided under the right provision of the law. I therefore find that the Charge Sheet to which the appellants were charged to be fatally defective in substance for making reference to the wrong provisions of law and to the extent that those provisions of law do not create an offence.
 25. Having found that the appellants were prejudiced by the defective charge sheet, the next question to determine is whether a retrial should be ordered. The Court of Appeal in *Pius Olima & another –Vs- Republic* [1993] eKLR reiterated the principles to guide the court in determining whether to order a retrial. It thus held:-

“The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court.....is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”
 26. Therefore, a retrial after a defective trial should only be ordered if it’s in the interests of justice and if no prejudice will be suffered by the appellants. In this case, noting the effluxion of time since when the alleged offense took place in February 2019, revitalizing a charge at this point would be prejudicial to the appellants and defeats the ends of justice as the appellants would be expected to plead afresh to a charge long after its occurrence.
 27. Consequently, I allow the appeal, quash the conviction and set aside the sentence of the trial court.
 28. It is so ordered.

RHODA RUTTO

JUDGE

DATED THIS 28TH DAY OF JUNE 2024

For Appellants: Mr. Muhoho

For Respondent: Ms Lubanga



Court Assistant: Peter Wabwire

