



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 41 OF 2017

(From original conviction and sentence in Murang'a CM Criminal Case NO 985 OF 2017 – A K MWICIGI, PM)

ANTHONY MACHARIA KARIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **Anthony Macharia Karimi**, was convicted upon his own plea of transporting adulterated milk for sale contrary to **section 131(2) as read with section 133** of the **Public Health Act, Cap 242**. It was alleged in the charge that on 19/06/2017 at 19.00 hours along Sagana-Kenol Road near Total Petrol Station in Kiharu Sub-County within Murang'a County, he was found transporting 500 litres of pasteurized milk that was laced with **hydrogen peroxide** and thus unfit for use, using motor vehicle registration number KCC 791 D, *Mitsubishi Canter*. He was sentenced to serve (2) years imprisonment and for the milk cans to be forfeited to the state. He has appealed against both conviction and sentence.

2. The grounds of appeal in his petition dated 27/06/2017 are –

(i) That the charge was defective in law and did not disclose any offence known to law.

(ii) That the Appellant's plea was equivocal.

(iii) That the trial court erred in law in admitting evidence after the Appellant had been convicted and after he offered his mitigation. The Appellant's right to fair trial was thereby violated to his prejudice.

(iv) That the sentence of two years imprisonment was manifestly harsh and excessive.

(v) That there was no basis for the order of forfeiture of the milk cans.

3. Leaned prosecution counsel supported the conviction and sentence.

4. I have considered the submissions of both learned counsels.

5. **Section 131(1)** of the **Public Health Act, Cap 242** prohibits the sale, exposure for sale, importation or

bringing into any market, or having in possession without reasonable excuse, any food for man in a tainted, adulterated, diseased or unwholesome state, or which is unfit for use. Milk is no doubt food for man.

6. The Appellant had in his possession 500 litres of milk that had been laced or adulterated with **hydrogen peroxide**, thus rendering it unfit for use. That milk was liable to be seized and to possible destruction under section 131(1) aforesaid.

7. In addition to the seizure and possible destruction, the Appellant was also clearly guilty of an offence under section 133 of the Act and liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

8. So, the Appellant should have been charged under section 131(1) as read with section 133 of the Act. But instead he was charged under section 131(2) as read with section 133 of the Act. Under section 131(2) the offence committed is collecting, preparing, manufacturing, keeping, transmitting or exposing for sale any foodstuffs without taking adequate measures to guard against or prevent any infection or contamination of the foodstuffs. It is an offence of omission, not commission.

9. The issue which the court must now decide is whether the Appellant suffered any prejudice by being charged under section 131(2) instead of under section 131(1) of the Act.

10. It was clear from the particulars of the charge that what the Appellant was being charged with was transporting or transmitting milk that was laced or adulterated with hydrogen peroxide, thus rendering it unfit for human or animal consumption and actually harmful. That was also clear from the facts given by the prosecution which he unequivocally admitted.

11. The penalty for the further offence whether under section 131(1) or section 131(2) is the same - a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding three years or both. So, the fact that the Appellant was charged under section 131(2) instead of under section 131(1) as he should have, occasioned him absolutely no prejudice, particularly considering that he unequivocally admitted being found in possession of the adulterated milk while transmitting it.

12. The defect in the charge thus did not occasion a failure of justice and is eminently curable under **section 382** of the **Criminal Procedure Code**. I so hold.

13. The only other complaint regarding the conviction is that the trial court admitted evidence after the Appellant had been convicted and after he had offered his mitigation.

14. The short statement by the **Dairy Board Inspector** was not evidence. It was in the nature of a victim impact report, in this case the victim being the public at large to whom the adulterated milk was going to be sold. The **Dairy Board Inspector** represented the victim (public). His statement did not occasion any prejudice to the Appellant, or failure of justice.

15. I therefore find no merit in the appeal against conviction, and the same is dismissed.

16. As for the sentence, from a public health and safety perspective, the offence committed by the Appellant was quite serious. He was transporting for sale in Nairobi a large quantity of milk that was dangerously laced with **hydrogen peroxide**, without caring about the health of those who were going to buy and consume it. The custodial sentence of two years was richly deserved.

17. The complaint regarding the order of forfeiture of the milk cans has merit. This was not a forfeiture under **section 29** of the **Penal Code** which applies only where a person is convicted of an offence under **section 118** or **119** of the **Penal Code** (**compounding felonies and compounding penal actions**). For any other forfeiture to ensue therefore, the procedure under **section 389A** of the **Criminal Procedure Code** would have to be invoked, but only where by or under any written law (other than section 29 of the Penal Code) any goods or things may be (but are not obliged to be) forfeited by a court. The **Public Health Act** under which the Appellant was charged does not appear to provide for forfeiture.

18. The order for forfeiture of the milk cans was thus bad in law and is hereby set aside.

19. Except to that very limited extent, the Appellant's appeal is otherwise dismissed. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF DECEMBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 29TH DAY OF DECEMBER 2017



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