



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.E012 OF 2021

REPUBLICAPPLICANT

FREDRICK NYAGENYARESPONDENT

J U D G M E N T

[1] This appeal was presented by the Republic of Kenya through the office of the Director of Public Prosecutions and arose from the decision of the Senior Principle Magistrate in **Busia CM. CR. Case No.1206 of 2021**, in which the respondent **Fredrick Nyagenya**, was charged under the **Crops Act** which three counts viz:-

COUNT 1 - Failure to register as a dealer with the Agriculture and Food Authority, contrary to **s.16 (1)** as read with **s.16 (4)** of the Crops Act, in that on the 11th April 2021 at around 10.00hrs along Amongura – Amaase murrum road, Teso South Busia County, the respondent was found with agriculture/food product namely dry maize to wit 120 bags using m/v Reg No.KCT 273T Isuzu FRR having not registered as a dealer with the Agriculture & Food Authority.

COUNT II - Transporting a scheduled crop from a non-registered dealer, contrary to **s.11 (b) (ii)** as read **with s.19 (3)** of the Crops Act, in that on the 11th April 2021 at around 1800 hrs along Amongura – Amaase murrum road Teso South Busia County the respondent was fund with agriculture/food product namely dry maize to wit 120 bags using m/v Reg No.KCT 273 Isuzu FRR from a non-registered dealer.

COUNT III - Importing maize consignment through a non-registered point of entry, contrary to Regulation **12 (3)** as read with Regulation **12 (12)** of the Food Crops Regulations, 2019 in that on the 11th April 2021 at around 1800 hrs along Amongura – Amaase murrum road Teso South, Busia County, the respondent was found importing maize, consignment through a non-designated point of entry namely dry maize to wit 120 bags using motor vehicle Reg No.KCT 273T Isuzu FRR from a non-registered dealer.

[2] After pleading not guilty to all the three counts, the respondent was put to trial with the prosecution closing its case after calling a total of six (6) witnesses. The trial court considered the evidence of the six witnesses and ruled that the prosecution had failed to establish a “**prima facie**” case against the respondent/accused in all the counts. The respondent was accordingly acquitted on all the three counts under **s.210** of the Criminal Procedure Code. The court further ordered that the respondent’s cash bail be refunded and that the m/v Reg No.KCT 273 T Isuzu FRR loaded with 120 bags of maize be released forthwith to the owner by the OCS Adungosi police station.

[3] Being aggrieved with the ruling and order the Republic/appellant preferred the present appeal on the basis of the three grounds set out in the petition of appeal filed herein on 3rd June 2021 and dated 27th April 2021.

At the hearing of the appeal which proceeded by way of written submissions, the learned prosecution counsel, **Mr. Gibson Mayaba**, appeared for the appellant while the learned counsel, **Mr. Okutta**, appeared for the respondent. Both parties filed their respective submissions. The respondent opposed the appeal and prayed for its dismissal.

[4] The duty of this court was to re-visit the evidence availed before the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In that regard, this court gave due consideration to the evidence by the six (6) prosecution witness i.e. **P.C. Amos Bundi (PW 1)** and **P.C. Nicholas Thumbi (PW 2)** both based at Adungosi police station. **Ferdinand Masinde (PW 3)**, a deputy director with Agriculture & Food Authority's Food Crop Directorate and **Erastus Loitaken (PW 4)**, a security officer with Kenya Revenue Authority (**KRA**), Chief Inspector **Munyoki Mubo (PW 5)**, the officer commanding Adungosi Police station (**OCS**) and **Job Lorechu (PW 6)**, an investigation officer with KRA.

[5] The issue which arose at that juncture was whether the evidence was sufficient and credible enough for purposes of a "*prima facie*" case to place the respondent on his defence. The trial court in a rather long ruling which involved analysis of the entire evidence found that the prosecution failed to establish a "*prima facie*" case against the respondent and acquitted him for having no case to answer in all the three counts.

[6] The same issue has now been presented to this court for determination via this appeal. s. 210 of the **Criminal Procedure Code**, provides for the acquittal of an accused person when there is no case to answer in the following terms:-

"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

[7] Such a case is termed "*prima facie*" and is one which would be sufficient to prove a particular proposition unless rebutted. In latin "*prima facie*" means at first sight. It is a legal term which means having enough evidence to proceed to trial or judgment. In order to establish a "*prima facie*" case, the prosecution only needs to offer credible evidence in support of the necessary ingredients or elements of an offence. Such evidence should be sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by the accused person.

[8] The leading decision on this point is the decision of the Court of Appeal in the case of **Bhatt Vs. Republic (1951) EA 332**, where it was stated that:-

"It may not be easy to define what is meant by a prima facie case, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the Law and the evidence could convict if no explanation is offered by the defence"

The Court further stated that:-

"At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."

[9] In this case, the accused/respondent was charged under the **Crops Act** and the **Food Crops Regulations, 2019** for failure to register as a dealer (**Ct 1**) and for transporting a scheduled crop from a non-registered dealer (**Ct II**). The third count related to importation of a consignment of maize through a non-designated point.

The prosecution evidence in support of the charges and in establishing the ingredients thereof was primarily that of P.C Bundi (**PW 1**), P.C. Thumbi (**PW 2**) and the office from the Agriculture & Food Authority, Masinde (**PW 3**). This was "**backed**" up by the evidence provided by the OCS Adungosi police station (**PW 5**) and officials from the Kenya Revenue Authority (**KRA**) (**PW 4**) and (**PW 6**)

[10] In this court's opinion, the evidence was in its totality credible and sufficient enough to warrant the placing of the respondent on his defence as there was no dispute whatsoever that he was the driver of the m/v Reg No.KCT 273T Isuzu FRR, which was found at Amaase Trading Centre along the Amukura – Amaase road leading to the neighbouring country of Uganda carrying and

transporting a consignment of 120 bags of maize, a scheduled crop the dealing in which is prohibited on commercial basis unless one is a registered dealer, a fact which can be confirmed by necessary documentation from the relevant authority.

[11] The circumstances of the case as shown in the prosecution evidence clearly implied that such quantity of maize was intended more for commercial rather than domestic purposes. A hundred and twenty (120) bags of maize are not one's everyday packets of maize flour for the favourite "ugali" (posho) meal in any African homestead.

[12] All the foregoing favours were not considered by the trial court to give weight to the prosecution evidence. Instead, more emphasis was placed on the standard of proof required to convict the respondent i.e beyond reasonable doubt. This was unnecessary at that stage of the proceedings and perhaps explains the trial court's lengthy ruling which gave rise to this appeal. The weight of the evidence to determine whether or not it was credible and sufficient enough to place the respondent on his defence should have been the main concern of the trial court.

[13] In sum, the present appeal is well merited and deserving but unfortunately, the appellant in its petition of appeal did not state the prayers being sought by itself upon success of the appeal.

It is obvious that the matter cannot be remitted back to the trial court as it has already made up its mind and taken a firm position that there is no case for the respondent to answer. Neither can the matter be remitted to a different trial court to place the respondent on his defence and render its final decision. This is because the new trial court would have had no advantage of seeing and hearing the prosecution witnesses to gauge their veracity and indeed, the veracity of the entire prosecution case against the respondent.

[14] At this juncture and in the interest of justice, the circumstances beckon the order for re-trial of the case. The appeal is ultimately allowed to the extent that the ruling of the trial court dated 30th April 2021 be and is hereby quashed with the result that there shall be a re-trial of the matter before a different magistrate of competent jurisdiction.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 18TH DAY OF NOVEMBER 2021]



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