



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 91 OF 1977**

**ESILAI VALENTINE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant in this case, Esialai Valentine, together with two others David Nyongesa and Kelefas Wekesa, appeared before the Second-Class District Magistrate at Busia on 12th April 1977, charged with the offence of dealing in coffee business without a licence, contrary to section 13(1) and (2) of the Coffee Act as read with section 36 of the same Act. The particulars were that on 11th April 1977, at Amugura village, Busia district, they jointly were found dealing with coffee business without a licence in that they were found with ten and a half bags of coffee in a motor vehicle (registration KLX 856, make Chevrolet) without a licence to authorize them issued in its discretion by the Marketing Board.

After the charge was read over and explained to them, they each said: "It is true. I was found dealing with coffee business without a licence". The prosecutor then outlined the facts as follows:

On 11th April 1977 when the three accused persons were found travelling jointly in a motor vehicle registration KLX 856, Chevrolet, that was loaded with ten and a half bags of coffee. The motor vehicle was travelling from Amugura to Angoromo. At Adongosi police post the three accused persons were stopped by the police officers who were on duty. The police officers found that the motor vehicle was loaded with ten and a half bags of coffee. All of them pleaded with the police officers to release them.

In the course of their discussion with the police officers, the OCPD arrived at the scene. The police officers went and made to him a report. He then ordered that the three men be arrested together with the ten and a half bags of coffee and be escorted to Busia Police Station. The three accused persons were later charged with this offence.

To that each of the accused said " I admit the facts of the case as true", upon which the Court convicted each of them on their own plea. The magistrate then sentenced them each to a fine of Shs 1500 or, in default, to three months' imprisonment and a further sentence of three months' imprisonment each.

Mr Behan for the appellant takes only one ground of appeal relating to conviction, that is that the plea

was not unequivocal. Mr Behan argues that, although the appellant first said "It is true. I was found dealing in coffee business without a licence", when it came to the recitation of the facts by the prosecutor, all that that disclosed was that the motor vehicle in which the three accused were travelling had in it ten and half bags of coffee. When one looks at section 13(1) of the Coffee Act, it provides as follows:

No person shall buy, sell, export, mill, warehouse or otherwise deal in or transact any business in coffee unless he is the holder of a current licence thereto authorising him, issued, in its discretion, by the Board;

...

There are then several *provisos* which I need not set out in full but which contain the sensible *proviso* that a retail seller of provisions may, without such a licence, purchase clean coffee or sell clean coffee in retail quantities; and then there is a further important *proviso* that:

any person may, without such a licence, buy coffee from a dealer holding such a licence or from a planter holding a current planter's licence for his own consumption or for planting on his own land.

The point which is taken by Mr Behan is that there must be a "dealing" in any business in coffee. "Dealing" or "to deal" is not defined in the Coffee Act, but I take it to mean any dealing which is *ejusdem generis* with the other transactions set out at the beginning of the section ie buying, selling, exporting, milling or warehousing. Certainly, there is nothing in the Act which penalises a person for possessing coffee without a licence and there is no presumption laid down that such possession would shift the onus upon the possessor to explain his possession. In those circumstances, in my judgment, Mr Behan's argument is correct, namely that the recitation of the facts by the prosecutors did not disclose any offence under section 13(1). It may well be, as Mr Etyang, for the Republic, rightly points out, that one should take judicial notice of the fact that there has been a lot of movement of coffee across the border and this being a border area I should take judicial notice of it. I am, of course, mindful of this evil but it seems to me that it is not for the Courts to stretch the meaning of the word "deal" in the Act in such circumstances but for the Legislature, if they see fit, to amend the Act to include possession of coffee as a "dealing" under the Act, or create the presumption which is found in such other enactments as the Scrap Metal Act and the Motor Vehicle Component and Accessories Act (see sections 2(2) of those Acts).

In the circumstances, I hold that there was no dealing in this particular case and that, accordingly, the plea of all the three accused person was equivocal and that the conviction of the appellant must be quashed. The two other accused, David Nyongesa and Kelefas Wekesa, have not appealed but exercising my powers of revision I quash their convictions as well.

The only matter that remains is whether having quashed the convictions, I should order a retrial, in the interests of justice. In ordinary circumstances, I would have done this, but it has been pointed out to me that the appellant has served one month of his sentence and that the other two men have served the whole of their three-months sentences. In the circumstances, I would not regard it as being in the interest of justice to order a retrial. The sentences imposed on all three accused are set aside, and the fines, if paid, are to be refunded to them.

*Appeal allowed.*

**Dated and Delivered at Kisumu this 30th day of September 1977.**

**E.COTRAN**

**JUDGE**



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