



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEALS NO 41, 42, 43 & 44 OF 1989 (CONSOLIDATED)

BETWEEN

PETER MWAN'GOMBE MWAKIMA..... 1ST APPELLANT

PASCAL MAKUMBI NJUMWA..... 2ND APPELLANT

AGNEALA KEZIAH WALEGWA..... 3RD APPELLANT

MNG'AMBWA MWIKAMBA..... 4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeals from conviction and sentence of the Resident Magistrate's Court at Voi (N O Masara, Esq)

in

Criminal Case No 736 of 1988)

October 13, 1989, **Bosire J** delivered the following judgment.

The appellants in these consolidated appeals are Peter Mwan'gombe Mwakima and Pascal Makumbi Njumwa in one part and Agneala Keziah Walegwa and Mng'ambwa Mwikamba on the other part. The two sets of appellants, as paired, were jointly and separately charged with the offence of having in their possession for use for trade purposes a weighing instrument not authorized by the Weights and Measures Act, contrary to section 20 as read with section 63 of the Act (No 18 of 1987); were tried, convicted and sentenced to pay Kshs 10,000/- each in default to serve 9 months imprisonment each. There was also an order of forfeiture of the offending weighing instruments.

The facts upon which each set of appellants were convicted are similar. On 14th June, 1988 Inspectors of Weights and Measures visited two butcheries at Voi Township, one owned by Peter Mwang'ombe

Mwakima, but which had Pascal Makumbi Njumwa, as an attendant; and the other was allegedly owned by Agnela Keziah Walegwa with Mng'ambwa Mwikamba as the attendant. At the counter of each of the shops there was a counter balance duly stamped as required by the Weights and Measures Act. There was another weighing instrument inside the meat safe of each shop. Those were not authorized for use for trade purposes. They were seized and charges were preferred against the appellants.

At the trial it was conceded by the prosecution that the seized weighing instruments were not in use, were of a capacity of 50kg and 90kg respectively and that the shop owners were not present in their respective shops at the time of seizure.

Determination of the appellants' case in the court below and of their appeals before me much depended and does depend on the construction to give to the provisions of section 29 of the Weights and Measures Act, which provides:

"Where any weight, measure, weighing or measuring instrument is found in possession or in control of any person carrying on trade or is found on any premises, whether in a building or not and whether open or enclosed, which are used for trade, that person shall be deemed for the purposes of this Act to have the weight, measure or weighing or measuring instrument in his possession for use for trade and the onus of proving the contrary shall be upon him".

The section places the burden on an accused found in possession to explain that the instrument he is found with is not for trade. The section operates where direct evidence is lacking. In the instant case the offending instruments were found hung in meat safes. There were other proper balances at the counter. The rationale for the deeming provision above is to discourage the keeping of fault instruments and those which may be adjusted in such a way as may lead to fraud, in places of business. The provision is intended to shift the burden to the accused to explain possession.

Where the law places a burden on an accused to prove it has never been, unless the law clearly says so, as high as always lies on the prosecution to prove a criminal charge beyond any reasonable doubt. The trial Magistrate was in error to have held that the duty placed on the accused by the above provision is to explain beyond reasonable doubt that the instrument is not for use in trade. The possession raises a presumption. The duty of the accused is to rebut the presumption by demonstrating on a balance of probabilities that the instrument is not for use for trade purposes.

In the instant matter there were two weighing apparatus in each shop. The offending ones were of a much greater capacity than the proper ones. Some explanation was given for the presence of the offending instruments. It was for internal accounting. The butcher gets meat from the slaughter house or from whatever other source, weighs it to ascertain the quantity he bought. The counter balance would not do because its capacity is small. That was an explanation the prosecution gave in court as having been offered by Pascal Makumbi Njumwa and Mng'ambwa Mwikamba. The explanation was plausible. The trial Magistrate having construed section 29, above, strictly did not consider that explanation to see if it rebutted the legal presumption of guilt. He erred.

Agnela Kezia Walegwa denied ownership of the butchery business which was attributed to her. The trade licence was not tendered in evidence. So she could not be held to be in possession and to be called upon to explain possession when she was not shown to have control of the premises in which the weighing instrument was found. She was improperly convicted.

The appellants' convictions are unsafe. They are quashed, and the sentences imposed are set aside. The evidence having shown that the weighing instruments are not for use for trade I am disinclined to

interfere with the order of forfeiture. Order accordingly.

Dated and delivered at Mombasa this 13th day of October , 1989

S.E.O BOSIRE

JUDGE



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