



Case Number:	Criminal Appeal 1402 of 1984
Date Delivered:	10 Dec 1984
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Joyce Adhiambo Aluoch
Citation:	Sempolo Ole Naeni v Republic [1984] eKLR
Advocates:	Mr MN Mbaya for Appellant Mr AK Nyairo for Respondent
Case Summary:	<p>Ole Naeni v Republic</p> <p>High Court, at Nairobi December 10, 1984</p> <p>Aluoch J</p> <p>Criminal Appeal No 1402 of 1984</p> <p>(Appeal from the Second Class District Magistrate's Court</p> <p>at Kajiado, GK Mutai Esq)</p> <p><i>Criminal Practice and Procedure – charge – defective charge – charge based on wrong provision of law – provision of law not a penalty provision – whether conviction under such charge proper – whether defect in charge curable – Animal and Diseases Rules rule 29(1) – Criminal Procedure Code (cap 75) sections 364(1), 382.</i></p> <p><i>Criminal Practice and Procedure - revisionary jurisdiction of High Court – when exercised – where accused convicted on defective charge – charge based on wrong provision of law – defect</i></p>

occasioning injustice – defect incurable – only one accused appealing – whether proper case for revision - Criminal Procedure Code (cap 75) section 364(1).

The appellant, together with four other persons, was charged in a magistrate's court with what was stated to be the offence of "[m]oving Animals without a permit, contrary to rule 29(1) of the Animal and Disease Rules, cap 364, Laws of Kenya". The appellant and his co-accused were all convicted and sentenced to fines and an order was made for the forfeiture to the Government of 33 head of cattle to the Government. The appellant appealed.

Held

1. The rule under which the appellant was charged did not provide a penalty and was the proper provision.

2. The appellant suffered a miscarriage of justice in being convicted under the wrong provision.

3. The miscarriage of justice suffered by the appellant could not be cured under section 382 of the Criminal Procedure Code (cap 75) as the offence charged was not similar to that which was anticipated under the Animal Diseases Rules of the Animal Diseases Act (cap 364).

4. The proviso to section 382 of the Criminal Procedure Code did not apply in this case because the accused persons had not been represented in the lower court and could not have been expected to know that they were charged under a wrong section in order for them to raise an objection at the trial.

5. The Court would exercise its reversionary powers under section 364(1) of the Criminal Procedure Code in ordering the acquittal and release of the appellant and his co-accused.

Appeal allowed.

Cases

Uganda v Keneri Opidi [1965] EA 614

	<p>Statutes</p> <p>1. Animal Diseases Act (cap 364)</p> <p>2. Animal Diseases Rules (cap 364 Sub Leg) rule 29(1)</p> <p>3. Criminal Procedure Code (cap 75) sections 364(1), 382</p> <p>Advocates</p> <p><i>Mr MN Mbaya</i> for Appellant</p> <p><i>Mr AK Nyairo</i> for Respondent</p>
Court Division:	Criminal
History Magistrates:	GK Mutai
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	Kajiado
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 1402 OF 1984

SEMPOLO OLE NAENI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Second Class District Magistrate’s Court at Kajjado, GK Mutai Esq)

JUDGMENT

The appellant, Sempolo Ole Naeni, together with four others, who have not lodged any appeal were convicted on their own pleas of guilty, by the learned second class magistrate, Kajjado, of the offence of “Moving Animals without a permit, contrary to rule 29(1) of the Animal and Disease Rules, cap 364, Laws of Kenya.”

The appellant, together with 4 others, were each sentenced to pay a fine of Kshs 2,000 in default, 3 months’ imprisonment. A further order was made forfeiting the 33 head of cattle to the Government. The appellant’s appeal before me was against both conviction and sentence, and the order of forfeiture. When the hearing of this appeal started before me, Mr Nyairo, State Counsel, conceded on the ground that the section under which appellant was charged, did not exist, as rule 29(1) of cap 364, was the rule dealing with “Notification of infected areas,” not a penalty section for “Moving animals without a permit.” Mr Nyairo relied on the case of *Uganda v Keneri Opidi* reported in [1965] EALR page 614. I have gone through the case and I would say, it provides a useful guide. I find that the appellant suffered a miscarriage of justice in having been convicted under rule 29 of cap 364, Laws of Kenya. The miscarriage of justice suffered cannot be cured under section 382 Criminal Procedure Code, because it goes to the root of the matter, in that the offence created under these Rules is, “Movement of Animals within restricted areas without a permit.” The intention of the legislature was to restrict movement of animals in restricted areas, not just movement of animals generally. This is why this defect cannot be cured by section 382 Criminal Produce Code. I also find that the proviso to section 382, Criminal Procedure Code cannot apply in this case either, because the appellant and the others who were unrepresented in the lower court, could not have been expected to know that they were charged under a non-existent section. Because of the foregoing, I am left with no alternative, but to allow the appeal, quash conviction and set aside the sentence imposed on the appellant. Because of the nature of the conviction imposed on the appellant, plus the other co-accused who have not appealed, these are Lekenye ole Noonkiyos, Kuya ole Loikitasae, Nkilasi ole Siaponi and Ntoyiau ole Moreru, I feel inclined to exercise my revisionary powers under section 364(1) of the Criminal Procedure Code, and order that they all be acquitted and released forthwith, unless otherwise lawfully held. If any fine had been paid by the appellant, Sempolo ole Naeni, or any of the other accused persons charged together with him in the lower court, I order that such monies be refunded back to them.

Finally, I rescind the trial magistrate’s order for the forfeiture of 33 head of cattle, and order that the

head of cattle be restored to the owners. Orders accordingly.

Dated and Delivered at Nairobi this 10th day of December 1984.

J.A.ALUOCH

JUDGE



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