

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA.
CRIMINAL APPEAL NO.20/98.

CORAM: HON. MR. JUSTICE G.M. OKELLO,JA.;
HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE,JA
HON. MR. JUSTICE A. TWINOMUJUNI ,J.A.

PETER DHOOR IYOUK..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

JUDGMENT OF THE COURT

This is a second appeal. It arises from an appellate decision of the High Court dated 26-6-98 whereby Tinyinondi,J. acquitted the appellant and confirmed the order of condemnation of the goods.

The appellant Peter Dhour lyouk was originally charged before the Chief Magistrate Y. Bamwine,Esq. on three counts of knowingly using counterfeit documents cls 148(h) of the East rican Customs and Management Act, as amended by Decree No.13 of 1997, in respect of about 800 cartons of sportsman cigarettes made in Tanzania purportedly consigned to him whereas not.

On the alternative count he was charged with Importing prohibited goods c/s 146(a) 1 of the Act.

The Chief Magistrate convicted the appellant on the three main counts and sentenced him to the maximum fine of Shs.200,000= or 12 months in jail in default.

The learned Chief Magistrate also ordered forfeiture of the goods under Section 180 (1) of the Act. He however acquitted the appellant, under Section 131 of the Magistrates Court Act; on the alternative count.

On appeal to the High Court, the learned judge allowed the appeal, in part. He quashed the conviction, acquitted the appellant and set aside the sentence. He however upheld the order for the goods to be condemned.

The appeal to this court is against such order of condemnation and is based on 4 grounds:

1. The learned judge erred in Law and in fact in holding that the Appellant was not the owner of the goods by reason of his acquittal or importing prohibited goods and which acquittal was itself irregular in Law.
2. The learned judge erred in Law and in fact in holding that the Appellant did not validly import the goods into the country on transit to Sudan when the Appellant was found not to have known that the documents he used to claim the goods from Uganda Revenue Authority were counterfeit.
3. The learned judge erred in Law and in fact in believing the evidence of PW8 who was incompetent and his evidence inconsistent with that of PW2 and PW4.
4. The learned judge erred in Law and in fact in condemning the goods.

Mr. Eric Muhwezi for the appellant argued them together.

He first dealt with the issue of acquittal on the alternative count. He stated that the learned Chief Magistrate erred in making a finding on the alternative count on which he based the order of condemnation. In his view the goods would not have been condemned had the correct procedure been followed. Having convicted on the three main counts, the Chief Magistrate should not have made any finding on the alternative count. He submitted that the acquittal was illegal and the finding based on such acquittal that the appellant did not import the goods and that the goods did not belong to him, irregular and erroneous.

The State did not canvass this point, neither before the High Court or before us. In view of the evidence on record it would make no difference.

We agree that the learned trial Magistrate was not correct to make a finding on the alternative count after convicting on the main counts. In *R. v. Seymour* 38, Cr. App. R.68, the evidence was consistent with both larceny and receiving, but no count on larceny was included in the indictment. It was held that the indictment should contain both counts, and that if a conviction is entered on one of the alternative counts, no finding should be made on the other.

We do not agree however that it was this finding that influenced the learned appeal Judge to order condemnation of the goods.

After convicting the appellant on the three main Counts, the Chief Magistrate proceeded to invoke Section 160(1) of the Act to order ‘forfeiture on account of the conviction.’

The learned judge similarly remarked:

“The reason for the forfeiture in the lower court was the conviction.”

The acquittal therefore did not influence either the lower or High Court in passing their orders.

Mr. Muhwezi's other submission was that the appellant had proved ownership of the goods and did not know the documents were false. He mainly challenged the evidence of PW8 whom he said was not the author of the documents and was therefore not competent to testify as to their authenticity. He said that the authors were available but were never called to testify as to their authenticity. He said that the authors were available but were never called to testify.

It was his argument that the goods were validly imported through middlemen and were enroute to Sudan. He prayed court to quash the condemnation order and order the appellant to produce proper documentation.

Mr. Byabakama, Senior Principal State Attorney, supported the High Court decision and prayed for dismissal of the appeal. He submitted that the High Court having found that there was lack of knowledge on part of the appellant on the counterfeit nature of the documents he presented to prove ownership of the goods, the learned judge rightly quashed the lower court conviction and having done so the judge was required to consider the fate of the goods in question under Section 160 (2) of the Act. He pointed out that under Section 167 the onus of proving lawful importation was on the appellant, which onus he had failed to discharge.

Regarding ownership the learned Chief Magistrate after admirably scrutinizing the documents and analysing the evidence of PW8 said:

“ They are all outright forgeries and therefore counterfeits.”

The learned judge observed:

“The court highlighted several discrepancies between the documents presented by the prosecution exhibit “PVI” and the evidence, of PW8 as against the documents presented by the appellant - Exhibit “P1” and “D11” to arrive at the conclusion it did. The learned trial Chief Magistrate's evaluation of the evidence cannot be faulted on the issue. The discrepancies in the documents presented by the appellant were several, they were glaring

and fundamental. PW8 was in a position to testify to the documents. He was best qualified by virtue of his official position of certifying and numbering the documents before releasing the goods as Resident Sales Tax officer in the Tanzanian Cigarette Company Ltd.”

We would agree PW8’s competence to testify was based on or acquired by practical experience. It has been held;

“All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required.” per Maule,J. in Vander Donckt v. Theiluson, (1849) 8 CB 812 cited in Gatheru s/o Njangware v. R.. - Cr. App. No.938 of 1954.

PW8 was not testifying as a handwriting expert as Mr. Muhwezi contended. He was testifying as a person employed by the Tanzania Tobacco Company as a Resident Sales officer for a long time since 1988. His knowledge was based on records kept by the company. He had handled genuine documents for a long time as correctly pointed out by Mr. Byabakama. He could therefore easily isolate false ones.

The learned Judge - referred to S.167 which casts - the burden of proving ownership of the cigarette upon the appellant, and said that this could be done only by the production of genuine documents. Furthermore, the onus was upon the appellant on first appeal to show that the findings of the Chief Magistrate were unreasonable and could not be supported having regard to the evidence on record.

Mr. Muhwezi maintained that the appellant did not know the documents were false and made a rather untenable suggestion that the appellant be ordered to produce proper documents. This

suggestion is rendered especially meaningless when considered in light of his earlier submission that the authors of the documents were available but were never called to testify. It is not clear why the appellant himself never availed himself of this evidence at his trial. It is to be observed that when the appellant was asked to produce the documents to PW1 he promised to produce them and never did so. After some time, instead of returning to PW1, he produced counterfeits to PW2, which prompted investigations culminating into this case. He had more than ample opportunity to produce the correct documents at the trial. The onus was upon him to prove ownership, the documents which were presented by the appellant were forgeries and could not support his claim to the ownership of the goods. The learned judge condemned the goods because ownership thereof had not been established. Section 160 gives the court power either to release the goods to the person from whom they were seized, or to the owner thereof or to condemn them. They were seized from the compound of Lt. Col. Kazini who displayed surprise as to how they had found their way to his compound and he alerted the URA. The appellant failed to prove ownership thereof. This left the court with the one option of condemning them; indeed it was the inevitable conclusion that the learned judge could come to, on the evidence and the law.

In these circumstances this appeal is dismissed. The order of condemnation is hereby upheld.

Dated at Kampala this 15th day of December, 1998.

G.M. Okello

JUSTICE OF APPEAL

A.E.Mpagi-Bahigeine

JUSTICE OF APPEAL

A.Twinomujuni

JUSTICE OF APPEAL

