

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**CRIMINAL APPEAL NO. 59 OF 2007**  
**NASSANGA ELIVA.....APPELLANT**  
**VERSUS**  
**UGANDA.....RESPONDENT**

Before: Hon. Mr. Justice E. S. Lugayizi

**JUDGMENT**

This judgment is in respect of an appeal, which the above-named appellant preferred against a decision that His Worship Mutazindwa Moses Katorogo (the Chief Magistrate of Luwero) handed down on 30<sup>th</sup> August 2007. Under that decision the learned trial Magistrate convicted the appellant of the offences of smuggling contrary to section 319 (1) (c) of the Penal Code Act (Cap. 120) and being in possession of goods reasonably suspected to have been smuggled contrary to section 320 of the Penal Code Act (Cap. 120). The learned trial Magistrate sentenced the appellant to a term of 3 years imprisonment on both counts and payment of a fine of shillings 5,000,000/= on each count. He also made an order that in default of payment of the fine the appellant would serve a term of 1 year's imprisonment on each count. In addition, the said Magistrate directed the police at Luwero to destroy the cigarettes that were the subject of the above charges.

The above decision, sentences and order aggrieved the appellant. Therefore, she appealed against them; and in her Memorandum of Appeal dated 19<sup>th</sup> September 2007 she sought this Honourable Court's orders overturning the decision and setting aside the sentences and order that followed the decision.

Be that as it may, before Court goes into the merits of the appeal it is wise to understand the background that gave rise to the appeal. That background was briefly follows:

After receiving information that traders were selling smuggled goods at Kikuubo in Luwero Township the police carried out a search in that place on 21<sup>st</sup> February 2007. The police officers involved in the exercise included Okello John (PW1), Kikomeko Florence (PW2) and Magada Moses (PW3). During the exercise the above police officers recovered 4 boxes of "**Match cigarettes**". They found them on display at a counter in a shop where the appellant was

sellings merchandise. The police officers arrested the appellant who in turn admitted that she was selling the cigarettes in question. They later took the appellant to court where she was charged and tried for the offences of smuggling and being in possession of goods that were reasonably suspected to have been smuggled.

In her defence the appellant disclaimed ownership of the shop in question. She explained that the said shop belonged to one Stephen Mugenyi. In addition, Katende Joseph (- i.e. DW2 – an officer from the revenue section of Luwero Town Council) testified that Stephen Mugenyi was the holder of the trading licence for the shop in question.

After recording the above evidence the learned trial Magistrate convicted the appellant of the above offences. He sentenced her accordingly; and hence the appeal herein.

At the time of hearing the appeal Mr. Nsubuga–Mubiru represented the appellant; and proceeded ex parte, for despite service the Director of Public Prosecutions did not show up for the hearing.

Without going into the details of the submissions that Mr. Nsubuga-Mubiru made during the hearing of the appeal it will suffice to point out that his arguments, in essence, raised three important issues which were as follows:

- (a) whether the learned trial Magistrate erred in law and in fact in convicting the appellant of the above charges;
- (b) whether the errors (if any) could be ignored as inconsequential on appeal; and
- (c) the remedies available.

Court will discuss the above issues in turn.

With regard to the first issue (**i.e. whether the learned trial Magistrate erred in law and in fact in convicting the appellant of the above charges**) Court will discuss the two charges separately. However, before doing so it is worth noting that section 318 of the Penal Code Act (Cap. 120) gives a good background to the charges in question. Firstly, among other things, that section shows that except in a few circumstances (e.g. where goods are for personal use or for use as gifts in reasonable quantity) the importation of goods into Uganda without a licence granted by the Minister responsible is prohibited. Secondly, section 318 leaves no doubt that the *“customs posts in existence immediately before the 11<sup>th</sup> January 1980 shall ..., be deemed to be the prescribed places of ... entry...”* into Uganda.

**The charge in count 1:**

The specific details of the charge in count 1 were as follows:

**“STATEMENT OF OFFENCE**

**SMUGGLING CONTRARY TO SECTION 319 (C) OF THE PENAL CODE**

**PARTICULARS OF OFFENCE**

*Nasanga Eliva in the month of February, 2007 at Muliro Zone in the Luweero District imported Super Match cigarettes into Uganda in a manner by which she evaded the control of customs over such importation.”*

For the sake of clarity it is also important to lay out section 319 (1) (c) of the Penal Code Act (Cap. 120), which is the basis of the above charge. That section reads as follows:

**“319. Smuggling.**

*(1) Any person who ...imports any goods ...into Uganda -*

*(a) ...*

*(b) ...*

*(c) in any manner by which he or she evades the control of customs over such ... importation, commits the offence of smuggling and is liable on conviction to a term of imprisonment of not less than three years and not more than fourteen years ...”*

Bearing in mind section 318 of the Penal Code Act (Cap. 120), the State would only succeed under the charge in count 1 if it led evidence to prove the following things beyond reasonable doubt:

(a) that the cigarettes in question were imported into Uganda without a licence granted by the Minister responsible; and

(b) that the appellant imported those cigarettes into Uganda in a manner by which she evaded the customs control over such importation.

The vital question to answer here is whether the lower court’s record bears evidence to prove beyond reasonable doubt the above two requirements of the law?

The answer to the above question is in the negative. Firstly, there is no evidence on the record of the lower court to prove that the cigarettes in question were imported without a licence granted by the Minister responsible. Secondly, none of the State’s witnesses testified that the appellant had a hand (direct or indirect) in the importation of the above cigarettes. Thirdly, the State did not lead any evidence to prove that the importation of the said cigarettes into Uganda was done by way of evading the control of customs over such importation. For example, there was no evidence on record to show that the importation of the above cigarettes was effected through dodging the known customs posts or by way of going through such posts with the cigarettes concealed so that no import tax was paid on them. In addition, although part of Okello John’s testimony was to the effect that an informer from Internal Security Organisation (ISO) told him that the cigarettes in question were smuggled into Uganda that testimony is simply useless. It is useless because it is hearsay. The State did not call the informer as a witness to substantiate what Okello John said he heard from him or her. **(See Kigecha**

**Njuguna v Republic [1965] E.A. 773).** Amazingly, the learned trial Magistrate believed that useless piece of evidence and finally used it to convict the appellant of the charge in count 1. In any case, the said, Magistrate failed to appreciate that the particulars of the charge in count 1 were fundamentally defective insofar as they alleged that the appellant committed the above offence in the Luwero district, yet that district lies deep inside Uganda and is not one of the customs places of entry into Uganda.

All in all, this Court is of the opinion that the learned trial Magistrate erred in law and in fact in convicting the appellant in respect of the charge in count 1.

**The charge in count 2:**

The details of the charge in count 2 were as follows:

**“STATEMENT OF OFFENCE**

**POSSESSION OF GOODS SUSPECTED TO HAVE BEEN SMUGGLED CONTRARY TO SECTION 320 (1) OF THE PENAL CODE ACT**

**PARTICULARS OF OFFENCE**

*Nasanga Eliva on the 21<sup>st</sup> day of February, 2007 at Muliro Zone in the Luwero District, was found in the possession of Super Match cigarettes reasonably suspected to have been smuggled into Uganda.”*

The relevant parts of section 320 of the Penal Code Act (Cap. 120) read as follows:

**“320. Possession of goods suspected to have been smuggled.**

***Any person who is found in possession of property or goods reasonably suspected to have been smuggled into Uganda ... in contravention of sections 318 and 319 commits an offence and is liable to the same penalties as are prescribed in section 319.”***

Bearing in mind section 318 of the Penal Code Act (Cap. 120) the State would only succeed under the charge in count 2 if it led evidence to prove the following things beyond reasonable doubt:

(a) that the cigarettes in question were imported without a licence granted by the Minister responsible;

(b) that the appellant was, at the material time, found in possession of the cigarettes, which were property or goods reasonably suspected to have been smuggled into Uganda in contravention of sections 318 and 319 of the Penal Code Act (Cap. 120).

In view of the foregoing, the question to answer here is whether the lower court's record bears evidence to prove the above two requirements of the law?

In Court's opinion the said record does not bear such evidence. On quick thinking, one of the reasons why Court is of the above view is this: If under the charge in count 1 the State failed to prove that the cigarettes in question were illegally imported into Uganda it would logically follow that being found in possession of such cigarettes was not an offence in terms of section 320 of the Penal Code Act (Cap. 120). In any case, the appellant disowned the shop where the police found the above cigarettes. She insisted that the said shop belonged to one Stephen Mugenyi. Indeed, Katende Joseph (- i.e. DW2 – an officer from the revenue section of Luwero Town Council) corroborated the appellant's defence by producing a trading licence for the above shop that was in the names of Stephen Mugenyi. Therefore, because such evidence exists on the record of the lower court the question as to who had possession of the above cigarettes at the material time becomes tricky. However, Court thinks that in such situation it is reasonable to assume that the holder of the above trading licence was the owner of all the merchandise in the shop in question; and that being the case that person was in constructive

possession of the above cigarettes, at the material time, as opposed to the appellant who might have been a mere employee at that shop.

All in all, therefore, this Court is of the opinion that the learned trial Magistrate erred in law and in fact in convicting the appellant of the charge in count 2.

With regard to the second issue **(i.e. whether the errors (if any) could be ignored as inconsequential on appeal)** Court has a very quick answer to this one. It thinks that the errors pointed out above could not be ignored as inconsequential on appeal. They are fundamental errors that finally resulted in a miscarriage of justice against the appellant.

With regard to the third issue **(i.e. the available remedies)** Court has this to say: The sum total of the foregoing is that the appeal herein has succeeded. Following that event, the conviction of the appellant in respect of the charges in counts 1 and 2 must be quashed; and the omnibus sentence passed against her must also be set aside. It is so ordered. In addition, Court also hereby sets aside the lower court's order requiring the appellant to pay a sum of shillings 5,000,000/= as a fine on each of the two counts. (In case the appellant paid that sum of money or any part thereof the lower court must, without delay, refund it.)

Finally before Court takes leave of this matter it wishes to say that it fully associates itself with some of the comments that Mr. Nsubuga-Mubiru made, during his submissions, about the lower court's judgment. For example, it is quite disturbing to note that although the learned trial Magistrate knew he was handling a very serious criminal matter his whole attitude in writing the judgment thereof seemed casual. In all, his judgment consisted of eight paragraphs typed on less than one full page of paper. The said judgment did not reveal the facts constituting the State's case, nor did it disclose what the appellant's defence was. It did not lay out the essential ingredients of the offences in question, nor did it attempt to make a logical analysis of those ingredients vis a vis the evidence given by both sides. In that judgment the learned trial Magistrate simply reproduced the name of the appellant, the contents of the two charges, and the names of witnesses who testified in support of the State's case. He then pointed out the number of witnesses the appellant called in her defence; and finally convicted

the appellant of the charges in the two counts. No wonder the said Magistrate made the wrong finding! To crown it all, his judgment is a classic example of how **not** to write a good judgment.

E.S. Lugayizi (J)

18/8/2008

**Read before:** At 10.21 a.m.

Mr. Nsubuga-Mubiru for the appellant

Ms. Elizabeth Kansime c/clerk

E.S. Lugayizi (J)

18/8/2008