THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

(ANTI-CORRUPTION DIVISION)

CRIMINAL APPEAL NO. 0007 OF 2022

(Arising out of Anti-Corruption Division Criminal Case No 0068 of 2017)

UGANDA (URA) ..... APPELLANT

VERSUS

MUSOKE DAN ..... RESPONDENT

BEFORE: Okuo Jane Kajuga, J

JUDGEMENT

This is an appeal arising from the decision of Namusobya Sarah, Magistrate Grade 1 of the Anti-Corruption Court, delivered on the 28th of February 2022 whereby she acquitted the accused (now the respondent) of the offences of acquisition and possession of uncustomed goods; and Conveyance of uncustomed goods contrary to sections 200(d)(iii) and 199(b)(iii) respectively of the East African Community Customs Management Act (EACCMA), 2004.

Background

The facts giving rise to this appeal as deduced from the prosecution's evidence are that the accused, being a person in charge of Motor Vehicle Reg. No UAS 274D, used it on the 27th of January 2017 to convey fishnets that he knew or ought reasonably to have known were uncustomed, meaning that they were dutiable goods on which due taxes had not been paid.

In summary, a soldier attached to the Uganda Revenue Authority (URA) enforcement office, Major Mercy Tukahirwa (PW2) received information in the

night of 27/1/2017 that the said vehicle was conveying uncustomed goods. Together with two other officers, she moved to Buvulubi on Mayuge Road where they intercepted the vehicle at about 4.30 am that night. According to her, the respondent confirmed that he was the owner of the fishnets they found in the vehicle but he had no documents. They let him go and impounded it. They took it to the Iganga enforcement station from where Kalema Francis, a URA customs officer took over when he reported for work later that morning. He photographed the vehicle, offloaded it and verified the goods. There were 46 rolls of fish nets in total of 100 % polyester material manufactured by Sun Flag textiles and Knitting from Kenya. 9 rolls had a packing date of 20th January 2017, 21 rolls had a packing date of 23rd January 2017 while the balance of 16 rolls had a packing date of 24th January 2017. A seizure notice was issued for the nets and the vehicle.

Almost three days later, documents alleged to have been brought by the respondent and left with the askari reached Kalema, and they showed that the goods had been cleared on 18th January 2017 under the single customs clearing regime, under entry No UG BUS 6 of 2/1/2017. According to that verification the manufacturers were Aramax mills. Kalema concluded that the documents were not related to the goods since the packing dates were much later than the verification and clearance date.

Satisfied that taxes had not been paid, the Respondent was consequently charged. The prosecution in a bid to prove its case called four witnesses. The accused person was put on his defense at the closure of the prosecution case and he opted to give testimony on oath and called one witness. He testified that he purchased the goods from Lauben Omia and produced documents to that effect. The latter testified as DW2, and stated that taxes were paid. Various documents were tendered in support.

At the conclusion of the case, the trial magistrate held that the accused had discharged the legal burden to prove that taxes had been paid. She further found

major inconsistencies and contradictions in the evidence of the prosecution witnesses, and that the exhibits had been poorly handled to the detriment of the prosecution case. She accordingly acquitted the accused, hence this appeal.

Grounds of appeal;

1. *The learned trial magistrate erred in law and fact when she failed to evaluate the evidence on record and thus acquitted the Respondent.*

2. *The learned trial magistrate erred in law and fact when she failed to evaluate the evidence and thus came to a wrong conclusion that the Respondent had discharged his burden to prove that tax was paid on the fishnets.*

3. *The learned trial magistrate erred in law when she held that amending the charge sheet to introduce the element of knowledge at the stage when the Respondent had been put on his defense would occasion an injustice.*

Representation

The appellant was represented by **Mr. Lomuria Thomas David** from URA legal and Board Affairs Department while the Respondent was represented by Mr. **Katumba Chryzestom** of Lukwago and Company Advocates.

Consideration of the appeal

The duty of the first appellate court in criminal appeals has been discussed in **Kifamunte Henry versus Uganda, SCCA 10/1997** as follows;

"On first appeal from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by

the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on the credibility of witness which the appellate Court has not seen.... Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice.

Section 34 (1) of the Criminal Procedure Act provides for this;

"The appellate court on any appeal against conviction shall allow an appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has, in fact, caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

In light of the foregoing, I proceed to subject the evidence to fresh and exhaustive scrutiny without ignoring the judgement that has been appealed from. I bear in mind that in criminal matters, the burden of proof lies on the prosecution. This stems from the presumption of innocence enshrined in **Article 28 (3)(a) of the Constitution** that a person shall be presumed innocent unless they are proved guilty or plead guilty. This principle is succinctly stated by Viscount Sankey J in **Woolmington V DPP [1935] AC 462** as follows;

"Throughout the web of English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to.... the defense of insanity and subject also to any statutory exception"

Article 28 (4) of the same Constitution creates exceptions to this standard and provides that;

"Nothing done under the authority of any law shall be held to be inconsistent with clause (3)(a) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts"

See also **Uganda versus Dick Ojok, 1992-93 HCB 54** for the legal position that the prosecution's duty to prove does not change except in a few statutory cases.

The import of this is that where the law shifts the burden to the accused to prove the existence of a fact or a specific aspect of the case, then the accused has to discharge this burden. The burden of introducing evidence to prove a specific fact in such instances lies on the defendant.

Section 223 (a) of EACCMA provides one of these legal exceptions. It reads as follows;

"The onus of proving the place of origin of any goods or the payment of proper duties, or the lawful importation landing, removal, conveyance, exportation, carriage coastwise, or transfer, of any goods shall be on the person prosecuted or claiming anything seized under this act."

One of the issues to be addressed in this appeal relates to whether the Respondent discharged this burden in as far as proving that due taxes on the fishnets were paid and whether the trial magistrate was right in holding that he had done so. In making that determination, the court has to consider whether the evidence adduced by the accused raises a reasonable doubt as to guilt of the accused person in respect of the offense.

Resolution of the Grounds of Appeal

Before I delve in the merits of this appeal I will resolve the preliminary objection raised by the Respondent regarding the competence of this appeal. It is his contention that the memorandum of appeal was filed out of time contrary to **Section 28 (3) of the Criminal Procedure Code Act** which requires the same to be filed within 14 days of receiving the judgement and record of proceedings.

He submitted that appeal is incompetent and ought to be struck out.

Section 28 (3) of the Criminal Procedure Act reads;

If the appellant or an advocate on his behalf indicates at the time of filing a notice of appeal that he wishes to peruse the judgment or order appealed against before formulating the grounds of appeal, he shall be provided with a copy of such judgment or order, free of charge and the grounds of appeal shall be lodged within fourteen days of the date of service on him of the copy of such judgment or order.

The judgement in this matter was delivered on 28th February, 2022. The notice of appeal was filed on 11th March 2022, within 14 days from the date of judgement delivery. On the 28th of March 2022 the appellants wrote to the Court requesting for a certified copy of the judgement and a typed record of proceedings to facilitate their appeal.

I have interrogated ECCMIS (Electronic Case Management Information System) which this court recently migrated to and noted that the proceedings and judgment were uploaded on 19th April 2022 at 9.33 am. There is however no record of or proof that the parties received notification of the upload. I am informed reliably by the IT team that the system does not capture this notification. There is no proof of manual service on the appellant of the same. Records show that the appellant filed a memorandum of appeal on 16th June 2022, long after the proceedings had been uploaded on ECCMIS.

When this case came up for hearing on 29th June 2022 both parties acknowledged that they did not receive a notification from the system when the proceedings were uploaded. It is therefore not easy to establish at what point the appellant realized that the proceedings were in fact online. It is clear that ECCMIS is a new development in the administration of justice and all stakeholders are still appreciating its dynamics. It is my view that had there been physical service of the judgment and the record of proceeding, this court would have easily established the exact time the appellant received the proceedings.

In light of the foregoing and the acknowledgement by both parties that they did not receive any notification of the upload, and the lack of independent proof on the system, I am reluctant to uphold the objection. I am of the view that justice will be served by addressing the appeal on its merits. The preliminary objection is overruled.

Secondly, I wish to address the manner in which ground one of the appeal is phrased. It reads as follows: ***"The learned trial magistrate erred in law and fact when she failed to evaluate the evidence on record and thus acquitted the Respondent".***

I am of the considered view that it offends **Section 28 (4) of the Criminal Procedure Code Act** which is couched in mandatory terms and requires that where the appellant is represented by counsel, the grounds should include the particulars of the matters of law or fact in regard to which the court appealed from is alleged to have erred.

Careful reading of Ground one does not reflect which matters of law or fact are in issue in this appeal. Courts have held on numerous occasions that a ground which merely faults the lower court for having failed to evaluate evidence is vague and ambiguous and contravenes the law. I too hold the same and accordingly, on my own motion, strike out Ground 1.

I will first resolve Ground three of the appeal as it deals with the foundational matter of the appropriateness of the charge sheet.

Ground 3

The learned trial magistrate erred in law when she held that amending the charge sheet to introduce the element of knowledge at the stage when the Respondent had been put on his defense would occasion an injustice.

Counsel for the appellant referred to the excerpt from the judgement where the trial magistrate observed as follows; ***"...the charge sheet lacked the element of knowledge. Introducing the element of knowledge at defense would occasion***

injustice to the accused. Further, it would require recalling of the prosecution witnesses, further cross examination and reexamination, yet the prosecution had closed its case. The prosecution did not plead to the element of knowledge and as such I am unable to make a finding on it"

He contends that it was wrong for the trial magistrate to make a finding that amending the charge sheet at the defense stage would occasion a miscarriage of justice. This is premised on the understanding that proof of knowledge is a necessary ingredient and that even where the indictment did not expressly cite the aspect of knowledge, the court was under a duty to evaluate the evidence led to satisfy this ingredient. It was therefore erroneous for the court to hold that since the charge sheet lacked the element of knowledge, she could not make a finding on it.

The respondent on the other hand supported the finding of the trial court and argued that failure to indicate mens rea on the charge sheet was a fatal defect. Further that allowing the third amendment would amount to an injustice to the accused as he would not know the nature of the case against him. He cited the authorities of **Uganda versus Okumu and 5 others, Gulu High Court Criminal Revision No 003/2018, Halsbury's laws of England 3rd Edition Vol 10 at page 273, State of Maharashtra versus Mayer Hans George 1965 AIR 722.**

In resolving this issue I have considered **Section 132 of the Magistrates Court Act** which provides;

(1) Where <u>at any stage</u> of a trial, <u>it appears</u> to a magistrate's court that

(a) the evidence discloses an offense other than the offense with which the accused is charged

(b) <u>the charge is defective in a material particular</u>, or

(c) the accused desires to plead guilty to an offense other than the offense with which he has been charged

then the court <u>if it is satisfied that no injustice to the accused will be caused thereby</u>, may make such order for the alteration of the charge by way of its

amendment or by the substitution or addition of a new charge as it thinks necessary to meet the circumstances of the case... (emphasis mine)

From the foregoing, the provision grants the court broad power to order for amendment of the charge at any stage of the trial, including the defense stage as long as it does not occasion a miscarriage of justice to the accused. The latter is the sole determining factor provided by law. In other words, the trial court is enjoined to ensure that the accused's right to a fair trial is not compromised by the amendment. Where the accused may be confused as the true nature of the case against him due to an amendment, or be challenged in preparing his defense to meet the charges brought, he will have been prejudiced.

It is however noted that the subsequent provisions of the Magistrates Courts Act set out mechanisms for guarding against any injustice that such amendment may cause. Under Section 2(b) of the same provision, the accused may demand and the court may order that the witnesses for prosecution be recalled and be further cross examined whereupon the prosecution also gets the right to reexamine. Under subsection (c) the accused would have the right to give or call such further evidence on his or her behalf as he / she may wish. Under sub section 3 the court is convinced that an alteration may prejudice the accused, it has the power to adjourn the trial for such period as may be reasonable. See Subsection 3. This is to enable the accused prepare adequately.

The foregoing provisions in my view, are meant to provide the court with mechanisms to address any prejudice that may be suffered by alteration. The law does not preclude automatically, amendment when the accused is on the defence. It is a value judgement to be made by the court bearing in mind the specific circumstances of the case. Where the safe guards would be insufficient to meet the ends of justice in a specific case, then the court will rightly reject the amendment.

Considering the facts of this case, the record shows as follows;

The prosecution filed the first charge sheet for the offense cited in section 200(d)(iii) of EACCMA. It read as follows;

"Musoke Dan and others still at large on the 27th of January 2017 between Mayuge and Musita in Mayuge District having acquired had in his possession 46 rolls x 100 yards and 60 inches by 8.0 kgs loaded on motor vehicle UAS 274D valued at 2,007,099/="

The record shows that on 17th December 2021, when the accused had just started his defense, about mid-way in his testimony, the prosecution applied to amend the charge sheet so as to include the subject matter of fishnets. The prosecutor informed the court that he had just realized that the charge sheet did not include the word "fishnets" which was the subject matter of the case. The court allowed the amendment on grounds that it would not prejudice the accused since all the witnesses had been referring to the nets and he was fully aware therefore, of the subject matter.

They then filed an amended charge sheet which instantly elicited an objection from the defense counsel to the effect that they had in fact amended it by including more than the fish nets as subject matter. They had also included the phrase ***"which he knew or ought reasonably to have known to be uncustomed goods".*** Defense counsel prayed that the latter be struck off. The prosecution conceded this issue and made no further application to court to allow the amendment.

The final charge, therefore read as follows:

"Musoke Dan and others still at large on the 27th of January 2017 between Mayuge and Musita in Mayuge District having acquired had in his possession 46 rolls x 100 yards x 60 inches x 8.0 Kgs loaded on motor vehicle UAS 274D valued at 2,007,099/= of taxes"

I first note that the prosecution conceded to the opposition to their amended charge sheet. They did not make an application justifying the inclusion of the new phrase nor demonstrate the necessity. I note however, that the trial

Magistrate had the power, even without being moved, to allow the amendment once it became apparent to her that there was an error on the charge sheet, within the meaning of Section 132 of the MCA. I am of the considered view that she was reasonably made aware of the error or omission when the defense made the lengthy submissions. Even if the prosecution conceded that the amendment in that respect had not been allowed, the trial court could enquire into why the state was including this phrase and had power to allow the amendment.

What is in issue here is the manner in which the trial magistrate handled the fact that the particulars of the charge sheet did not include or mention the element of knowledge.

Section 200(d)(iii) of the East African Community Customs Management Act which creates the offense with which the accused was charged in count 1 provides that;

A person who, acquires, has in his or her possession, keeps or conceals, any goods which he or she knows or ought to have known, to be un customed goods; commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both. (emphasis mine)

In criminal cases, there is a presumption that the wrongful conduct of an accused person is accompanied by a guilty mind, also known as mens rea. This is at times emphasized by the wording in statutes including "knowingly", "intentionally" and "recklessly". There are however strict liability offenses where mens rea is not required and an accused may be convicted for the act alone. It is not therefore automatic, as submitted by counsel for the appellant that mens rea is required in all criminal offenses. I am guided by the authorities filed by the respondent in this matter. **Halsbury's laws of England (supra)** provide that *a statutory crime may or may not contain an express provision of the necessary state of mind. A statute may require a specific intention, malice, knowledge, willfulness, or recklessness. On the other hand, it may be silent as to the*

requirement of mens rea and in such a case in order to determine whether or not mens rea is an essential element of the offense, it is necessary to look at the objects and the terms of the statute"

Section 200 (d) (iii) of EACCMA specifically requires mens rea as an essential element. There is therefore no need to scrutinize the objects and terms of the statute further. I have considered the impugned particulars of offense and are convinced that the omission of the words **"...knows or ought to have known..."** resulted in creating a strict liability offense, suggesting that the mere act of possessing the fish nets is sufficient to sustain a conviction. This is in fact a departure from the provisions under which the offense is brought.

It can be logically concluded that an accused person hearing the particulars read out to him could be prejudiced in the preparation of the defense, by not knowing the full and true nature of the case against him. He is not informed that he is alleged to have acted either knowingly or that he ought reasonably to have known so as to adequately prepare his defense.

From the foregoing, the element of knowledge (Mens rea) is important in this case. The particulars on the charge sheet on the other hand refer to a strict liability offense, where knowledge is not a vital element. It is my considered view that the charge sheet at the point of amendment was clearly erroneous.

There was no probable cause as to why the trial magistrate did not allow/ direct for the amendment of the charge sheet when the matter arose. As observed hereinbefore, the law permitted her to do so, and also provided safeguards to address any injustice that would have arisen. I have already discussed the legal safeguards. To this extent, I find that the magistrate erred when she held that *"introducing the element of knowledge at defense would occasion injustice to the accused. Further it would require the recalling of prosecution witnesses for further cross examination and reexamination yet the prosecution had closed its case."* These are some of the measures or safeguards that are provided in the law to ensure an alteration does not cause miscarriage of justice. Though the state

conceded when defense objected to their amendment, the court had the power to direct its amendment in the interests of justice. The application to amend the charge may be made by the prosecution or any other party, but the court too may on its own motion direct amendment if convinced there is an error on it.

As it stands, the charge sheet on which the trial proceeded was fatally defective.

I will consider whether the error occasioned a miscarriage of justice, after addressing ground 2 of the appeal.

Ground 2:

The learned trial magistrate erred in fact and in law when she failed to evaluate the evidence and thus came to the wrong conclusion that the respondent had discharged his burden to prove that tax was paid on the fish nets.

The appellant contends that the trial court chose to ignore the evidence led by the prosecution regarding the source/origin of the impugned fishnets yet the sole reason for their seizure was the contest regarding the same. All four prosecution witnesses consistently testified that the customs documents provided by the accused showed that they originated from Aramax Mills Ltd. The exhibits themselves were marked Sun Flag and Knitting Wear Ltd. He submitted that the documents used under the EACCMA are the same and include the seizure notices and cargo deposit receipts to show the movement of exhibits. In this case, the exhibit labels were dated 20th, 23rd and 24th January 2017 yet the exit note of Busia was dated 17th January 2017. The import of their argument was that it was impossible that the exit note comes before the manufacturer's date reflected on the product.

They disputed the appellant's defence that he had 48 and not 46 fishnets impounded and that the breakdown he gave of the total nets purchased by him and their deployment/distribution did not tally hence throwing doubt on the alleged purchase of the goods from Omia Lauben. They, therefore, prayed the court to draw the inference that the goods were uncustomed.

They emphasized that documents submitted by the appellant to support his claims that taxes had been paid did not tally with the physical goods.

In reply, it was argued that the respondent had bought the fish nets from Omia Lauben, and taxes had been duly paid. He was not the importer himself and thus he had no duty to pay the tax. Omia testified as DW 2 and stated that he paid taxes while the goods were still in the factory in Kenya as they were single custom goods. The documents submitted by DW2 confirmed that taxes were duly paid. They supported the trial magistrate's observation that it was the duty of the prosecution to adduce evidence on what the practice under the single customs territory is, and they had failed to do so. In the absence of that evidence the court rightly found that the appellant had discharged the burden to prove taxes had been paid.

Further, they submitted that the prosecution evidence had been found to be unreliable on account of grave contradictions and inconsistencies.

I have carefully considered the detailed submissions by both parties and the judgment of the trial court. In order to resolve the ground, I will consider three issues;

1) Was the appellant in possession of the 46 rolls of fishnets described in the particulars of Count 1 on the charge sheet?
2) Were there contradictions and inconsistencies in the prosecution case? If so, what was the effect on the prosecution's case?
3) Were the goods uncustomed and did the appellant discharge the evidential burden placed on him by Section 223(a) of EACCMA?

Issue 1:

It is the duty of the prosecution under section 200 (d) (iii) of EACCMA to prove beyond reasonable doubt that the appellant was found in possession of the goods in issue. This is relevant to count 1 on the charge sheet. In addition, count 2

which is brought under section 199 of the same law requires proof that the appellant used a vehicle to convey the same goods.

The appellant during his defense stated that they did not impound 46 fish nets from him but rather 48 and those were not the ones in issue in this case. Through his letter to Manager Operations URA dated 27th January 2017 (Exhibit P 5) the appellant filed a report that 48 pieces of nets were impounded from the Motor Vehicle Reg. No UAS 274D. In his defence however he claimed that the 48 fishnets went missing or were stolen while with URA and he tendered a letter from James Abola, Assistant Commissioner Staff compliance of URA to support his assertion. This was admitted as D 9. In that last paragraph, Abola states that they were enquiring into the circumstances that led to the disappearance of the impounded motor vehicle and 48 fishing nets and would notify him in due course.

The appellant informed court that it was not true that he possessed 46 rolls x 100 yards x 60 inches x 8kgs of fishnets described in the particulars of the offense in count 1. He testified that the rolls tendered in court were 60 inches by 63 inches. His fishnets were 10 millimetres.

During trial, defence raised a concern that the chain of custody of the exhibits had been breached, to the detriment of the prosecution case. The import of his submissions was that the integrity of the exhibits was in issue, hence the state could not be said to have discharged the burden of proof to the requisite standard. The trial magistrate agreed with them and held in her judgement that the fishnets had been mishandled.

I note that PW 1, Francis Kalema, a customs officer in the Enforcement Division testified that on 27th January 2017, he found a Toyota Noah Reg. No UAS 274 D parked at the office loaded with fishnets. He contacted his supervisor, Major Tukahirwa Mercy (PW2) who confirmed that she had impounded it the previous night. He took pictures of the vehicle, offloaded the goods and verified them. They had labels of Textiles and Knitting Ltd from Kenya, 100 yards by 60 inches.

9 rolls had a packing date of 20/1/17, 21 rolls had 23/1/2017 and 16 rolls had the date of 24/1/2017. He issued a seizure notice. The goods were then kept in their customs store in Iganga. He tendered a document to that effect.

I have scrutinized the photos which were admitted as **P 2(a) and (b)** showing Motor Vehicle Reg. No UAS 274D and some sealed packages in the back passenger seats. The same packages are then photographed outside the car after offloading, presumably. They also show the labels alleged to be on the bags.

The photos are of such poor quality that one cannot read the words on the labels. The bags on the floor are loaded upon each other in such a manner that one cannot tell how many they are in total. They are also black and white photos thus the court cannot rely on them to resolve the question of whether the exhibits impounded were pink or orange, which question arose during the trial. It was a valid question since I observed that the photos of the three photographed from Nakawa by PW 3 had different colours. I find P2 (a) and (b) to be of little evidential value to this court as the description of witness PW 1 regarding these exhibits is not supported by the photos.

I have considered Exhibit P 2 (a) which is the Seizure notice. The goods are described therein as 100 yards by 62 inches, contrary to the testimony of PW 1 that they were in fact 100 yards by 60 inches. He also stated that he found the weight of each to be about 6 kgs, but the seizure notice indicates 8 kgs each. These disparities raise serious questions, in light of the appellant's assertions that the nets he had were not produced in court.

I note that there was no clear handover to PW1 by PW2. He did not mark the exhibits he found in the vehicle in the morning. Under cross-examination, he admitted that he opened the vehicle at 10 am. The keys had been left with the police officers on duty and put in the drawer. It is the officer who directed him to the key. He did not receive them from the persons who intercepted and impounded the vehicle. The person under whose custody the truck was left, and who handed over the key to PW 1 did not testify, so there is a break in the chain

of custody of the exhibits. In my view, PW1 can only verify what he found in the truck, but his evidence cannot confirm whether these were the very items that were impounded. The court would require corroboratory evidence from the ones who impounded.

I therefore look to the testimony of PW 2 who was the officer who impounded the truck on 27/1/20 at about 4.30 am. She states that she and officers she was with, handed over the vehicle to PW1 at 6 am. It was her evidence that she received information that the vehicle was carrying uncustomed goods. She impounded it and checked inside. She claims she saw fishnets. She did not record the vehicle or the goods as exhibits, though ordinarily she would do so. She did not count, mark or label the nets she saw. She did not even describe them by size, type, label or colour. She did not testify on the steps she took to secure the vehicle and its contents before handover to PW1.

The evidence regarding handover is also uncomfortably contradictory. PW 1's evidence was that he found the key for the car in a drawer where it had been kept by a policeman. He could not recall the police man's name, nor did he have any record of handover. The vehicle had been parked in the yard till he found it in the morning. PW 2 said she handed to PW 1 directly.

PW3 Mitango Twaha is a Scene of Crimes Officer who was called by the investigating Officer to take pictures of the fishnets in this case. He did so twice. The first was on 26/5/2017, almost four months after they were impounded. He was shown 3 rolls of fishnets at the offices in Nakawa and he photographed them. He did not find them in storage in Iganga but they were brought to him by the investigator. The second time was on 2nd January 2019 at Iganga customs Offices from where he photographed 41 rolls. His Report was admitted as P 4. What is clear from the report is that the exhibits had sunflag textiles labels. This corroborates testimony of PW 1. However, whereas PW1 verified 46 rolls, PW3 only photographed 41 in Jinja and 3 in Kampala. It is unclear what could have happened to the other 2 rolls, if at all there were 46 at the start. There is no

explanation for this variation. The court can only conclude that the exhibits were tampered with.

PW 4 tendered the three rolls of fishnets which had been photographed. He presented evidence of the movement of the three rolls from Iganga. See Exhibit P7. One of the rolls in the photo has a distinctly different colour from the other two. This raises a question since prosecution evidence was that all the rolls were of same colour. The 41 rolls were never produced before the court. They were photographed two years after they were impounded. The storage and custody of the goods was never satisfactorily explained. I attach little evidential value to these photos for the above reason.

In **Engonu Cornelius versus Uganda**, **Criminal Appeal No 518/2015,** the Court of Appeal guided on production of exhibits before court as follows;

"It is imperative in our view where the prosecution recovers exhibits that will be used as evidence in a case, for the record of movement of such exhibits from the moment they are recovered up to the moment they are produced as evidence at the trial to be accounted for. This is what is often referred to either as the chain of evidence or chain of custody. Firstly, it lays down a proper foundation that connects the evidence to the accused, or to a place or object that is relevant to the case. Secondly it ensures that what the object is claimed to be is what it is. The chain of custody ensures that there has been no tampering with the exhibit save where it is done for the purpose of scientific analysis or examination, prior to the production of the exhibit at the trial. Where there is a gap in the chain of custody such exhibit ought not to be accepted in evidence, and if it is accepted its probative value would be nil"

This underscores the importance of handling exhibits properly so as to maintain their integrity and evidential value. Where prosecution cannot tender the exhibits to court for inspection, there should be clear reasons for the non-production else court may draw a negative inference.

In the case of **Malumbo V Director of Public Prosecutions [2010] EA 280** Court of Appeal of Tanzania set aside a conviction that was based on exhibit evidence that had gaps in the chain of evidence. The court stated; ***'We wish to add that it is important to ensure that exhibits are handled carefully. Needless to say, exhibits are vital evidence, so, their preservation, loss or tampering will depend on how they are handled"***

In this case, there was a break in the chain of custody. The exhibits were handled very poorly. PW3 took photographs of exhibits that were shown to him two years after. At the time, some were missing and no explanation is offered for that. With the absence of recording and marking of exhibits, a lot of doubt is raised on the integrity of the exhibits in issue.

Once the accused pleaded not guilty, he threw into issue all the elements of the offense and it was incumbent on the prosecution to prove them, except where the law placed an evidential burden on the accused. The defense had no obligation to prove possession or conveyance of goods. The element of possession was not conceded and was in fact challenged by the defense all through the trial. The integrity of the exhibits was in issue.

I cannot fault the trial Magistrate for her finding that the chain of custody was broken. I am unable to find that the state proved the aspect of possession of the goods in issue to the requisite standard.

Issue 2:

The trial magistrate held that there were major contradictions and inconsistencies in the prosecution case. She pointed them out at pages 8 and 9 of her judgement.

I have already referred to the contradictions in the testimony of PW1 and PW2 regarding the handling of the exhibits. PW 2 impounded the vehicle, checked it and saw fishnets. She did not describe what they looked like, or how many they were, nor did she testify on how she secured them before handover. She claimed she handed over the car to PW 1 at 6 am of the same day. PW 1 contradicts her.

He states that he found the car parked and had to enquire from her why it was there. He then states that he did the verification of the goods with her, then later retracts and says she was not present. That she was at her home in Iganga at the time. He confirmed in cross examination, and the court believes it to be true, that he found the keys to the car in a drawer. That it had been put there by a police officer whose name he could not recall. There were also inconsistencies on description of the goods. I have also pointed these out previously.

These contradictions and inconsistencies affected the integrity of the prosecution's evidence, the chain of custody and credibility of witnesses. Failure to explain the disparities in description of goods pointed to untruthfulness. The trial Magistrate's finding on this cannot be faulted.

Issue 3:

Section 200(d)(iii) of EACCMA requires proof that the accused charged with the offense "knew" or "ought reasonably to have known" that the goods were uncustomed.

Section 2 of the EACCMA defines uncustomed goods as ***including dutiable goods on which the full duties due have not been paid, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the customs law."***

It is vital that the court before convicting an accused under Section 200(d)(iii) of EACCMA should be satisfied that the duties due had not been paid and that they had been imported or transferred in a manner that contravenes the customs laws. In making that assessment the court considers **Section 223(a) of the East African Community Customs Management Act 2004** which places the onus of proving the place of origin of any goods or the payment of the proper duties, or lawful importation, landing, removal, conveyance, exportation, carriage coast wise, or transfer, of any goods on the person prosecuted or claiming anything seized under this act.

Any evidence that the accused adduces in meeting this evidential burden is not evaluated in isolation. The court must weigh the evidence as a whole, and determine whether the evidence adduced by the accused under Section 223 (a) raises a reasonable doubt on the prosecution case that taxes had not been paid. It is my considered view that the person in possession of the goods is best placed to explain the origin of the goods he is found with, and whether taxes were paid or not as these are facts that should be within his possession.

I have carefully considered, and I am guided by Sections 105 of the Evidence Act, whose provisions I find relevant and which I reproduce here below;

(1)When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he or she is charged and the burden of proving any fact especially within the knowledge of that person is upon him or her;

but—

(a)that burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that those circumstances or facts exist; and

(b)the person accused shall be entitled to be acquitted of the offence with which he or she is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

Sub section 1 (b) clearly sets out the standard on which the accused may be acquitted of the offense charged, and that is when, after the evaluation of the evidence as a whole, the evidence of the state or of the accused raises a reasonable doubt.

The accused testified that he bought 300 pieces of fishnets from Omia Lauben on 23/1/2017. He was operating from Busia. He tendered the receipt dated

23/1/2017 and it was received as an exhibit as evidence of payment of taxes and it was marked DEX2. He states that he knew the seller since 2009 as a dealer in fishnets. After selling goods the seller always provides him with the documents to confirm that taxes were paid. **DW 2, Omia Lauben** confirmed the sale. This evidence was not controverted by the state or discredited by cross examination.

The relevance of the above evidence is that the appellant is established as a buyer and not as the importer of the goods, and that he only received information and documents from DW 2 regarding the payment of taxes. In effect he was not the one who paid the due taxes.

To determine whether taxes were actually paid, we must look at the documents in issue and the evidence of DW2.

He told court that Paluku agencies are his clearing agents. That PEX 5 was a receipt for DTB for payment of taxes and it bears his name. He bought the goods from Arax Mills, a factory based in Nairobi. He further states that when the respondent told him that he had been arrested for not paying taxes he told him he had all the documents for paying taxes with him. DW2 under cross examination further told court that he paid for taxes when the goods were still in the factory. It is after paying for the taxes that he went to the ICD Nairobi and they stamped and he was given an exit note and the goods exited.

Considering the mishandling of the exhibits in the case, and the failure of the state to prove possession of the 46 rolls of fishnets, it would be pointless for the court to rely on the argument that the 46 rolls of fishnets labelled Sunflag textiles and knit wear mills in Kenya and yet the appellant's documents were for a different company. This is one of the aspects the state relied on to argue that taxes were not paid. I am of the considered view that court must first be certain of the goods that were found in possession of the accused before it can logically

determine if taxes were paid. Failure to establish that, the rest will be an exercise in futility because the question will be "which goods are in issue here?"

In the instant case, PW1 testified at page 8 of the record of proceedings that the officer on duty gave them documents which the driver of the vehicle had brought. On the entry he saw goods cleared under the single customs clearing regime, that from it the goods had reached the border from Kenya and had been verified there on 18/1/17.

PW4 testified that he checked on the URA system Ascyuda for the certificate of origin of the invoice of goods which he printed to confirm whether the documents were genuine. That the accused's documents were matching with those in the system. He printed the IM4 UG Busia C6 dated 2/1/17 of a consignee Omia Lauben of Busia declared by Paluku Agencies of motor vehicle KBE 997E and that the certificate of origin had the same details.

From my analysis of the evidence on record all prosecution witnesses seemed to agree that the taxes were paid for the goods as per the documents presented by the accused but however they seemed to suggest that the goods Omia paid for were different from the physical goods. This takes us back to challenges with the chain of movement of exhibits. The same argument then applies to the prosecution's contention that the exhibits had different packing dates. The packing dates on the impugned exhibits cannot be relied on as a basis to find that taxes were not paid. I have already explained why this is so.

In conclusion, I am satisfied that the appellant met the evidential burden placed on him by law. His evidence then raised a more than reasonable doubt against the prosecution's case. I therefore agree with the trial Magistrate's finding and see no cause to depart from it.

On the basis of the foregoing, count two was also not proved. **Section 199(b)(iii) of the East African Community Customs Management Act** provides that a master of any air craft or vessel and any person in charge of a vehicle, which in

a partner sate and b) *which has in it, or in any manner attached to it, or in any which is conveying or has conveyed in any manner, any goods imported, or carried coastwise, or intended for exportation, contrary to this Act, commits an offence and is liable to a fine not exceeding five thousand dollars and the vehicle and the goods in respect of which such offence has been committed shall be liable to forfeiture.*

In the instant case it is not contended that the Respondent was conveying goods in motor vehicle UAS 274D loaded with fishnets on the 27th January 2017 before he was intercepted with URA officials. There is no evidence that the goods were being conveyed contrary to the Act.

Grounds 1 and 2 of the appeal fail.

I had reserved the decision on whether the trial magistrate's error in rejecting an amendment of the charge sheet occasioned a miscarriage of justice. I am of the view that it did not, as the prosecution had failed to prove possession and conveyance of the uncustomed goods. Accordingly, I see no need to evaluate the element of whether the appellant had knowledge or reasonably ought to have known that goods were uncustomed.

In conclusion, the appeal fails and is dismissed. The judgment and orders of the trial magistrate are upheld

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Okuo Jane Kajuga

Judge of the High Court

20.12.2022