**Republic ex parte Thuo and another v The Principal Magistrate’s Court at**

**Githunguri and another**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 8 July 2005

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**Case Number:** 491/04

**Before:** Nyamu J

**Sourced by:** LawAfrica

*[1] Tea –The law governing tea in Kenya – Whether a permit is necessary to transport tea – Whether*

*there is any offence as transporting tea without a permit.*

**JUDGMENT**

**Nyamu JA:** In this matter the two applicants who are tea growers in Githunguri Kiambu District were charged in a Githunguri Court in *R v James Kahuha Thuo* 383 of 2004 and *R v Margaret Muthoni Ngugi* 460 of 2004 with offences of transporting green tea contrary to section 13A

1)

*b*) Chapter 343 of Laws of Kenya as read with section 16

*b*) of the Tea Amendment Act of 1999. The application dated 14 May 2004 seeks orders of prohibition against the Attorney-General and the Kenyan police by prohibiting the preferring any charges against or prosecuting the applicants in the two cases. It also seeks an order of prohibition against the principal magistrate or any other magistrate at Githunguri from hearing, continuing with the hearing or determining the case or any charge against the applicants in the two cases. The third order sought is an order of *certiorari* to remove and quash any judgment, order conviction or other proceedings in Githunguri Principal Magistrate’s Court in the criminal cases described above. And finally a declaration that no licenses or permits are required to grow or transport tea by virtue of section 8 of the Tea Act Chapter 343 of the laws of Kenya as amended by the Tea

Amendment) Act of 1999. Both applicants claim to be registered growers with Karirana Tea Factory and claim that the charges preferred against them arose from a complaint made by a rival factory called Kambaa Tea Factory and that the police are being used to harass them so that they can instead register with Kambaa Tea Factory. They claim that there is an error of law, in that, after the amendment of the Tea Act Chapter 343 by The Tea

Amendment) Act of 1999 number 6 of 1999 no permits or licenses are required to be issued by the Tea Board or any other regulatory authority for planting or transportation of tea. The two applicants were also charged without taking any statements or giving them any hearing whatsoever and that the criminal charges were motivated by malice and were preferred for a purpose other than the spirit of the administration of justice, criminal law and the Constitution and they constitute an infringement of applicants’ right to liberty and equal protection of law. They also claim that the police used their power arbitrarily and without justification. The respondents claim *inter alia*, through an affidavit of Stephen Ringera, an Inspector of police: 1. T hat the applicants have been charged with known offences and that the applicants were transporting tea leaves to factories other than their designated factory by using unauthorised vehicles. 2. T hey claim that a permit was required in each case and they only arrested the two applicants after failing to produce a permit. Counsel for each party have also made brief submissions emphasising on the above points. It is common ground that the Tea Act Chapter 343 was amended in 1999 by the Tea

Amendment) Act number 6 of 1999. The first applicant has been charged with the offence of transporting tea without a permit contrary to section 13A

1)

*b*) as read together with section 16 of the Tea

Amendment) Act of 1999. The second applicant has similarly been charged with an offence contrary to section 13A

1)

*b*) as read together with The Tea

Amendment) Act section 16. Section 16 of the Tea

Amendment) Act of 1999 deleted completely subparagraph

*b*)

ii) of section 13A, which previously read:

*a*) “buys, sells, exposes for sale, transports or has in his possession any tea which to his knowledge or belief:

ii) *i s being or has been moved otherwise than in accordance with regulations controlling such movement*.” On the other hand, the regulations which controlled such movement are the Tea

Movement Control) Regulations appearing at 27 of the Tea Act Chapter 343. The regulations required a written permit – *see* regulation 3. I find that following the deletion of section 13A

*b*)

ii), by the Tea

Amendment) Act of 1999, the regulations referred to in

*b*)

ii) must have been impliedly repealed because regulations have to have as their base a provision in the parent act and cannot exist on their own. The Tea

Amendment) Act number 6 of 1999 repealed and replaced section 8 of the Tea Act Chapter 343 by the enactment of a new section 8 which reads: 8

1) “Every tea grower shall upon the commencement of this section, register with the tea factory to which he delivers green leaf, by supplying such particulars as the Board, may in regulations prescribe.” Since it is not in dispute that the applicants are registered with Karirana Tea Factory the complaint by Kambaa Tea Factory does not have any basis in law unless it was designated as the factory to which the applicants must deliver the green leaf. No such designation has been shown to the court or any supporting regulations on transportation or on designated vehicles. Similarly the provision under section 13A

*b*)

ii) regulating movement having been repealed; I find that the requirement of a permit, as per the above regulations, were also repealed and their breach cannot constitute an offence not defined by the parent act. The applicants were charged on 1 March 2004 and 29 March 2004 respectively and the amending act came into force on 14 January 2000. It is, therefore, irresistible for the court to find that the two applicants have been charged with offences not defined anywhere or with offences not known to law. The court finds that the very act of charging them with non-existent offences is an unlawful act. It is a cardinal principle of the rule of law that a person can only be charged with breaches of law in ordinary courts and with nothing else. Any attempt to charge a person otherwise is an infringement of the rule of law and the Constitution specifically prohibits any conviction, except in respect of contempt under section 77

8) and the *proviso*. For the above reasons, an order of *certiorari* shall issue in terms of prayer 3 and the record, order or proceedings are hereby immediately removed to this Court and forthwith quashed and orders of prohibition shall also issue in terms of prayer 1 and 2 of the application dated 14 May 2004

*sic*). As regards the prayer of declaration in terms of prayer 4 the same is declined because this Court has currently no power to give declarations in judicial review in the face of section 8 and 9 of the Law Reform Act. I give no order as to costs.

It is so ordered.

For the applicants:

*Information not available*

For the respondents:

*Information not*