**Koech v Republic (Criminal Appeal E012 of 2022)**
**[2023] KEHC 1176 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1176 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CRIMINAL APPEAL E012 OF 2022**

**TM MATHEKA, J**

**FEBRUARY 21, 2023**

**BETWEEN**

**PETER KIPSANG KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against both conviction and sentence dated 27th August 2021 in Criminal Case No. 2143 of 2021in Molo Law Court before Hon. E. Nderitu –C.M)***

**JUDGMENT**

1. The appellant Peter Kipsang Koech was charged with being in possession of an alcoholic drink that does not conform to the standards of *Alcoholic Drinks Control Act* No 4 of 2010.contrary to sections 27(1) (b), 27(2)(b) as read with section 27(4) of the same *Act*. The particulars were that on August 26, 2021 at Pangani Area, Amalo Location in Kuresoi South Sub-County within Nakuru county he was found in possession of alcoholic drink namely Chang'aa to wit 40 litres that did not conform to the standards of the *Alcoholic Drinks Act* No4 of 2010.

2. On August 27, 2021 the charge was read to the appellant and he pleaded guilty. He was convicted him on his own plea of guilty.

3. For purposes of sentence, the prosecution submitted that the appellant was not a first offender and proceeded to set out the accused's previous records;that on March 19, 2021 he was charged with being in possession of 10 litres of Changaa was fined Ksh 5,000/= in default to serve 2 months' imprisonment, and on May 7, 2021 he was charged with being in possession of 30 litres of Chang'aa and was fined 50,000/ in default to serve 6 months' imprisonment. He paid the fines. The appellant confirmed that theserecords as read by the respondent were true.

4. The fact that the appellant paid the fines each time was an issue and respondent urged the trial court to impose a stiffer sentence on the appellant noting that he was not a first time offender. Further that

there had been complaints from the area chief that the parents in his locality had become irresponsible, families had been ruined and children were no longer being taken to school due to the consumption of the illicit liquor. This was blamed on the appellant.

5. The record shows that the appellant was unrepresented and did not make any submissions in mitigation.

6. The trial court, having considered that the appellant was not a first time offender and persuaded by the submissions by the prosecution on the impact of his offence on the accused's community, proceeded to sentence the appellant to three (3) years imprisonment without the option of a fine.

7. The appellant was aggrieved by the lower court's finding and brought this appeal against both the conviction and sentence on the grounds that: -

    1. The learned magistrate erred in Law and fact by disregarding the appellant's Mitigation

    2. The learned Magistrate erred both in Law and fact by imposing a custodial sentence against the appellant without according him the option of a fine.

    3. The learned magistrate erred both in law and fact by sentencing the appellant to a three (3) year custodial sentence without seeking for a pre-sentence probation report.

    4. The learned magistrate erred in law and fact by failing to inform the appellant of his right to be represented by counsel thus violating his fundamental right to a fair trial under Article 50(2) (g) of the *Constitution*. (emphasis mine)

8. The appeal was disposed of by way of written submissions from Mr. Bore for the appellant and Ms Murunga for the state.

**appellant's submissions.**

9. On the right to representation counsel for the appellant submitted that the appellants right to fair hearing as provided for under Article 50(2) (g) of the *Constitution* was violated because the trial court failed to inform him of his rightto representation by counsel of his choice. He relied on *Francis Ochieng Osura v Republic* [2019] eKLR, *Owuor v Republic* (Criminal Appeal 16 of 2019) [2022] KECA 18 (KLR) , *Fraser v ABSA Bank Limited* (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC), *Republic v Karisa Chengo & 2 others* [2017] eKLR, Article 14(3)(d) of the *International Convention on Civil and Political Rights* (ICCPR) and Section 43(1)(a) of the *Legal Aid Act* No6 of 2016.

10. On when the appellant should have been informed of the right to legal representation Counsel relied on *Joseph Kiema Philip v Republic* [2019] eKLR where the court stated that a person should be informed of his right to legal representation at the earliest opportunity; at the time of first appearance, at plea taking or at commencement of first hearing, which position was echoed by Justice Mrima in Francis Ochieng Osura (supra).

11. On the issue of custodial sentence, mitigation and failure by the court to call for a pre-sentence report, counsel submitted that the record shows that the appellant did not mitigate and that the trial court did not explain to him nature and essence of mitigation. That proceeding to sentence the appellant without considering his mitigation infringed on his right to fair trial; that the court ought to have requested for a presentence report to assist it in arriving at a fair sentence; further that the court erred by relying on the prosecution's mere utterances that the appellant had a previous criminal history without any

substantiation of the particulars. He stated that the court in *Peter Murauko Matumo v Republic* [2021] eKLR at paragraph 31 the court explained why that was not right thus;

> "...The Criminal Procedure Code has an elaborate procedure of proving previous convictions. The certificate of previous conviction must be produced at time of sentencing and the accused asked to state whether he admits them or not. If he denies them the prosecution embarks on calling evidence to proof them. The court merely stated that the appellant had a pending land dispute in court I. This was an irrelevant consideration. This was not followed..."

12. He argued that in absence of previous criminal records, the appellant was entitled to a fine commensurate to the offence he was charged with.

13. He submitted that the appellant suffered a travesty of justice by being denied the benefit of being given the option of a a fine considering the charge against him was a misdemeanor.

**Respondent's submissions**

14. The Respondent submitted that any appeal against convictionwhere that accused pleaded guilty is barred under Section 348 of the *Criminal Procedure Code*. The respondent concurred with sentence by the lower court and its reasons for the same.

**Analysis**

15. From the fore going the main issues that arise for determination are:

    1. Whether the appellant's plea was unequivocal

    2. Whether in light of s 348 of the *Criminal Procedure Code* the appellant can appeal against conviction

    3. Whether the sentence meted to the appellant was harsh in the circumstances of his case

16. In my considered view all these issues must be looked at from th view of the law under which the appellant was charged. The appellant was charged with being in possession of an alcoholic drink contrary to the provisions of the *Alcoholic Drinks Act*.

17. For starters the Act at Section 2 of the defines alcoholic drink as follows:

> "alcoholic drink" includes alcohol, spirit, wine, beer traditional alcoholic drink, and any one or more of such varieties containing one-half of one percent or more of alcohol by volume, including mixed alcoholic drinks, and every liquid or solid, patented or not, containing alcohol, spirits, wine, or beer and capable of being consumed by a human being; (emphasis mine)

18. The appellant is charged under Section 27 of the *Act* which provides: Conformity with requirements;

    (1) No person shall—

        (a) manufacture, import or distribute; or

        (b) possess, an alcoholic drink that does not conform to the requirements of this Act.

    (2) Subsection (1) shall not apply to a person who—

        (a) is authorized under this Act to be in possession of the alcoholic drink; or

(b) has possession of the alcoholic drink in a premises licensed under this Act.

(3) The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or the requirements of this Act.

(4) A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both."

19. In determining whether the plea was unequivocal it is necessary to look at the ingredients of the offence of the offence facing the appellant, and whether it can be said that the prosecution established the same in the facts as read by prosecutor to enable the appellant understand the same and plead to the same. For that reason, these provisions of the law must be kept in mind.

20. The appellant's counsel argued that the appellant was unrepresented and therefore the court ought to have informed him of his rights to legal representation. That failure to do so resulted in violation of his rights as provided for under Article 50(2) (g) of the *Constitution*.

21. The *Legal Aid Act* No6 of 2010 provides at Section 43 the Duties of the court with respect to legal representation.

Duties of the court

(1) A court before which an unrepresented accused person is presented shall—

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

(1A) . In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

(a) the severity of the charge and sentence;

(b) the complexity of the case; and

(c) the capacity of the accused to defend themselves.

22. It is evident that this provision seeks to breathe life to the Constitutional requirements of Article 50 on the right to fair hearing. At Article 50(2) it provides that an accused person has the right *inter alia*

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

23. It goes without saying that the requirements of s. 43(1) of the *Legal Aid Act* are mandatory.

24. In this case it is clear in the first place that the appellant was unrepresented and the court did not inform him of his right legal representation of his choice. This is crucial as the court has no discretion in this. The law says for every unrepresented person; the court shall inform them of the right to be represented by counsel of their choice. This is a fundamental principle with respect to the right to fair hearing. The court erred in failing to inform the appellant of this right and such error led to the denial of the appellant's right to a fair hearing.

25. Tied to this is the requirement that the court ought to make a determination as to whether as accused person can self-represent without the risk of substantive injustice occurring against him. To arrive at that the court is required to determine whether the matter before is is one, if it proceeds without legal representation substantive injustice will result against the accused person before it. The factors to be considered are the severity of the charge and sentence; the complexity of the case; and the capacity of the accused to defend themselves. In this case there is no evidence that the court made any such determination with respect to the appellant.

26. I have carefully considered the wording of the sections of the law under which the appellant was charged; the ingredients of the offence and the sentence that one may face if found guilty. I note that the court dealt with the matter in the same manner courts did at the time when a possession of Chang'aa charge depended simply on the determination of the local administration (the chief, assistant chief, village elder) or the police, the administration police officers; that what had been found with the suspect was Chang'aa.

27. For purposes of memory, record and emphasis, I find it necessary to cite the repealed *Changaa Prohibition Act* Cap 70 Laws of Kenya which I is reproduced herein below;

> An Act of Parliament to prohibit the manufacture, supply and possession of chang'aa
>
> Short title.
>
> 1. This Act may be cited as the *Chang'aa Prohibition Act*.
>
> Interpretation.
>
> 2. In this Act -
>
> "chang'aa" means any spirits which are distilled otherwise than in accordance with a licence issued under Part IX of the *Customs and Excise Act*, by whatever name called, and includes spirits commonly known as "enguli", "kali", "kangari", "kill-me-quick", "Kisumu whisky", "kivia", "maai-matheru", "machozi-ya-simba", "machwara", "njeti" and "warigi",
>
> "spirits" means any intoxicating liquor in the nature of an essence of or abstract from any substance, obtained by distillation, and includes any liquor mixed with spirits.
>
> 3. Prohibition of manufacture, etc., of chang'aa.
>
> (1) No person shall manufacture, sell, supply, consume or be in possession of chang'aa.
>
> (2) No person shall, without lawful excuse, the burden of proof whereof shall be on him, be in possession of any implement, apparatus or utensil designed or adapted for the distillation of chang'aa.
>
> 4. Offences and penalty.
>
> (1) Any person who contravenes any of the provisions of section 3 shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

(2) On conviction of any person for an offence under this Act the court shall order the forfeiture and destruction of all chang'aa and any implement, apparatus or utensil used in connexion with the commission of the offence.

(3) An offence under this section shall be cognizable to the police and shall be triable by any subordinate court.

5. Power to search and arrest.

(1) An administrative officer or a police officer may enter upon and search any premises at any time when he has reasonable grounds to believe that chang'aa is being manufactured, stored, sold, supplied or consumed thereon.

(2) A person entering premises under subsection (1) may, if he finds that chang'aa is being or has been manufactured or is being stored or sold on the premises, arrest the occupier of the premises and may take possession of any chang'aa and any implement, apparatus or utensil used for distillation, or designed or adapted therefor, which is found thereon.

(3) A person arrested under this section shall, without unnecessary delay, and subject to the provisions of the Criminal Procedure Code as to bail, be taken before a magistrate or an officer in charge of a police station.

6. Debt for chang'aa nor recoverable.

No suit shall be maintainable to recover any debt alleged to be due in respect of the sale or supply of chang'aa.

28. A reading of the repealed Act demonstrates that it is evident that the Alcoholics Drinks Act changed raised the bar with respect to this offence. One can no longer tell that that a drink is chang'aa by their name of the drink. The new Act changed that by not only increasing the fine 200 times more from Ksh 10,000 to Ksh 2,000,000 but also by adding as part of the ingredients of the offence the determination of the alcoholic content by volume of the drink suspected to be Chang'aa. My understanding of this part is that the offence is not committed by the mere possession of chang'aa. It is committed by the possession of chang'aa that answers to the description given at s. 2 of the Act.

29. Under the previous statutory regime a suspect would plead to the charge of being in possession of a drink known by its notorious name, and that was sufficient, but now it is not just the name but its chemical content that brings it into the purview of prohibition.

30. Evidently the charge facing the appellant is not as simple as it appears. Look at the definition of alcoholic drink. How is a simple lay person expected to interrogate that definition? The key ingredient to that definition is the chemical content of the drink: it must contain one-half of one percent or more of alcohol by volume. Any drink going by the name Chang'aa that does not have that chemical content would not fall foul of that provision of the law.

31. It is also evident from the charge and its particulars of the alleged standards required by the law were nor particularized yet the appellant was expected to plead to whatever particular requirements of the Act he was alleged to not have complied with.

32 Hence without those particulars, how can it be said that the plea was unequivocal? It cannot.

33. The case of *Adan v Republic*, (1973) EA 446 firmly established the procedure of recording a guilty plea in criminal trials. In that case the court made it clear that;

> " When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."(emphasis added)

34. The charge sheet as drafted does not bear the particulars of the charge. The mere statement that he was found 'in possession of alcoholic drink namely Chang'aa that does not confirm to the standards of the Act' does not reveal anything. What are those standards? Did prosecution counsel know them? Did the trial court know them? They are not set out anywhere in the particulars of the charge and therefore it cannot be said that the magistrate indeed explained to the accused person all the essential ingredients of the offence charged. One of these would have been the chemical content of the drink. The learned trial magistrate could not have done so because those essentials were not set out in the charge sheet by the prosecution.

35. To make it worse the prosecutor did not give any facts of the case. He simply stated Facts as per the charge sheet and proceeded to produce what he said were 40 litres of chang'aa.

36. A reading of the charge sheet does not reveal facts of any particulars that can be said to support the charge the appellant was facing. What are those standards he was expected to comply with? They are not set out; neither were they set out in the alleged facts as per charge sheet.

37. All this begs the question what was the prosecutor's basis for telling the court, and the court accepting that what was before it was 40 litres of Chang'aa? There is nothing except containers with a liquid whose content neither the court nor the prosecution could say for sure is what it was said to be. How did the court know that this liquid did not comply with the requirement of one-half of one percent or more of alcohol by volume? The prosecution placed nothing before the court.

38. The question then becomes should the mere fact that the appellant pleaded guilty to the charge placed before him overtake the duty of the prosecution and the court to ensure that the charge and the facts indeed present a proper charge and facts that support the charge against the accused person?

39. I do not think so.

40. Our Constitutional dispensation does not support the almost conveyor belt practice in subordinate courts where suspects in offences categorized commonly as petty pleas are presented. It does not matter how petty the offence is as at the end of the day the orders of the court may curtail the liberty of that accused person and all the rights associated with the right to liberty.

41. I find that while the elaborate procedure set out in Adan v Republic is very deliberate, our Constitutional dispensation as borne by the Bill of Rights , and the rights of an accused person requires that that that checklist must now include the duty of the court to inform every accused person of the right to legal representation of choice and conduct an assessment as to whether there is the risk of substantive injustice to the accused to warrant the assignment of state counsel where the accused cannot afford legal counsel.

42. I hold that clearly the manner in which the charge is framed and the failure by the prosecution to set out the particulars required by law to establish the charge were prejudicial to the appellant and the presence of counsel would have made a difference.

43. The next question is whether the appellant barred from bringing an appeal because he pleaded guilty to the charge?

44. Section 348 of the Criminal Procedure Code provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, that provision is not an absolute bar to challenging a conviction founded on a guilty plea on any other ground.

45. In the case of *Olel v Republic* [1989] KLR 444, it was held that:-

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

46. In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged."

47. This case falls squarely under the scenario described as where upon admitted facts the appellant could not in law have been convicted of the offence charged. The prosecution ought to have obtained the complete set of facts in support of the charge before making the decision to charge.

48. If the facts are what is recorded in the charge sheet, then those facts do not support that charge and the appellant ought not to have been convicted. This position is clearly demonstrated herein above.

49. With respect to the sentence the offence under section 27 (4) of the *Alcoholic Drinks Control Act* No 4 of 2010 provides for a sentence in the following terms

> A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both."

50. The principle of sentencing in case of fines is set out in of the *Kenya Judiciary Sentencing Policy* at paragraph 11.5, p.28 that –

> " 11.5 where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence. If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so as it proceeds to impose the available option."

51. In this case the court relied on the submission by the prosecution that the appellant had two previous records where he had paid the fine. The prosecution added as aggravating circumstances to that by stating that due to the appellant's possession of chang'aa there were complaints by the area chief that parents of children were now lost in the consumption of the appellant's illicit brews, families were being neglected and ruined and children were not going to school. These utterances by the prosecution were not supported by any evidence other than the letter from OCS Olenguruone Police Station saying that the appellant was a brewer, a dealer and seller of Chang'aa, yet no such evidence was produced. In addition, it was not demonstrated how the appellant's being in possession of that drink could result in all the social mayhem that was attributed to him. There was no statistics, no affidavit from the assistant chief, or the OCS; No evidence that he was a brewer otherwise the paraphernalia ought to have been in court, yet the court was moved to cut the appellant's liberty through the 3 years' imprisonment sentence.

52. It is now good practice to seek a pre-sentence report. The appellant's counsel here has a point. That asking for a social inquiry report would have given the court as idea of the kind of person the court was dealing with, and the alleged victims of the offence would have been given voice. True, the court has a duty to mete out deterrent sentences where an offender is a repeat offender but courts should also look at the reasons for the recidivism on the part of the accused person as sometimes more punishment does not necessarily lead to reform and rehabilitation of the offender. This is because maintenance of law and order has to walk with access to justice which must be more than just locking offenders up in prison. As Courts we are called upon to be vehicles of social transformation by doing things differently as evidenced by Article 159 (2) of the *Constitution* which states;

> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause
>
> (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) the purpose and principles of this Constitution shall be protected and promoted.

53. Having said the foregoing, I do find that the pre-sentence report would have assisted the court in arriving at the appropriate sentence taking into consideration the circumstances of the offender and the community where the offence was committed and the public interest.

54. In the end I do find that this is a case where the plea was not unequivocal, the right to a fair hearing was denied by failure of the court to inform the appellant of his right to representation or carry out the

requisite assessment as to his ability to represent himself, and facts as per charge sheet set out by the prosecution could not support the charge as drawn and the appellant ought not to have been convicted.

55. The appeal is there for successful. The conviction is quashed, the sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST FEBRUARY 2023.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

Court Assistant Jennifer

Mr. Bore for the appellant

Ms. Murunga for respondent