REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. E99 OF 2021

EUNICE JEBITOK KOSGEI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. E1042 of 2021

in the Senior Principal Magistrate's Court at Kapsabet delivered

by Hon. B.Wachira, RM on 29 July 2021)

RULING

[1] The applicant was charged in **Kapsabet SPM's Criminal Case No. E1042 of 2021: Republic vs. Eunice Jebitok Kosgei**, with the offence of manufacturing or otherwise producing alcoholic drinks without a license contrary to **Section 8(1)(a)** as read with **Section 64** of the **Nandi County Alcoholic Drinks Control Act, No. 6 OF 2014.** It was alleged that on **27 June 2021,** at Kokwet Village in Kosirai Location within Nandi County, she was found in the process of manufacturing an alcoholic drink, namely *changaa*, and was using 240 litres of kangara in manufacturing changaa using the process of fermentation and or distillation.

[2] The applicant admitted the charge and was, on **29 July 2021,** sentenced to pay a fine of **Kshs. 40,000/=,** in default to serve 8 months' imprisonment. She thereafter applied for revision pursuant to **Sections 362, 364** and **365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, contending that:

> **[a]** The particulars of the offence disclose the charge of being in possession of an ingredient used in manufacturing alcoholic drink and not the offence of manufacturing or producing an alcoholic drink;
>
> **[b]** The Prosecutor failed to present the facts to the accused person and therefore the plea was not unequivocal;

[3] The applicant relied on **Gladys Cherotich vs. Republic** [2019] eKLR, and **Hilda Atieno vs. Republic** [2016] eKLR in urging the Court to make a finding on the legality and propriety of her conviction and sentence by the lower court.

[4] Accordingly, the record of the lower court was called for and has been scrutinized by this Court. That record confirms that the Learned Trial Magistrate took the plea in accordance with **Section 207** of the **Criminal Procedure Code,** and the steps set out in **Adan vs. Republic (1973) E.A. 445, duly followed. In the case aforementioned, those steps were set out thus:**

> **"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
>
> **(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

[5] Thus, the record of the lower court confirms that the applicant was arraigned before the lower court on **28 June 2021**; and that the Charge was read over to her in Kiswahili language and her response recorded in that language. The facts were then read and the 240 litres of Kangara produced before the lower court as an exhibits. The applicant responded to the facts by unequivocally stating, in Kiswahili language, that the facts were true. Her response was recorded by the Learned Trial Magistrate in Kiswahili, whereupon a conviction ensued. The applicant was then called upon to express herself in mitigation; which she did. The lower court then called for a pre-sentence report, in addition to according the State time to confirm that she was a repeat offender as alleged by the Prosecution counsel.

[6] It is therefore plain that the plea was unequivocal and that all the steps set out in **Section 207** of the **Criminal Procedure Code** and the case of **Adan vs. Republic** (supra) were duly followed. It is therefore not correct for the applicant to state that the facts were not presented by the Prosecutor before the lower court. As to whether the facts were in tandem with the Charge and its particulars, it is instructive that **Section 8(1)(a)** of **Nandi County Alcoholic Drinks Control Act,** under the Charge was laid provides that:

(1) No person shall—

(a) manufacture or otherwise produce;

(b) sell, distribute or dispose of, or deal with; any alcoholic drink in the County except under and in accordance with a licence issued under this Act.

(2) Any person who contravenes the provisions of sub-section (1) commits an offence.

[7] The Charge as laid was that the applicant was found manufacturing or otherwise producing an alcoholic drink. The particulars indicated that she was found in the process of manufacturing an alcoholic drink, namely changaa, using 240 litres of *kangara* through the process of fermentation and/or distillation. The facts, as presented by the Prosecutor, likewise indicated that she was found in the process of making alcohol; for which she had 240 litres of kangara.

[8] Clearly then, it cannot be said that there is a variance between the charge and the particulars or between the particulars and the facts as laid. As there was no allegation that the k*angara* that the applicant was found with was itself an alcoholic drink, I find the cases of **Gladys Cherotich vs. Republic (supra) and Hilda Atieno vs. Republic** (supra) inapplicable.

[9] The trial magistrate was informed that the applicant was a repeat offender and the particulars of the previous cases she had been charged in were given by the Prosecution Counsel. That notwithstanding, the trial magistrate called for a pre-sentence report which was favourable. It was on that account that the fine of **Kshs. 40,000/=** was imposed. I find no reason to interfere with the sentence as it is altogether lawful; granted that under **Section 64** of the Act it is provided that:

"Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both."

[10] In the result, I find no justification for revision. The amended application dated **5 August 2021** is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER 2021

OLGA SEWE

JUDGE