**REPUBLIC OF KENYA**

**AT THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL 132 OF 2019**

**BETWEEN**

**ALBINA SUZAN MWEMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**(An Appeal from the original conviction and sentence in the Chief Magistrate Court at Makadara Cr. Case No. 2737 of 2019 delivered by S. Jalang'o, PM dated 7th June 2019).**

1. The Appellant was charged with exposing alcohol for the purpose of sale without a license contrary to **Section 34A of the Alcoholic Drinks Act**. It was said that on the 7th June, 2019 at about b0130 hours at Debrus bar at Donholm in Nairobi within Nairobi County was found selling alcoholic drinks without licence to wit eighteen bottles of wine an d one pump.

2. She was convicted on her own plea of guilty and sentenced to pay a fine of Kshs. 20 000/- in default serve five (5) months imprisonment. She was aggrieved by the decision against which she preferred the instant appeal. The main ground of appeal is that the plea was not unequivocal.

3. The Appellant through learned counsel, Mr. Mugo urged that the plea was improperly taken. He submitted that the charge and particulars were not explained to the Appellant. Therefore, this fact vitiated the trial. Miss Akunja for the Respondent conceded to the Appeal. It was her concession that indeed the plea was not unequivocal. She urged that a retrial be ordered. It was however the sentiment of the Mr. Mugo that there was no need for a retrial as plea was taken a while back, in July 2019.

4. Mr. Mugo relied on the cases of **Judy Nkirote v Republic [2013] eKLR, Nyabwony Wiyual Nguner and another V R [2017] eKLR and Paul Ouma Atinda v R[2017] eKLR** to buttress the submission.

5. A perusal of the trial court record attests that there was indeed an anomaly in the plea taking. After the Appellant pleaded guilty to the charge, the prosecution only stated that the facts were as per the charge sheet,

> **"facts as per the charge sheet."**

**6. Section 207 (1)(2) of the Criminal Procedure Code** provides the following with regards to plea taking:

> **"*207.* (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.(emphasis added)"**

7. In the case of **Judy Nkirote v Republic [2013]eKLR** the learned Judge stated as follows:

> **"At the time the statements of facts are read by the prosecution and before the accused person is required to plead to those facts the court has a judicial role to play of considering the facts stated by the prosecution and determining whether those facts as read disclose the offence charged, and whether the facts also support the offence charged. If the particulars of the facts led by the prosecution do not support the offence charged or where they do not disclose the offence charged, the court should reject the charge under section 89(5) of the Criminal Procedure Code. A court cannot exercise that discretion if no facts are led by the prosecution. The court will not also be able to explain the facts to the accused if no facts are led by the prosecution.**
>
> **In the instant case after the charge was explained to the Appellant the prosecution did not give any facts but stated "facts as per the charge sheet". At that juncture what the learned trial magistrate ought to have done was to enter a plea of not guilty and set down the case for hearing in order to give the prosecution an opportunity to call evidence out of which the facts of the case would be derived. A conviction could not and cannot result out of a plea to a charge alone where no facts are led."**

8. Similarly in this case, it was required that the prosecution read out the facts of the case. This was not however adhered to. As guided by the sister court in **Judy Nkirote V R (Supra)** the court was therefore duty bound to enter a not guilty verdict. Instead, the court proceeded to sentence the Appellant. The Appellant was no doubt prejudiced. I then hold that the failure by the prosecution to adhere to the requirements of Section 207(2) of the Criminal Procedure Code was fatal to the case. I now grapple with the question of whether the case is ripe for a retrial.

9. The then East Africa Court of Appeal in **Ahmed Sumar V Republic[1964] EA 481 at page 483** stated as follows:

> **"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered"**

10. It is trite that the prosecution did not lay down the facts on which the trial court ought to have relied upon before convicting the Appellant. It follows that it (prosecution) cannot benefit from its wrong. I accordingly quash the conviction, set aside the sentence and order that the Appellant is hereby forthwith set at liberty unless otherwise lawfully held. The fine of Ksh. 20,000/ paid by the Appellant be forthwith refunded. It is so ordered.

**Dated and delivered at Nairobi This 29th day of April, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Mugo for the Appellant.

2. Miss Nyauncho for the Respondent.