



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO 14 OF 2020

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 13 OF 2020

BASIPIKA BIAKI alias

JOYCE MORAA OMWENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of

Hon. R.M Oanda – PM dated 5th February 2020 at the Principal

Magistrate's Court at Kilgoris in Criminal Case No.s 52 and 59 of 2020)

JUDGEMENT

1. The appellant has filed 2 appeals being HCCRA 13 of 2020 and HCCRA 14 of 2020. The 2 are consolidated and the judgement is in respect of both.

2. The appellant was charged with being in possession of narcotic drugs and psychotropic substance contrary to **Section 3(1)** as read with **Section 3(2)(a)** of the **Narcotic drugs Control Act No. 4 of 1994**. The particulars were that on the 20.1.2020 at Complex Estate in Transmara West Sub County within Narok County, was found in possession of narcotic drug namely bhang to wit 1 big roll of a street value of Sh. 200 which was not in medical preparation form.

3. Plea in Criminal Case No. 59 of 2020 was taken before the Principal Magistrate at Kilgoris on 21/1/2020. The record indicates that the language used in Court was “*ekegusii*”. The court assistant is listed as Ng'eno. In her mitigation the appellant stated;

“I pray for forgiveness. I have never sold things but I had hidden them. Police searched and got it. I have a patient who requires treatment.”

4. The appellant was convicted and sentenced to a fine of 50,000 in default one (1) year imprisonment.

5. In Criminal Case No. 52 of 2020, the appellant was arraigned before the Principal Magistrate's Court at Kilgoris for the offence of selling alcoholic drink without a license contrary to **Section 7(1)(b)** as read with **Section 62** of the **Alcoholic Drink Control Act No. 4 of 2010**. The particulars were that on 20.1.2020 at Complex Estate within Kilgoris Town in Transmara West District of Narok County was found selling alcohol drinks namely Chang'aa to wit 32 litres without a license.

6. She faces a second count of being in possession of uncustomed goods contrary to **Section 200(d) Part (III)** as read with **Section 210(1)** and **Section 213** of the **East Africa Customs Management Act of 2014**. That at the said time and place he was found in possession of 16 packets of Supa Match cigarettes against Export Law.

7. Plea was taken on 21.1.2020. The record indicates that language used was “*ekegusii*”. The court assistant was Ng'eno. The appellant

was not afforded an opportunity to mitigate.

8. Both appeals were canvassed by way of written submissions. Mr. Masese for the applicant has submitted that the main ground is that in each of the cases the plea was not unequivocal.

In both the plea is said to have been taken through the medium of Kiswahili language yet it is not indicated if the appellant understood Kiswahili. The proceedings show the appellant was communicating to the court through “*ekegusii*” language and there is no indication there was a Kisii interpreter. Ng’eno is named as a court assistant is not Kisii. This omission is fatal and renders the plea equivocal and the appeal should therefore be allowed and appellant acquitted.

9. Mr. Otieno for the Director of Public Prosecutions concedes the appeal and stated that in Appeal No. 13 the appellant in mitigation denied the offence and a plea of not guilty ought to have been entered.

In regard to Appeal No. 14, Mr. Otieno submits that the record shows the appellant was not allowed to mitigate. This was fatal.

10. I have considered the 2 appeals. I have re-evaluated the proceedings in the trial court in both instances. There is glaring evidence that the plea in both trials was equivocal. The language of communication was not ascertained. The appellant was not given an opportunity to mitigate in Criminal Case No. 52 of 2020 and in Criminal case No. 59 of 2020, the appellant’s mitigation was actually a denial of the offence. These errors are fatal and render the conviction unsustainable.

11. With the result that I find the appeals herein meritable. I allow the both appeals, set aside the conviction and sentences imposed. This would have been a suitable case for an order for a retrial. But in view of the nature of the offences and the time now spent in prison by the appellant, an order of a retrial would be, in my view, prejudicial.

12. The appellant is hereby set free unless otherwise lawfully held under a separate warrant.

Dated, Signed and Delivered at KISII this 30th day of July 2020.

A. K. NDUNG’U

JUDGE