REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 9 OF 2019

AGOSTINO NJERU CHEGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *Agostino Njeru Chege* was charged and convicted of the offence of selling alcoholic drinks before the permitted hours contrary to *section 34 (a)* of the *Alcoholic Drinks Control Act No. 4 of 2010* (hereinafter the Act).

2. The particulars of the offence alleged that on 18th March 2018 at about 7 a.m in KCC area of Runyenjes Town within Embu County, he was found selling alcoholic drinks to wit assorted beer by exposing it for sale at Karimiri Bar before permitted hours in contravention of the said Act.

3. Upon his conviction, the appellant was sentenced to pay a fine of KShs.50,000 in default to serve 6 months imprisonment. He was dissatisfied by his conviction and sentence hence this appeal.

4. In the grounds of appeal encompassed in his petition of appeal filed in court on 29th March 2019, the appellant raised eight grounds of appeal in which he principally complained that the learned trial magistrate erred in law and fact by: convicting and sentencing him on a defective charge sheet; by convicting him of the offence on the basis of contradictory evidence which did not prove the charges beyond reasonable doubt; by disregarding his defence and submissions without giving any reasons; and, by imposing a sentence which was excessive and unreasonable despite the fact that he was a first offender.

5. At the hearing, the applicant chose to rely entirely on written submissions filed on his behalf by his advocates on record on 8th September 2020. In his submissions, the appellant contended that the charge sheet as orally amended on 19th July 2018 was fatally defective as the particulars in support thereof did not specify the licence issued to the appellant and the operational hours allowed under the licence which he had allegedly contravened; that the particulars did not disclose whether he was selling or exposing alcoholic drinks for sale outside the permitted hours.

6. The appellant further submitted that there were glaring contradictions in the prosecution case which were highlighted in his submissions before the trial court which the learned trial magistrate disregarded and which raised a reasonable doubt in the prosecution's case. The appellant advanced the view that the evidence adduced by the prosecution was not sufficient to justify a conviction.

7. On sentence, the appellant submitted that he was sentenced to the maximum fine of KShs.50,000 which was excessive in the circumstances considering that he was a first offender; that though aggrieved by the sentence, he paid the fine to secure his liberty. He urged the court to allow his appeal on both his conviction and sentence and order a refund of the fine paid.

8. The state through learned prosecution counsel, *Ms. Mati* responded to the appellants submissions through oral submissions. In her submissions, counsel opposed the appeal in its entirety. She supported the appellant's conviction and sentence arguing that all the ingredients of the offence were proved beyond any reasonable doubt through the evidence of PW1 and PW2 which was consistent and corroborative; that the imposition of the maximum sentence was lawful since it was meant to achieve one of the objectives of sentencing as spelt out in the *Sentencing Policy Guidelines of 2016*. She did not however address the appellant's claim that he was convicted on the basis of a defective charge sheet.

9. This being a first appeal, this court is enjoined to reconsider and to re-evaluate the evidence presented before the trial court to arrive at its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See: ***Soki V Republic, [2004] 2 KLR 21; Mwangi V Republic, [2004] 2 KLR 28***.

10. Applying the above principle to this appeal, I have considered the grounds of appeal alongside the evidence on record as well as the rival

submissions made on behalf of both parties.

11. Starting with the appellant's complaint that the charge sheet was incurably defective as the particulars thereof were vague in that they did not disclose whether the appellant was selling or exposing alcoholic drinks for sale, my reading of the particulars reveal that they were clear that the appellant was being accused of selling alcoholic drinks before permitted hours under *Section 34 (a)* of the *Alcoholic Drinks Control Act*.

12. Though I agree with the appellant that the particulars of the charge should have specified the nature of the licence that had been issued under the Act and the operational hours permitted therein which he had allegedly contravened, the omission to include those details did not render the charge incurably defective. The charge and its particulars clearly disclosed the offence the appellant was facing and that is why he was able to effectively defend himself against the charges. The aforesaid omission and the inelegant drafting of the charges did not occasion him any prejudice. The omission in my view amounted to an irregularity which is curable under *Section 382* of the *Criminal Procedure Code*.

13. I have read and evaluated the evidence adduced by the two prosecution witnesses who testified in support of the prosecution case. PW1 and PW2 testified that they were on normal patrol duties within Runyenjes Town at around 7 a.m when they came across Kirimiri Bar in which the appellant was selling alcoholic drinks to members of the public. According to PW1, the patrons ran away on seeing the police motor vehicle inferring that they were using a police vehicle in their patrols.

14. On his part, PW2 claimed that they had been on foot patrol and when they arrived at the bar, members of the public who had been drinking ran away since they recognized them as police officers; that the appellant produced the bar's licence which showed that he was licensed to operate between 11am to 11pm.

15. Though PW1 and PW2 claimed that the patrons ran away with the glasses (according to PW1) and the cups (according to PW2) they were using to consume the key barrel beer, I find it incomprehensible that patrons who dispersed suddenly to avoid arrest by police officers would have had the presence of mind to run away with the glasses or cups they were allegedly using and none was dropped or left at the scene which could have been recovered by PW1 and PW2 to be produced in evidence as exhibits in support of the prosecution case. If the appellant was indeed selling beer to several patrons, I fail to understand how three police officers acting in concert would have failed to arrest at least one or two of the patrons.

16. The appellant in his defence admitted having opened the bar at the time alleged but denied that he had opened it for the purpose of selling alcohol. He also denied the prosecution claim that he was found by PW1, PW2 and their companion selling alcohol at the time alleged. He insisted that he was in the bar solely undertaking stock taking when he was arrested.

17. In her judgment, the learned trial magistrate convicted the appellant on the basis of the definition of the word "sell" as contained in *Section 2* of the *Alcoholic Drinks Control Act*. She did not take into account the appellant's evidence in his defence that at the material time, he was not selling any alcohol but was stock taking. This was a fundamental misdirection on the learned trial magistrate's part since as an impartial arbiter, she was enjoined to consider the evidence adduced by both the prosecution and the defence.

18. In addition, the learned trial magistrate did not thoroughly interrogate the evidence tendered by the prosecution. As submitted by the appellant, she did not appreciate the contradictions in the evidence of PW1 and PW2 which casted aspersions on their credibility.

19. From my own independent analysis, the appellant's sworn statement in defence is plausible and worthy of belief considering that none of the alleged patrons was arrested nor were the cups or glasses used to consume the beer that had allegedly been sold to them were confiscated and produced in evidence during the trial. It is thus my finding that the defence advanced by the appellant created a doubt in the prosecution's case which should have been resolved in his favour. This finding leads me to the conclusion that the appellant's conviction was unsafe.

20. For the foregoing reasons, I find merit in this appeal and it is hereby allowed. The appellant's conviction is consequently quashed and the sentence set aside. As the appellant paid the fine imposed by the trial court, I direct that the amount paid as fine be refunded to him forthwith.

It is so ordered.

DATED and SIGNED at NAIROBI this 24th day of November 2020.

C. W. GITHUA

JUDGE

DATED and DELIVERED at EMBU this 26th day of November 2020.

L. NJUGUNA

JUDGE

In the presence of:

Ms Mutuama holding brief for Mr. Njeru Nthiga for the appellant

Ms Mati for the respondent

Esterina: Court Assistant