REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL APPEAL NO 53 & 54 OF 2018

BETWEEN

GEORGE JUMA ONYANGO.....1ST APPELLANT

DANIEL OUMA NGWENA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

[Appeal from original conviction and sentence of Hon. E.M. Onzere - SRM

dated 28th May, 2018 from Tamu SRM'S Criminal Case No. 65 of 2018].

JUDGMENT

1. The appellants, **DANIEL OUMA NGWENA** and **GEORGE JUMA ONYANGO** were convicted for the offence of being in possession of alcoholic drink which does not conform with the requirements to ***Section 27(1) (b), as read with Section 27(4) of the Alcoholic Drink Control Act No. 4 of 2010.***

2. Each of them was then sentenced to imprisonment for **TWO YEARS.**

3. They have now brought appeals to challenge both the convictions and the sentences.

4. They stated that the Charge Sheet was incurably defective and could not therefore be the basis for a sound trial or conviction.

5. Secondly, they stated that the facts adduced in evidence were at variance with the particulars of the Charge Sheet.

6. Thirdly, they stated that the trial court had admitted into evidence, matters which were inadmissible.

7. In any event, the appellants felt that their conviction was against the weight of the evidence.

8. As regards the sentence handed down to them, the appellants reasoned that the same was manifestly harsh and excessive.

9. When canvassing the appeals, Mr. Onsongo, the learned advocate for the appellants, first informed the court that he had received his clients authority to proceed with their appeals even though both appellants were absent from the court.

10. In the light of the express assurance given to the court, I did permit Mr. Onsongo advocate to prosecute the appeals.

11. The first point made by the appellants was that the Charge Sheet had failed to comply with the requirements of ***Section 27(1) (a) of the Alcoholic Drink Control Act.***

12. Their reasoning was that the Charge Sheet ought to have specified whether the offence related to the labelling or the packaging of the alcohol.

13. ***Section 27 of the Act provides as follows;***

"(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."

14. The said Section does not stipulate that there was a need to specify whether the offence related to either the labelling or the packaging of the alcohol. Therefore, the failure to make such specification in the Charge Sheet would not render the said Charge defective.

15. Offences pertaining to the packaging or to the labelling of alcoholic drinks are set out in ***Sections 31 and 32 of the Act.***

Those 2 statutory provisions have no application to this case, as the appellants did not, for instance, sell alcohol in sachets or in packaging which did not comply with ***Section 32.***

16. ***Section 27 (2)*** states that ***Subsection (1)*** shall not apply to a person who-

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

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

17. It therefore follows that any person who was in possession of alcoholic drinks, without the requisite authority, commits an offence.

18. In this case, the prosecution provided evidence which proved that the appellants were in possession of changaa.

19. The appellants were not authorized to have possession of the said alcoholic drink nor were they found to be in possession of the alcoholic drink, within a premises licensed under the Act.

20. The appellants had possession of alcoholic drinks, inside a motor vehicle. The motor vehicle was not a premises licensed under the Act. Therefore, ***Section 27 (1) of the Alcoholic Drink Control Act*** was applicable to them.

21. I also find that the learned trial magistrate did take into account the defences put forward by the appellants. She did not believe the story about the 2nd appellant being sought from Kisii, with a view to travelling over 170 kilometres to Ugunja, to check on the vehicle of the 1st appellant.

22. The court was convinced that the two appellants were together at Ugunja, when the changaa was loaded onto the vehicle.

23. The trial court also dismissed the assertion that the appellants were unaware that the substance they were ferrying was changaa.

24. The fact that the 1st appellant had used the Kisumu route when he was driving to Busia, but on his return journey he used the route through Kapsabet, Nandi Hills and Mashambani, led the trial court to conclude that the appellants were deliberately avoiding police dragnets along the Kisumu route.

25. Having re-evaluated the evidence on record, I do share the conclusion arrived at by the learned trial magistrate, because it simply does not add up, for the appellants to go from Ugunja, through Yala, Kapsabet and Nandi Hills, allegedly in search of some spare parts, yet there were many other towns along the more direct route through Kisumu, where spare parts could have been found.

26. As the trial court noted the distance through the Kapsabet route was also much further, (at 250 kilometres) as compared to the 176 kilometres through Kisumu.

27. The offence of possession does not require the prosecution to prove that the accused person knew exactly what he was in possession of.

28. Of course, the conduct of the appellants in this case points to the fact that they both knew that the substance they were ferrying was not lawful.

29. But even assuming that they had actually thought that they were ferrying battery acid, the court would still have been right to convict them, once it was proved that the substance in their possession was changaa.

30. The proof was not just through the smell emanating from the substance. The said substance was taken to the Government Chemist for analysis, and the Report showed that the substance was changaa.

31. There can be no doubt, therefore, that the conviction was founded upon solid evidence. Accordingly, I uphold the conviction of both appellants.

32. As regards the sentence, the appellants submitted that the Trial Court was wrong to impose imprisonment without the option of a fine, if the court did not give reasons for not imposing a fine.

33. The appellants also faulted the Trial Court for failing to take their mitigation into account. On the other hand, if that court took the mitigation into account, the appellants blamed the court for failing to show that it had done so.

34. I have given due attention to the Notes on Sentencing, as recorded by the learned trial magistrate.

35. The court said that it had given consideration to the mitigation of the accused persons.

36. The 1st accused said that he is an orphan. The 2nd accused also said that he is an orphan.

37. The 1st accused has 5 children, 2 of whom are in High School. He also took care of the children who were left behind by his late sister.

38. Meanwhile, the 2nd accused was taking care of his siblings.

39. Finally, both accused persons pleaded for leniency and forgiveness.

40. When handing down the sentences, the trial court noted that the offence for which the accused had been convicted, had become prevalent, leading to increased moral decay in our society.

41. The learned trial magistrate decried the effect of changaa especially among the youth and even school-going children.

42. The court then pointed out that the quantity of changaa was large.

43. I presume that the court was taking account the effect to which such a large quantity of changaa would have on society. To my mind, a consideration of the probable impact which a criminal offence could have on the society is a relevant consideration.

44. When a person was in possession of a substance that could have significantly adverse impact on a sizeable part of the society, justice may be better achieved by keeping the offender away from the society.

45. Of course, I appreciate that imprisonment would have an adverse impact on the family of the offender together with the persons who relied upon the offender for their wellbeing.

46. Does that imply that the court must therefore give to a first offender, the option of a fine?

47. The answer to that question is in the negative.

48. The court is guided by statute, as to the sentence which can be handed down for any particular offence.

49. In this case, the trial court was fully alive to the provision of the sentence of a fine (of up to Kshs 2 Million) or imprisonment for up to 5 years, or both.

50. Pursuant to the Guidelines on Sentencing, a first offender should not be given the maximum sentence.

51. Considering that the maximum sentence was 5 years imprisonment, I find that the sentence of 2 years imprisonment is neither excessive nor harsh. It strikes me as a sentence which was tempered with a consideration of the appellants' mitigation.

52. I find no basis in law to warrant an interference with the discretion exercised by the learned trial magistrate, as it has not been demonstrated that she either took into account some irrelevant factors or that she failed to take into account some relevant factors.

53. Accordingly, the appeal against sentence is also dismissed.

54. In sum total, the entire appeal is dismissed; and I uphold both the convictions and sentences for both the appellants.

DATED, SIGNED and **DELIVERED at KISUMU,** this **31st** day of **July 2018.**

FRED A. OCHIENG'

J U D G E