REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

(Alcoholic Drinks/Being in Possession of uncustomed Goods)

HIGH COURT CRIMINAL APPEAL NO. 20 'B' OF 2018

(CORAM: R.E. ABURILI – J.)

DANIEL ODHIAMBO NG'ODA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal against both the conviction and the sentence dated 14.3.2018 in Criminal Case No.231 of 2018 in Siaya Senior Principal Magistrate's Court before Hon. J.O. Ong'ondo – P.M.)

JUDGMENT

1. The Appellant **Daniel Odhiambo Ng'oda** was charged with two counts under the **Alcoholic Drinks Control Act No. 4/2010 and the East African Community Customs Management Act of 2004**. This was before the Principal Magistrate at **Siaya vide Siaya P.M. Cr. C. No. 231 of 281.**

2. Particulars of the changes are Count 1: **Selling Alcoholic Drinks in Sachets Contrary to Section 31 (1), (2) (a) as reads with Section 31 (3) of the Alcoholic Drinks Control Act No. 4/2010.**

3. It was alleged in the particulars of the charge in Count 1 that on the 10th day of March, 2010, at Kaugagi Hawinga sub-location in Siaya District within Siaya County, was found selling **Alcoholic Drinks in sachets to wit, 312 sachets of Simba Gin Waragi spirits, 120 sachet of Empire cane spirits in contravention of the said Alcoholic Drinks Control Act No. 4 of 2010**.

4. Count 2, states that: **Being in possession of uncustomed goods contrary to Section 200 (a) (iii) as read with section 210 and 213 of the East African Community Customs Management Act of 2004**.

5. Particulars of the charge were that on the 10th day of March, 2010, at Kaugagi Hawinga Sub-Location, in Siaya District within Siaya County, was found in possession of 713 packets of pure Export Super Match King Size Cigarettes valued at KShs.71,000/= in contravention of the said East African Community Customs Management Act of 2004.

6. The Appellant allegedly pleaded guilty to the two counts as read out to him and he was convicted accordingly. He was fined Kshs.50,000/= in default 6 months imprisonment. In addition, he was to serve six months imprisonment.

7. On Count 11, the Appellant was fined KShs.213,000/= in default to serve one (1) year imprisonment.

8. The exhibits were ordered to be destroyed.

9. Dissatisfied with the conviction and sentence imposed on him, the Appellant herein sought to challenge the same vide this appeal. He also sought and obtained bail pending appeal on 9.4.2018.

10. In his grounds of appeal, he claims vide his Petition of appeal dated 16th March, 2018, that:

> ***a. The trial Magistrate erred-in-law and fact in entering a plea of guilty against the Appellant which the charges before the Court did not disclose the alleged offences.***
>
> ***b. The learned trial Magistrate erred-in-law and fact in convicting the Appellant on his alleged plea of guilty when, in fact, no***

such plea could be entered against the Appellant since the purported plea of guilty could not be said to be unequivocal;

c. The learned trial Magistrate erred-in-law and in fact in convicting the Appellant on his own purported plea of guilty when the particulars of the charges read to the Appellant did not disclose any of the alleged offences.

d. The learned trial Magistrate erred in law and fact in failing to properly record the language in which the charges were read to the Appellant and the purported plea of guilty was therefore erroneously entered and the conviction and sentence were therefore null and void.

e. The learned trial Magistrate erred in law and fact in convicting the Appellant on defective charges and imposing sentences which are uncertain.

f. The learned trial Magistrate erred in law and fact by imposing on the Appellant very harsh, unlawful, uncertain and oppressive sentences totally disregarding the Appellant's mitigation, past clean records and ill-health.

g. The Appellant through his Counsel Amuga & Co. Advocates prayed that the appeal be allowed, his conviction quashed and the sentences set aside.

11. The history of the case is that on 14.3.2018 the Appellant was arraigned before the P.M's Court, Siaya before Hon. Ongondo charged with the two counts as stated above in the introductory paragraph.

12. During the said first appearance in Court, the Appellant is recorded as having pleaded guilty to both counts.

13. Since the equivocality of the plea is under challenge, I shall herein below reproduce the same as appears in the trial Court record 14/3/2018.

"**Before Hon**. J. Ongondo – P.M.

Prosecutor – Mr. Ngetich for State

Court Clerk – Juma/Irene

Accused – Present

Interpretation – English/Kiswahili

Court: Case for Plea

The substance of the charge(s) and every element thereof has been stated by the Court to the Accused person, in the language that he/she understands (English/Kiswahili) who being asked whether he/she admits or denies the truth of the charge(s) replies: English/Kiswahili/Dholuo:

Count 1 – True

Count II – True

Court:- Plea of Guilty entered.

Prosecutor:

On 10th/3/2018 at 3.00 p.m. Police on Patrol received information from members of the Public, Police went to the home of Accused and recovered 3020 sachets of Simba Waragi, 120 sachets of Coffee Spirits, 120 sachets of Empire and 713 packets of cigarettes, Super Match Cigarettes.

Accused:- Facts are true

Court: Accused is convicted on his own plea of guilty.

Prosecutor – Accused is a first offender.

Mitigation:

My father died in 1982. I have children I do not have employment. I have septic leg. I pray for leniency.

Court: Mitigation noted.

Court 1:

Five KShs.50,000/= I/d 6 months imprisonment. In addition Accused will serve 6 months imprisonment.

Count 2:

Five KShs.213,000/= I/d (one) (1) year imprisonment.

14 days right of appeal.

J. Ongondo/PM

14.3.2018"

20. Based on the above trial record, the Appellant now challenges both his conviction and sentence as per the stated grounds of appeal set out in his Petition of Appeal.

21. During the hearing, Mr. Amuga Advocate for the Appellant urged the 6 grounds of Appeal in clusters namely, grounds 1, 2 and 3 together. In his oral submission, Mr. Amuga maintained that the charge as laid and facts as read out to the Appellant did not disclose an offence.

22. In addition, he submitted that the plea was not unequivocal. He argued Count read being in passion of uncustomed goods contrary to Section 200 (a) (iii) as read with Section 210 and 213 of the EAC Management Act, yet Section 200 (9) of that Act does not have a S/Section (iii) hence the Appellant was charged with a non-existent charge or offence. It was submitted that the trial Magistrate should have reflected the charge.

23. It was further submitted by Mr. Amuga on behalf of the Appellant that the facts as read out to the Appellant by the Prosecution did not disclose any offence of being found with uncustomed goods. It was submitted that uncustomed goods must have as place of origin yet the facts are silent on this aspect.

24. On Count 1: It was submitted that albeit the Appellant was charged with selling alcoholic drinks in sachets, the facts read out to him only stated that the Police went to the Appellant's home..

25. It was submitted that nowhere was it stated that the accused/appellant was selling the said alcoholic drinks in sachets hence there was no offence disclosed by the facts read out to the Accused.

26. It was submitted that as a consequence, the trial Court should have rejected the charges under Section 89(5) of the Criminal Procedure Code.

27. It was further submitted that even the language used to take the plea does not conform and that it is not clear from the record, which language was understood by the Accused which is a ground for setting aside his conviction.

28. On sentence, it was submitted that it captures grounds five (5) and six (6) of the Petition of Appeal.

29. It was submitted that the sentence of Shs.50,000/= five indefault to serve 6 months imprisonment and the additional six months imprisonment imposed on the Appellant was an illegal sentence which denotes that even if the Accused had paid the fine imposed, he would still serve the additional 6 months imprisonment. In this regard it was submitted that the law only permits 9 maximum of Shs.50,000/= five or six 96) months imprisonment.

30. On the second Count, it was submitted that the fine if Shs.213,000/= in default one year imprisonment was illegal because the maximum sentence allowed by law is double the value of the uncustomed goods. In this case, it was submitted that the charge sheet says that the value of the uncustomed goods was KShs.71,000/= hence the file of KShs.213,000/= was unlawful as it exceeds double the value of the alleged uncustomed goods.

31. The Appellant's Counsel maintained that the two sentences were illegal and that no offence was disclosed in the facts of the case as read out by the Prosecution.

32. Mr. Amuga relied on several authorities filed on 3.4.2018 which include statutory and case law.

33. In the view of Mr. Amuga, the goods allegedly recovered were never produced in Court hence it is questionable if there was any offence committed or recovery made.

34. Mr. Amuga maintained that in the Ruling by Hon. Makau – J. In an application for bail pending appeal, the Honourable Judge made comments that the appeal had overwhelming chances of success and that there was a high possibility that the Appellant herein was wrongly convicted hence this appeal should be allowed, conviction quashed and sentence set aside and the Appellant be set at liberty.

35. In opposing the appeal, Mr. Okach, Prosecution Counsel, submitted that on production of exhibits, the facts of the case were read out to

the Accused in a language that he could understand which was English and interpretation done in Kiswahili.

36. It was submitted in concession that albeit there were errors in the proceedings, those errors could not vitiate the plea as they were negligible errors which, according to the Prosecution Counsel, were technicalities curable by Article 159 of the Constitution. Mr. Okach, maintained that the Accused person was accorded a fair trial.

37. In a rejoinder, Mr. Amuga submitted that he had not raised any issues of technicalities but issues of law and substance, Further, that the State Counsel who attended to the Application for bail pending appeal conceded the Application based on the decision by Nyakundi – J, in **Joshua Njiri Vs. Republic [2017] eKLR** on the requirements for an unequivocal plea. He reiterated that the maximum fine on Count 2 is 50% of the total value of the uncustomed goods, not 100% as earlier submitted.

DETERMINATION:

38. I have carefully considered the appeal herein, the submissions by the Appellant's Advocate and the Respondent's Counsel. I have also considered the Case Law, Statutory and Constitutional provision and Constitutional provision cited by both parties Advocates. In my view, the issues that flow for determination in this appeal are the main issue in this appeal is whether the plea as taken was unequivocal and therefore whether the conviction and sentences meted out on the appellant in the two counts are sound and or lawful.

40. Mr. Amuga Advocate for the appellant condemned the procedure used by the Trial Court to record the guilty plea. He thought that the procedure was deficient and failed to meet the high threshold stipulated in section 207 of the Criminal Procedure Code.

41. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in **Adan v Republic(1973) EA 445 at 446:**

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."***

42. However, in the case of **Ombena v Republic1981 KLR 450** the court tended to depart from the law as laid down in the ***Adan*** (supra) case to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

43. With this totality of circumstances test in mind, the following observations are appropriate from the proceedings in the Magistrates' court.

44. First, although the Court record indicates that the charge and every element thereof was stated by the court to the accused person in the language he understood, it is however not clear from the record which language was used to explain the charge to the accused person. The record simply states **English/Kiswahili** which was the language of interpretation. It does not state which specific language the accused understood, between English and Kiswahili and which language the court used.

45. Second, while the Adan Case stipulates that the Court records the words of the Accused Person verbatim, this did not happen in the instant case. Instead, the Learned Magistrate recorded the response in English as follows: English/Kiswahili/Dholuo:

> **"Count 1-True"**
>
> **"Count 2-True"**

46. Makau J, in his ruling allowing an application for bail pending appeal stated as follows concerning the application which was conceded by the State Counsel in conduct of the matter:

> ***"I have considered the application for bail pending appeal and having heard both the State Counsel and Counsel for the applicant I am satisfied from the arguments advanced before me that the appeal has overwhelming chances of success for the following reasons:-***
>
> ***(a) the language used during plea taking is not disclosed as required***
>
> ***(b) the facts in support of the charges are at variance with the charges the applicant faces and do not disclose any offences the accused faced***
>
> ***(c) the plea was not unequivocal***

(d) the exhibits were not produced and it is not clear as to whether any exhibits were recovered and if so where they are and who is the beneficiaries of the recovered exhibits

(e) Count II is defective as it is based on nonexistent section of the law.

(f) The State concedes the application for bail pending appeal for the above reasons I find the state has rightly done so.

47. As correctly submitted by Mr. Amuga, Count 2 of the charge is being in possession of goods contrary to section 200(a) (iii) as read with section 210 and213 of the East African Customs Management Act. I have perused the relevant Act and Section thereof and I note that the section 200 (a) has no clause (iii). In addition, section 200 (a) of the Act has nothing to do with uncustomed goods. It deals with (a) importation or carrying coastwise any (i) prohibited goods whether or not the goods are unloaded;(ii) or any restricted goods contrary to any condition regulating the importation or carriage coastwise of such goods, whether or not the goods are unloaded.

49. The part that deals with uncustomed goods is section 200(d) (iii) but this is not the section under which the appellant was charged. Accordingly, I am in agreement with Hon Makau J that the appellant was charged with a nonexistent offence and therefore the appeal from the onset had overwhelming chances of success to warrant allowing an application for bail pending appeal. In my humble view, the trial Magistrate should have examined the section under which the appellant was charged to establish whether such law existed before entering a plea of guilty. The principle of legality connotes that no person shall be culpable for an offence which is not recognized in law.

49. The other aspect of the plea that was challenged was that the facts as read to the appellant did not disclose the offence of being found in possession of uncustomed goods in that the facts do not mention that the Cigarettes were uncustomed. Further, that unaccustomed goods must have a place of origin which the facts do not disclose hence the plea was unequivocal.

50. I have considered the argument by Mr. Amuga and read the facts as recorded by the trial magistrate. There is nothing in the facts read out by the prosecutor to the court that discloses that any f the recovered goods namely 3020 sachets of Simba Warangi, 120 sachets of coffee spirits, 120 sachets of Empire and 713 packets of Cigarettes, Supper Match Cigarettes were uncustomed. Uncustomed goods are defined in section 2 of the Act as:

""uncustomed goods" includes dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the Customs law."***

51. There is nothing in the facts read out to the accused that show that the full duty ought to have been paid or the goods were dutiable or not or that they were imported and if so from which country of origin. In other words, even assuming that the charge was properly brought under section 200(d) (iii) of the Act, there is nothing in the facts that disclose that the goods were uncustomed.

53. The appellant could therefore not have pleaded guilty to facts which did not disclose an offence under the law. On that ground alone this appeal must succeed.

54. Count 1 on the other hand states that the accused was found selling alcoholic drinks in sachets contrary to section 31(1) (2) (a) as read with section 31(3) of the Alcoholic Drinks Control Act No. 4 of 2010. However, the facts as read out to the accused person do not state that the accused was ever found selling the said alcoholic drinks in sachets. They simply state that on 10/3/2018 at 3.00pm the police received information while on patrol from members of the public, went to the accused person's home and recovered 3020 sachets of Simba Warangi, 120 sachets of Coffee spirits, 120 sachets of Empire ….. There is no mention of the said goods having been on sale or being sold. ***The act of selling the alcoholic drinks in sachets must be disclosed*** in the facts as per the charge sheet. This is so because section 31 (1) of the Alcoholic Drinks Control Act is clear that No person shall, sell, manufacture, , pack, distribute or sell an alcoholic drink in sachets or such other form as may be prescribed. In the absence of such aspect of selling, the offence was not proved in the facts and therefore the plea was not unequivocal. The charge, as correctly submitted by Mr. Amuga, should have been rejected under section 89(5) of the Criminal Procedure Code.

54. Albeit the appellant is said to have pleaded guilty which plea was not unequivocal and although he gave mitigations prior to sentence being pronounced, an indication that he must have understood what was happening in court, it is my humble view a guilty plea should not be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It should be even more so when the Accused faces a serious charge capable of attracting custodial sentence.

55. On sentence, Mr. Amuga was categorical that the sentences meted out on the appellant were both illegal and unsustainable because the court, apart from fining the appellant Kshs 50, 000 on the first count and in default to serve six months imprisonment, he also sentenced him to serve six months imprisonment whether or not a fine is paid.

56. Section 31(3) of the Alcoholic Drinks Control Act provides that:

"A person who contravenes this section commits an offence and shall be liable to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months, or to both."

57. What the section provides in terms of punishment is discretionary for the convicting court to either fine the convict Kshs fifty thousand shillings or imprison him for a maximum term of six months or to sentence the convict to serve both the six months imprisonment term and pay a fine of Kshs 50,000.

58. In the instant case the appellant was ordered to pay a fine of Kshs 50,000 and in default to serve six months imprisonment and in addition, he was sentenced to serve six months imprisonment. What the sentence means is that whether the appellant pays the fine or not,

after serving the default sentence of six months he would in addition serve a further six months. On this aspect I agree that the sentence meted out on the appellant is unknown in law. I find and hold that the sentence was unlawful inviting interference by this court.

59. There is then the question of whether the sentence meted out in count 2 was lawful or not.

60. Assuming the appellant was lawfully convicted on count 2, section 200 provides that a person who commits an offence under that section shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

61. In the instant case, the trial court fined the appellant Kshs 213,000 in default to serve one year imprisonment.

62. As earlier stated, it is not disclosed whether the goods were dutiable or not and even if they were, their value was given as Kshs 71,000. That being the case, upon conviction, the trial court could only have fined the convict an amount not exceeding fifty per cent, 50% of the value of the dutiable goods. Assuming Kshs 71,000 was the dutiable value of the goods, the maximum fine could have been Kshs 35,500 and not the fine of Kshs 213,000 imposed on the appellant. The trial court did not explain the basis for the 213,000 fine since there was a specific penalty section cited in the charge sheet. Accordingly, I have no hesitation in finding and holding that the sentence imposed on the appellant by the trial court in count two was illegal and must therefore be set aside. That ground succeeds as well.

63. Another complaint in this appeal is that the exhibits were never produced in court and more so, the beneficiary of the said exhibits is unknown. Section 210 and 213 of the EACM Act stipulates that uncustomed goods are liable to forfeiture (see section 210(c). The procedure for forfeiture of such goods is set out in section 214 of the same Act. In this case, after the plea was taken and sentence pronounced on each of the counts, the trial court ordered for destruction of the exhibits within 14 days. This order was made despite the fact that no exhibits were produced and seen by the court and neither does the law provide for destruction of such goods. The law is clear that such goods would be forfeited through a process set out in section 214. This was never the case in this case.

64. Accordingly, I have no hesitation in finding and holding that the order by the trial court for destruction of the exhibits which were never produced in court was unknown in law.

65. Finally, courts have always held that extra caution must be taken in the case of undefended defendants who plead guilty. Thus, where an accused person is unrepresented, it is the duty of the Court to ensure the plea of guilty is unequivocal. Ngugi J in **Paulo Malimi Mbusi v R, Kiambu Criminal. App. No. 8 of 2016 (unreported)** citing his earlier decision in **Simon Gitau Kinene v Republic [2016] eKLR** held, inter alia, and I concur that:

"In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.….To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea."

66. These views apply with equal measure to the present case. Accordingly, I find and hold that in the circumstances, it would be unsafe to uphold the guilty plea entered against the appellant herein.

67. The court notes that the Prosecution Counsel Mr. Okachi did concede in his submissions that the albeit there were errors in the proceedings but that those errors were technical and could not vitiate the plea as they are curable under Article 159 of the Constitution. I have carefully considered the so called technical errors and in my humble view, the errors are substantial. They go to the root of the charges facing the appellant and therefore fatal to the plea of guilty entered against the appellant. The prosecution had the opportunity to amend the defective charge before the plea was taken but they chose not to.

68. As there is no evidence that the exhibits were recovered, a retrial would be in vain. A court of law ought not to make orders in vain. Accordingly, I make the following final orders:

a. The equivocal plea of guilty entered in Siaya Principal Magistrates' Court Criminal Case No. 231 of 2018 is hereby set aside and quashed.

b. The sentences imposed on the Appellant on both counts are hereby set aside and quashed.

c. Any fine or fines if at all paid by the appellant to be refunded to the appellant

d. Any cash bail paid by the appellant to be refunded to the appellant and sureties if any are discharged forthwith.

Dated, signed and delivered at Siaya this 24th day of September, 2018.

R.E.ABURILI

JUDGE