REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 141 OF 2017

SARAH JEPKOSGEI BIWOTT……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

[Being an appeal from original conviction and sentence of the 10th day of March 2017 in Criminal Case No. 190 of 2017 in the Principal Magistrate's Court at Eldama Ravine (Hon. J. L. Tamar PM]

JUDGMENT

1. In accordance with the duty of a first appellate court as held in ***Okeno v. R*** [1972] EA 32 the court has re-examined the evidence presented in the trial court and determined that a conviction of the appellant would be unsafe for the reasons given in this Judgment. I have also considered the written submissions field by Counsel for the appellant and for the DPP in the appeal.

2. In sum the respective submission of the parties is as follows.

APPELANTS SUBMISSIONS

3. On the first ground of the appeal the appellant submits that a plea of guilty should be unequivocal . The appellants responded with "it is true" and this was for the reason that she understood the language used when the facts of the charge sheet were read to her. For a plea of guilty to be unequivocal it has to satisfy certain ingredients which were set out in ***Kato v. Republic (1971)EA 542***, ***Wanjiru v Republic*** [1975] EA 5 and in ***Adan v. Republic*** (1973) EA 445 where the court of appeal held as follows;

> a) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
>
> b) The accused own words should be recorded and if they are an admission, a plea of guilty should be recorded.
>
> c) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts
>
> d) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered
>
> e) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused reply should be recorded.

4. The appellant submits that there is no evidence on record that the accused was asked in a language she understands and thus the word "it is true" standing on its own did not constitute an unequivocal plea of guilty as held in ***Paul Irungu Maina v. Republic*** HCCRA NO. 1209 of 2007.

5. The second ground of appeal the appellant was that the charge sheet was defective. She was charged with having 120 litres of kangara. Section 2 of the Alcoholic Drinks Act No. 4 of 2010 does not include kangara. The Court in ***Hilda Atieno vs Republic [2016] eKLR*** the Court held that Kangara is not an alcoholic drink but a substance used in distilling changaa which is an alcoholic. Thereafter if Kangara is not an alcoholic drink then the charge sheet is defective. They relied on a Ugandan case in ***Libyan Arab Uganda Bank for Foreign Tarde and Development and Another v. Adam Vaniliadis [1986] UG GA 6***, in this case the court held

> "***"in the system of trial which we have evolved in this country, the judge sits to hear and determines the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe in some foreign contries."***

6. It was further submitted that it is the prosecution who have the burden of proof beyond reasonable doubt. The exhibit that was produced in court Jerrycans of "Kangara" were never supported with any scientific tests from the government chemist. They relied on the case by ***Lord Denning Miller Vs Ministry of Pension [1947] 2ALL ER 372*** who held as follows

> ""*that degree is well settled. It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."*

The appellant submits that by merely the prosecution showing the jericans in court was not sufficient.

PROSECUTIONS SUBMISSION

7. The prosecution submits that the charge sheet was read to the appellant in a language she clearly understood and she responded. The answer "it is true" in all the three counts and when the facts were read to her she responded "facts are true" the appellant never added anything on to her answer to make the trial magistrate doubt what she said. Thus, the plea was unequivocal.

8. The prosecution further submits that the Kangara was in regard to count one but for count 2 and 3 the appellant was charged with being in possession of changaa and busaa. In fact, they state that the definition of alcoholic drink is not in the way that any would know if any substance was an alcoholic drink without a scientific analysis.

<u>The points for determination</u>

9. The issues for determination are whether the plea of guilty was unequivocal; whether the charge sheet was defective and whether there was evidence to support the charges against the appellant.

<u>Determination</u>

10. The appellant pleaded guilty to the offences charged in Counts I, II and III and she was convicted and sentenced to "six months imprisonment, without an option of fine. The procedure for recording of plea is set out in ***Adan v. R*** (1973) KLR 445 elaborating on section 207 of the Criminal Procedure Code. A court is required to ensure that "the accused own words should be recorded and if they are an admission, a

plea of guilty should be recorded". I would agree that the words "it is true" are not sufficient to signify a plea of guilty and such a plea herein is unequivocal.

11. The charges and particulars thereof were set out as follows:

> *"**COUNT I***
>
> *Contravening alcoholic drinks control act contrary to section 27(1) (b) as read with section 27(4) of the Alcoholic Drinks Control Act no. 4 of 2010.*
>
> ***SARAH JEPKOSGEI BIWOTT**: On 9th MARCH 2017 at 1130hrs in Torongo village in Koibatek Sub county Baringo County, was found being in possession of Kangara to wit 120 litres for sale packed in separate plastic jericans in contravention of the requirements of Alcoholic Drinks Control Act no. 4 of 2010.*
>
> ***COUNT II***
>
> ***CONTRAVENING ALCOHOLIC DRINKS ACT CONTRARY TO SECTION 27(1) (b) AS READ WITH SECTION 27 (4) OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010.***
>
> ***SARA JEPKOSGEI BIWOTT:** On 9th March, 2017 at 1130hrs in Torongo village in Koibatek sub county within Baringo County, was found being in possession of being CHANGAA to wit 5 litres for sale packed in a plastic jerican in contravention of the requirement s of alcoholic drinks Act No. 4 of 2010.*
>
> ***COUNT III***
>
> ***MANUFACTURING AN ALCOHOLIC DRINKS THAT DOES NOT CONFORM TO THE REQUIREMENTS OF THE ACT CONTRARY TO SECTION 27(1)(A) AS READ WITH SECTION 27(4)(a) OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010***
>
> ***SARAH JEPKOSGEI BIWOTT:** On 09th March, 2 2017 at 1130hrs in Torongo village on Koibatek sub county within Baringo county, was found manufacturing alcoholic drink namely BUSAA that does not conform to the requirements of the act using sprouted millet to wit 15kg in contravening Alcoholic Drinks Control Act No. 4 of 2010."*

12. The proceedings of the trial court are attached as follows:

> *"**REPUBLIC OF KENYA***
>
> ***IN THE PRINCIPAL MAGISTRATE'S COURT AT ELDAMA RAVINE***
>
> ***CRIMINAL CASE NO. 190 OF 2017***
>
> ***REPUBLIC …… PROSECUTOR***
>
> ***VERSUS***
>
> ***SARAH JEPKOSGEI BIWOT ……..…….. ACCUSED***

10.030017

Coram: Before-Hon. -JA L. Tamar PM

State council Relwon

Court clerk — Malakwen

Accused — Present

The charges and elements therein are read over and explained to the accused in a language that he/she understands (i.e) Kiswahili/ English who replies

Count I: It's true

Count II: It's true

Count III: It's true

Court Plea of not guilty entered

1-1011. J. L Tamar— PM

CP Facts are here that on 09.032017 at Torongo around 1130hrs the accused was found with 1201itres of Kangara packed in plastic jericans, The accused was also found with 5 litres of Chang'aa and 15kg of fermented millet used for manufacturing of illicit brew,

Hon. J.L Tamar PM

Accused - facts are true

Hon. J. L Tamar- PM

Court — accused convicted

CP — Wish to produce 1201itres, 5 lifers and 15kg of millet as evidence.

Court — Produced as exhibit I and 3 respectively.

Hon. J, L Tamar PM

<u>Mitigation</u>

I am sorry I am a widow.

Hon. J. L Tamar PM

Court — I have considered accused mitigation the offence committed is rampant in this Area as a deterrent accused is sentenced to serve six months imprisonment without option of fine, Right of appeal explained.

Hon- J. L Tamar PM"

13. The Court did not indicate whether the sentence was for all the three counts each at six months the sentences running concurrently or the aggregate of the sentences for the three counts running consecutively in terms of section 37 of the Penal Code.

14. Section 37 of the Penal Code provides as follows:

> *"**37.** Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:"*

15. The default by the Court to indicate what the sentence of six months imprisonment was for is not capable of cure by section 382 of the Criminal Procedure Code as there is obvious prejudice on the part of the appellant because had the sentences been an aggregate of the sentences in three counts and directions given that they were to run concurrent sentence, she would only have served two months imprisonment.

16. Failure to specify the sentence for each count offends section 169 (2) of the Criminal Procedure Code and denies the appellate court the opportunity to consider the legality or excessiveness of the sentence in relation to the penalties prescribed for the different offences. Section 169 of the CPC provides as follows:

> *"**169. Contents of judgment***
>
> *(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*
>
> ***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> *(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."*

17. Under the Alcoholic Drinks Control Act, the offences charged in three counts are punishable by sentence of "a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.", under section 27 of the Act as follows:

> *"**27. Conformity with requirements***
>
> *(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.*
>
> *(2) Subsection (1) shall not apply to a person who—*
>
> *(a) is authorized under this Act to be in possession of the alcoholic drink; or*
>
> *(b) has possession of the alcoholic drink in a premises licensed under this Act.*
>
> *(3) The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or the requirements of this Act.*
>
> *(4) A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not*

exceeding five years, or to both."

18. The charge sheet was defective in that as held by the Court of Appeal in ***Yongo v. R*** (1983) KLR 319 –

"1. A charge is defective under section 214 of the Criminal Procedure Code (cap. 75) where:

a. it does not accord with the evidence in the committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b. ***it does not, for such reasons, accord with the evidence given at the trial;*** or

c. it gives a mis-description of the alleged offence in the particulars.

2. Where the charge is defective either by misdescription or at variance with the evidence at the trial, the court has power to order an amendment or alteration of the charge …"

19. The appellant contests that Kangara is not one of the prohibited substances under the Act. The DPP responds that the definition of alcoholic drink in the Act encompasses Kangara. Scientific evidence is necessary to bring Kangara substance within the meaning of alcoholic drink under Section 2 of the Act which provides as follows:

"alcoholic drinks' includes" alcohol, spirit, wine beer, traditional alcoholic drink or any more of such varieties containing one half of one percent or more of alcohol by volume, including mixed alcoholic drinks and every liquid or sloid, patented or not, containing alcohol, spirits, wine or beer and ***capable of being consumed by a human being."***

I would agree with the decision of ***Hilda Atieno vs Republic [2016] eKLR*** that Kangara is not an alcoholic drink within the meaning of the Act. The offence in Count I is accordingly unknown to law.

20. Similarly, as regards Count II, the prosecution did not adduce any evidence that the substance produced before the court despite the admission of guilt by the appellant was Chang'aa, a prohibited alcoholic drink under the Act.

21. As regards count III all that was produced was 15kg millet and no evidence that the millet was being used for manufacturing of prohibited alcoholic drinks as charged. The Court emphasizes that even on a plea of guilty the prosecution must consistently with its burden of proof to prove the case beyond reasonable doubt prove the chemical composition of substances presented as substances in contravention with the Act.

22. In ***Peter Kioko Mbithi v. Republic*** Machakos HC Cri. Appeal no. 16 of 2015, this Court considered unequivocality of a plea of guilty with regard to a charge of possession of C***annabis*** under the Psychotropic and Narcotic Substances Act 1994 as follows:

*11. "The Court did not however record the appellant's plea in his own words as required by section 207 of the Criminal Procedure Code. The record merely shows the interpretation "It is true" in English language, when the accused must have responded in chosen language Kiswahili. As regards the facts of the case, the Court similarly recorded the English interpretation of the appellant's statement in response to the Court's enquiry whether he "****understood the facts"*** *and whether* ***"the facts true or not true",*** *that "****I have understood the facts. The facts are true. This is the bhang I was found in possession****".*

12. To support the unequivocality of the plea the trial Court should have, in addition to indicating the fact of interpretation into Kiswahili, recorded the accused's answer to the charge and the facts set out by the prosecution in the actual words used by the accused. This is the requirement of section 207 of the Criminal Procedure Code that where an accused admits the truth of the charge, ***"his admission shall be***

recorded as nearly as possible in the words used by him.*"*

Proof of possession of Cannabis

13. In civil proceedings facts that are admitted need be proved otherwise than by those admissions except where the court so directs:

> ***"Facts admitted in civil proceedingsNo fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:***
>
> ***Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions."***

14. However, in criminal cases, an admission of fact has no consequence to the burden of proof which remains with the prosecution at all times. This is how I understand, the holding of the Court of Appeal in ***Wandete David Munyoki v. Republic*** *[2015] eKLR that –*

> ***"The burden on the prosecution to prove any charge against an accused person beyond reasonable doubt is not lessened by the fact that the accused person pleaded guilty. The facts that are outlined after the accused person admits the charge represents evidence in support of the charge. They (the facts) must, of necessity, therefore support the charge and disclose the offence charged.***
>
> *At any stage before passing sentence the accused person is free to change his plea. Where the accused person does not agree with the facts as outlined by the prosecution, or where he raises any question of his guilt, his reply must be recorded and a change of plea entered. In that case the court shall proceed to hear the case by calling oral evidence. See* ***Kariuki*** *v* ***R*** *[1984] KLR 809. By omitting the fact that the deceased was robbed of a bicycle and radio in the narration by the prosecutor and by the appellant explaining that he was not in the company of any other person, the plea of guilty recorded by the learned trial magistrate was not unequivocal and the offence of robbery with violence contrary to* ***Section 296(2)*** *was not proved."*

15. Of course, in terms of section 3 (2) of the Evidence Act –

> ***"****(2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.****"***

16. The offence of being in possession of ***cannabis*** *with which the appellant was charged is set out in section 3 (1) and (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as follows:*

> *"****Penalty for possession of narcotic drugs, etc.***
>
> *(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.*
>
> *(2) A person guilty of an offence under subsection (1) shall be liable—*
>
> *(a) in respect of* ***cannabis,*** *where the person satisfies the court that the* ***cannabis*** *was intended solely for his own consumption, to imprisonment for ten years and in every other*

case to imprisonment for twenty years;"

17. For successful prosecution of the offence in section 3(1) as read with (2) (a) thereof as charged herein, the Prosecution must prove that the accused had with him or in his control (see definition of 'possession' in section 2 of the Penal Code) a narcotic drug called ***cannabis*** *as described in the First Schedule of the Act. However, because of the technical nature of the method of ascertainment of a substance as a narcotic drug or psychotropic substance for purpose of the Act, and the standard of proof of beyond reasonable doubt required in criminal cases, the prosecution must by evidence that leaves no reasonable doubt prove that a substance offered as* ***cannabis sativa*** *or other prohibited drug or psychotropic substances is indeed such drug or substance, in terms of its physical and chemical character. The accused may mistakenly, or in ignorance, well admit possession of a substance whose chemical composition does not offend the law on narcotic drugs and psychotropic substances.*

18. There should be evidence that what the appellant admitted to have in his possession was the prohibited ***cannabis*** *the subject of the charge facing him. To be sure, the appellant is not shown to have admitted to being in possession of* ***cannabis****. The prosecution ought to have shown that the substance whose possession the accused admitted was indeed* ***cannabis****. Then the offence would have been proved. "*

23. Furthermore, the prosecution did not produce a Government Chemist report on the substances produced as exhibits to confirm that they were in the prohibited formulation under the Act. The DPP lamented that in pleading guilty, the appellant denied them a chance to call for evidence to prove the charge beyond reasonable doubt. DPP also concede that from the definition of alcoholic drink in the Act, "it not in any way that any person would know if any substance was an alcoholic drink without scientific analysis." It is precisely for this reason that the prosecution should have adduced a Government Chemist report on the substances produced as a way of establishing the facts to which the accused would then be called upon to admit or reject.

24. There was no amendment to the charge to correct the defects on the charge sheet and the Court must declare a mistrial. Indeed, the DPP called for *"a retrial to allow the prosecution to submit their evidence and prove their case"*.

25. However, in considering whether a retrial may be ordered the court considers that the appellant has almost served her entire term having served close to 4 months of the six months sentence whereby allowing for remission under section 46 of the Prisons Act, she would have been due for release on the 10th July 2017. It may also be that the exhibits in the case may have been destroyed upon conclusion of the trial in the trial court and a retrial is therefore not possible.

26. Moreover, the conviction cannot be supported by the evidence presented before the court as indicated above. There being no evidence to support the charges, the proper order is an order for dismissal of the charges for want of evidence and acquittal of the appellant of all the charges.

Orders

27. Accordingly for the reasons set out above, the Court quashes the conviction and sentence of imprisonment for six months imposed on the Appellant for the three offences charged in the Charge sheet, namely, Count I *Contravening alcoholic drinks control act contrary to section 27(1) (b) as read with section 27(4) of the Alcoholic Drinks Control Act no. 4 of 2010; Count II* ***Contravening Alcoholic Drinks Act contrary to section 27(1) (b) as read with section 27 (4) of the Alcoholic Drinks Control Act no. 4 of 2010 and Count III Manufacturing an alcoholic drink that does not conform to the requirements of the Act contrary to section 27(1) (a) as read with section 27(4) (a) of the Alcoholic Drinks Control Act no. 4 of 2010.***

28. The Court therefore directs that the appellant be released from custody forthwith unless she is otherwise lawfully held.

DATED AND DELIVERED THIS 29TH DAY OF JUNE 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chebii for M/S Arusei & Co. Advocates for the Appellant

Ms. Onkoba for DPP.