



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NUMBER 27 OF 2017**

**MARY KINYA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Being an appeal against the Judgment of Hon. G. Sogomo – SRM,***

***delivered on 28<sup>th</sup> February 2017 in Tigania Cr Case No.1212/2016***

***at Tigania Principal Magistrate's Court)***

**J U D G M E N T**

The appellant was charged with the offence of manufacturing an alcoholic drink without a licence contrary to **section 7(1) (a)** as read with **section 62** of the **Alcoholic Drinks Control Act No.4 of 2010**. The particulars of the offence were that the appellant on 29<sup>th</sup> May 2016 at Michuune village, Kitheo sub-location, Kitheo location in Tigania West sub-County, within Meru County was found manufacturing an alcoholic drink namely Chang'aa at her home by use of 140 (one hundred and forty) litres muna and 20 (twenty) litres of already manufactured Chang'aa without license in contravention of the said Act.

The trial court convicted the appellant and sentenced her to serve eighteen (18) months imprisonment without the option of a fine. The grounds of appeal are that the conviction was based on insufficient evidence, that the prosecution evidence is scanty, that the trial court erred in law by allowing a police officer to produce the exhibit memo, that the appellant's defence was not considered, that no apparatus for manufacturing illicit brew were produced and that the sentence is harsh and did not consider the appellant's mitigation.

**Mr. Anampiu** appeared for the appellant. Counsel submitted that the evidence adduced before the trial court is insufficient. Non of the witnesses testified that the appellant was manufacturing illicit brew. There was no evidence that the appellant was the only one at the home. No independent witnesses were called to testify. A police officer produced exhibits which she was not competent to produce. Counsel further submit that the sentence is excessive.

**Mr. Odhiambo**, prosecution counsel, conceded the appeal. Counsel submit that the investigating officer produced Government analyst report without laying the background for its production. The police officer could not have produced the report.

This is a first appeal and the court has to evaluate the evidence adduced before the trial court and make its own conclusion. PW1 **Abraham Gitoyo** is the chief of Kitheo location. He testified that on 29/5/2016 they went to the appellant's home at 5.30am and woke her up. They found 140 litres of Muna, 20 litres of chang'aa and two sets of distilling apparatus. They arrested the appellant and took her to Tigania Police Station.

The record of the trial court gives two other witness. PW3 Corporal **Noeline Makoba** and PW2 recorded as male adult, **Henry Kimathi**. The evidence of PW3 who comes before PW2 is that she was stationed at the Tigania Police Station. On 29/5/2016 she was in the office when area chief (PW1) and his assistant brought in prisoners including the appellant. The appellant was arrested with 20 litres of chang'aa and 140 litres of muna. She was accused of her being the owner of some jericans found outside her house.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The handwritten record also gives the sequence of the witness as PW1 the chief, PW3 the police officer and PW2 the assistant chief. The record of witnesses kept by the clerk indicate that PW1 was the chief, there was no PW2 and PW3 was the police officer.

**Mr. Odhiambo** submitted that the prosecution did not lay background as to why the Government analyst did not testify. PW3 testified that

she escorted liquor alongside an exhibit memo to the Government chemist and the report confirmed that the samples had alcoholic content.

The offence occurred on 29/5/2016. The exhibit memo is dated 8/11/2016. The Government analyst report is dated 11/1/2017. The exhibits were received on 5/12/2016. It is not clear why the exhibits stayed at the police station from 9/5/2016 upto 5/12/2016. The exhibit memo was done after five (5) months and it is not clear whether the samples taken were properly stored. I do agree with **Mr. Ohiambo** that the police officer was not competent to produce the Government analyst report. There was need for the analyst to explain whether the exhibits could have retained the alcoholic content for all that long.

The record of the trial court was properly made. It is not indicated how PW2 came in to testify. He was not cross-examined. His evidence ends and the evidence of PW3 continues after PW2's evidence. The same sequence is shown in the handwritten records. It is therefore not a typing error. I do find that the trial was not fairly conducted.

I further find that the sentence is excessive. An option of a fine could have been ideal. Further still, the prosecution did not produce the distilling apparatus. It is also not clear whether it was the muna or the chang'aa that was tested by the Government analyst. The sample is indicated to be 500ml plastic bottle.

I do find that the prosecution did not prove its case beyond reasonable doubt. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

**DATED SIGNED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF JULY 2017.**

**SAID CHITEMBWE**

**JUDGE**