



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL REVISION NO. 123 OF 2017

MARGARET NYANCHAMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

19/9/2017

Before W.A. OKWANY J

In Chambers

RULING

1. The applicant herein was charged with the offence of manufacturing of alcoholic drink contrary to **Section 27 (1) (a)** as read with **Section 27 (4) of the Alcoholic Drink Control Act of Kenya Gazette Supplement No. 4 of 2010**.
2. The particulars of the charge were that on 19th July 2017 at Getare in Kisii Central District within Kisii County was found manufacturing alcoholic drink namely changaa without license using 200 litres of kangara.
3. The applicant pleaded guilty to the charge and was on 21st July 2017 sentenced to pay a fine of Kshs. 60,000/= in default eight (8) months imprisonment.
4. In her letter to court dated 18th September 2017, the applicant seeks orders of revision of the sentence under **Section 362 and 364 of the Criminal Procedure Code (CPC)** while stating that the said sentence was irregular, illegal and unconstitutional.
5. I have perused the lower court record which shows that the applicant pleaded guilty to the said charge of manufacturing of alcoholic drink without a license.
6. A perusal of the lower court record shows that even though the applicant pleaded guilty to the said charge, the facts of the case were not read out to the applicant so that she could confirm the same before her conviction and neither was a conviction recorded before she was sentenced contrary to the provisions of **Section 207 of the Criminal Procedure Code** which stipulates as follows on the procedure to be adopted in recording a guilty plea.

“207. Accused to be called upon to plead

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President’s pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”

7. The Court of Appeal emphasized and expounded on the import of the above provisions in the landmark case of **Adan vs. Republic (1973) EA 445** as follows:

i. 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.

ii. the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

iv. If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

v. If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

8. In the instant case, the trial court delved straight into asking the applicant to tender his mitigation before sentencing without first asking the prosecutor to tender the clear and full facts of the case as envisaged in the **Adan’s Case (supra)**. The record of the trial court when taking plea was as follows:

“20/07/17

Coram: Hon. J.M. Njoroge CM

State- Muhindi

Court Assistant- Rotich

Interpretation:

Accused: present

The substance of the charge (s) and every element thereof has been stated by the court to the accused person (s) in Kisii Language that he/se understands who after being asked whether he/she admits or denies the truth of the charge replies:

Accused: true.

Court: plea of guilty entered.

J.M. NJORGE CM

20/7/17

COURT: Further mention on 21/7/17 for exhibits to be availed.

J.M. NJORGE CM

20/7/17

21/7/2017

Before: Hon. J.M. Njoroge CM

State- Muhindi

Court Assistant- Rotich

Interpretation:

Accused: present

PROSECUTOR- I produce the two hundred litres of kangara as exhibits.

Accused- That is correct.

Court: plea of guilty entered.

J.M. NJORGE CM

21/7/17

Prosecutor: No previous records.

Accused: I plead for leniency. I have children in school.

Court: The accused is fined Kshs. 60,000/= in default eight months imprisonment.

Right of appeal 14 days.

J.M. NJOROGÉ CM

21/7/17”

9. From the above record, it is also clear that the trial court did not make a record of the applicant's conviction which means that the applicant was sentenced without first being convicted.

10. As can be noted from the above cited provisions of the CPC and the holding in **Adan's case(supra)** the importance of explaining the facts and all the essential ingredients of a charge in a language that an accused person understands cannot be gainsaid because it is only when an accused understands the full nature and extent of the charge that a guilty plea can be said to be truly unequivocal.

11. In the instant case, the facts of the case were not read out to the applicant so that she could confirm whether they were correct or not. It is therefore my finding that the procedure for recording the guilty plea was flawed for failure to comply with **Section 207 of the Criminal Procedure Code** thereby resulting in a guilty plea that was not unequivocal.

12. Consequently and by virtue of the powers conferred upon this court under **Section 362 and 364 of the Criminal Procedure Code** I find that there is justification in exercising the court's powers of review, I set aside the sentence imposed on the applicant by the trial court and in its place order that the applicant be discharged unconditionally.

13. **Dated, signed and delivered in open court this 21st day of September 2017**

W. A. OKWANY

JUDGE