REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 104 OF 2015

(CORAM: J. A. MAKAU – J.)

HILDA ATIENO ….…..... APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 549 of 2015 in Bondo Law Court before Hon. M.M. NAFULA – S.R.M.)

JUDGMENT

1. The appellant Hilda Atieno was charged with an offence of being in possession of an alcoholic drink that does not conform to the requirements of the **Alcoholic Drinks Act** contrary to **Section 27 (1) (b) (4)** of the **Alcoholic Drink Control Act 2010.** The particulars of the offence are that on the 1st day of July 2015, at Rachar sub-location within Siaya County was found being in possession of Kangara, to wit hundred litres (100) an alcoholic drink that does not conform to the requirements of the **Alcoholic Drinks Control Act 2010**.

2. The appellant was convicted on her own admission of the offence and sentenced to pay a fine of Ksh.100,000/= in default to serve 3 years imprisonment.

3. Aggrieved by the conviction and sentence the appellant lodged this appeal through the firm of M/s. Olel, Onyango Ingutiah and Company Advocates, raising the following grounds:-

a) The learned trial Magistrate erred in law in finding the appellants guilty yet her plea of guilt was not unequivocal.

b) The learned trial Magistrate erred in law in convicting the appellant based on a defective charge sheet.

c) The learned trial Magistrate erred in law in convicting the accused persons, yet key ingredients of the charge was not proved by the prosecution.

d) The learned trial Magistrate erred in law in convicting the appellant yet no scientific report was produced in Court by the Government Chemist to prove that the contents does not conform

to the provisions of the Alcoholic Drinks Control Act 2010.

e)The judgment is contrary to provision of the Criminal Procedure Code and provisions of the Evidence Act.

f) The sentence handed down was excessive in the circumstances of this case.

4. At the hearing of the appeal Mr. Olel, learned Advocate appeared for the appellant, while M/s. Maurine Odumba appeared for State.

5. Counsel for the appellant emphasized that the key issue in this appeal relates to the charge being defective as the charge is based on a purported **Section 27 (1) (2) (4) of the Alcoholic Drink Control Act 2010,** which he submitted was non-existent, that the ingredient of the offence were not proved, urging the word ***"kangara"*** did not appear amongst the list of drinks which are prohibited, and relied on **HCCRA NO. 3 of 2015 at Bomet.** That the appellant's plea of guilt was not unequivocal urging for the appellant to have said ***"It is true"*** the plea could be said to be unequivocal as the particulars of the offence have always to be explained, that the learned Advocate relied on **HCCRA No. 1209 of 2007, CRA No. 134 of 2001 Kisumu, Adan V. Republic Cr. A 58 of 1973.** He submitted further it was not proper for the prosecution as regards facts of the offence to state ***"Facts are as per charge sheet."***

6. On the sentence, the learned counsel submitted that the sentence was excessive and no Probation Report was called for before sentence.

7. The State Counsel conceded the appeal, admitting the charge was defective and on the word ***"Kangara***" she submitted it is not amongst the list of the prohibited drinks as it is a raw material used for making changaa. She stated the plea was not unequivocal plea of guilty.

8. The Court record of 2.7.2015 is before me and I have very carefully perused the same.

9. The Court record show that the charge was read and explained to the accused in Kiswahili language which she understood but replied in English ***"it is true."*** The languages of the Court is translated as English/Kiswahili/Luo.

10. The Prosecutor then applied to produce the 100 litres of Kangara before giving facts. He then proceeded to State ***"Facts are as in the charge sheet."*** The accused prayed for leniency. The Prosecutor stated the accused is a first offender and the Court proceeded to sentence the appellant to pay a fine of Kshs.100,000/= indefault to serve 3 years imprisonment.

11. The appellant at the lower Court faced a charge of being in possession of an alcoholic drink that does not conform to the requirements of the **Alcoholic Drinks Act** contrary to **Section 27 (1) (b) (4)** which provides:

> ***"27. Conformity with requirements***
>
> ***(1) No person shall -***
>
> ***(b) possess, an alcoholic drink that does not conform to the requirement 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."***

12. The Charge sheet shows that the appellant was charged under **Section 27 (1) (b) (4)** of the **Alcohol Drinks Control Act** which deals with the punishment, while **Section 27 (1**) deals with the offence. It is my view for punishments provisions to have been part of the charge sheet was anormally as there is no

offence under **Section 27 (1) (b) (4)** under which the appellant could have been charged. The appellant was charged with a non-existing offence under **Section 27 1 (b) (4)** as I have already stated **Section 27 (1) (b) (4)** under T**he Alcoholic Drinks Control Act** does not exist.

13. Charging any person with non-existing provision of the Law makes a charge defective. No plea can be taken in respect of a non-existing charge as such purported charge is defective. The proper Section that ought to have been applied is **Section 27 (1) (b) of this Act** without adding **Sub-Section (4)** to the relevant Section.

14. **Section 2 of Alcoholic Drinks Control Act No. 4 of 2010** defines **"alcoholic drinks"** as follows:-

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

15**. Section 27 of the Act** clearly refers to an alcoholic drink. **Section 2** of the Act which I have reproduced herein above, lists what constitutes an ***"alcoholic drink.***"

16. The particulars of the charge in the instant case refers to the drink found with the appellant as ***"Kangara"*** to wit hundred litres (100) an alcoholic drink that does not conform to the requirements of **the Alcoholic Drinks Control Act 2010**. Section 2, on definition of ***"alcoholic drink***." do not have ***"Kangara"*** amongst the list of included alcoholic drinks. The learned State Sounsel submitted that ***"Kangara"*** is a substance used in distilling of changaa. The State Counsel confirmed Kangara is not an alcoholic drink but a substance used in making a changaa drink. The appellant should have been charged with a different offence other than being in possession of an alcoholic drink as ***"kangara"*** is not an alcoholic drink as pointed out but a substance used for the purpose of making changaa which itself is an alcoholic drink. I have noted from the aforesaid Act, that possession of such substance as ***"kangara"*** has not been criminalized and as such the appellant could not be charged with non-existent offence. Similarly a plea could not be taken on a defective charge as was the case in the instant case. I have seen the judgment of my sister **Honourable Lady Justice H. I. Ong'udi** who was faced with similar case, on appeal in the case of **Gladys Cherotich V. Republic in HCCRA No. 3 of 2015** at **Bomet** where she held:-

> ***"This confirms that Kangara is not an alcoholic drink but a substance used in distilling changaa which is an alcoholic drink."***

I agree entirely with my learned sister's judgment and have nothing useful to add to it.

17. I have perused the plea-taking at the trial Court . The issue for contention is whether the plea was unequivocal? The Lower Court record show that the appellant stated ***"it is true."*** That once charge is read and explained to the accused in the language he understands and wishes to speak and answers to the charge, the facts are supposed to be given and explained to the accused in the language he/she understands and wishes to speak. The accused is required to plead and admit all the ingredients constituting the offence he/she is charged with before a plea of guilty is entered against him/her. In the case of **Paul Irungu Maina V. Republic HCRCA No. 1209 of 2007 (Nakuru)** the Court held that the word ***"It is true"*** standing on their own did not constitute an unequivocal plea of guilty. (See the case of **Kato V. Republic (1971) E.A. 542, Wanjiru V. Republic [1975] E.A**.**5**, and in the case of **Adan V. Republic (1973) E.A. 445 Court of Appeal** held:

> ***"(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 dispute or explain the facts or to add any relevant facts;

(iv) 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;

(v) 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;s reply should be recorded."

18. In the instant case the charge was read and explained to the appellant who replied thus:-

"It is true"

The Court did not enter plea of guilty but allowed the prosecution to produce the 100 litres of kangara and who stated facts are as per charge sheet The Court erred in not having facts stated in details for the appellant to know the nature of the offence, the ingredients constituting of the offence charged before her response could be recorded. In the instant case, no facts were given as charge sheet do not constitute facts of the offence and it is wrong for the prosecution to state ***"facts are as per charge sheet."*** The appellant in the instant case was not given an opportunity to dispute or challenge the ***"facts as per charge sheet."*** The trial Court did not convict the appellant with the offence charged as the record is silent, on what transpired thereafter but proceeded to sentence the appellant to pay a fine of Ksh.100,000/= in default to serve 3 years. The trial Court was in error in sentencing the appellant without a conviction. The sentence in my view is not supported by the record as there is no compliance with the principles set out in the **Adan V. Republic case (Supra).** Besides that the appellant's response that ***"It is true"*** without any other word and without facts therein did not in my view constitute an unequivocal plea of guilty. It was desirable that every element constituting the offence charged before plea of guilty could be entered against the appellant be explained in the language she understands and wished to use in Court. The appellant should have thereafter been required to make admission or denial of the facts constituent of the charge. In view of the aforesaid, I find the plea was not unequivocal.

19. The appellant was sentenced to pay a fine of Kshs.100,000/= for an offence of being in possession of Kangara drink, that does not conform to the requirements of Alcoholic Drinks Act. It is a fact that the appellant was sentenced on non-existing Offence in the Act. The sentence should, in my view, not have been meted against her. She also mitigated that she was selling the substance to care for her children. That she was a first offender. The trial Court did not call for probation officer's report to consider the appropriate sentence and had the trial Magistrate done so he would have considered an alternative sentence. The sentence of Ksh.100,000 indefault to serve a term of 3 years is excessive. The appellant should have been considered to serve community service order or be put on probation. The sentence in view of the above is excessive and also in view of the mitigating factors in favour of the appellant.

20. The upshot is that the appeal succeeds. I allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AT SIAYA THIS 14TH DAY OF JANUARY, 2016.

J.A. MAKAU JUDGE DELIVERED IN OPEN COURT THIS 14TH DAY OF JANUARY, 2016.

In the presence of**:**

Mr. Olel for the Appellant

M/s. Odumba for State

Appellant - Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J.A. MAKAU JUDGE