



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 79 OF 2015

FLORENCE MAKENA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant **Florence Makena**, was charged and convicted of the offence of selling alcoholic drinks without a licence contrary to **Section 7 (1) (b) of the Alcoholic Drinks Control Act No. 4 of 2010 as read with Section 62 of the same Act**. It was alleged that on 16/12/2012 at Ciothirai Sub Location, in Giaki Division of Meru County, was found selling alcoholic drinks namely ‘*mugacha*’ – 80 litres without a licence.

When the appellant appeared before the trial court on 17/12/2014, she pleaded guilty, was convicted and sentenced to pay a fine of KShs.80,000/= in default 18 months imprisonment. Thereafter, the court ordered that the exhibits be destroyed.

Being dissatisfied with the conviction and sentence, the appellant prays that the conviction be quashed and sentence set aside for the following grounds:

- 1. That the court erred in failing to discern that the charged was not supported by the particulars of the offence;**
- 2. That the sentence was excessive;**
- 3. That the appellant was not accorded her right to representation and fair trial;**
- 4. That the proper procedure was not followed before pleas was taken.**

In support of the grounds Mr. Otieno submitted that the charge was not explained to the accused in a language that she understood; that no certificate of analysis was produced to confirm that what the appellant was selling was an alcoholic drink in terms of **Section 50 of the Alcoholic Drinks Act**. He submitted that the plea was equivocal and urged the court to allow it. He further submitted that the sentence was excessive. He relied on two decisions of:

- 1. Fredrick Mburugu v Rep. CRA 119/2013 (Meru) and**
- 2. Wesley Kirui v Rep. CRA 37/2014 (Kericho)**

In opposing the appeal Mr. Mulochi, Learned Counsel for the State submitted that the appellant understood and responded to the charge which was clear and that she can only question the sentence. He urged that the sentence was lawful because under **Section 62 of the Alcoholics Drinks Act**, upon conviction, one is liable to a fine of KShs.500,000/= or 3 years imprisonment and that since the appellant was not a first offender, the sentence was fair.

I have considered the appeal. The appellant pleaded guilty to the charge and ordinarily, an appeal would only lie against the sentence if the court is satisfied that the plea was unequivocal. The plea has been challenged for the reason that the alcohol content in the liquid found with the appellant was not proved and a certificate issued in accordance with **Section 50 of the Act**. In the case of **Fredrick Mburugu (Supra)**, J. Lesiit was faced with a similar scenario and considered the ingredients to be proved under Section 7 (1) (b) of the Act. The Judge said:

“First of all, the prosecution should show that the appellant was in possession of the liquid in question; that he was selling it; that he did not have a license to sell it and most importantly, that it was an alcoholic drink within the meaning of Section 2 under the Act. Of this ingredients the prosecution made no attempt to establish the two litres of liquid described as changaa under the charge met the requirements of an alcoholic drink as defined under the Act. The only way to prove that the ingredients is by having the liquid analysed by a government chemist and a report made establishing that the alcohol content in the liquid exceeded 1% as required under the Act.”

The prosecution having failed to prove this very primary ingredient of the charge, the plea was equivocal and must be set aside.

When the charge was read to the appellant, she upheld **“it is true”**. The facts were read to her as follows:

“FACTS

On 16th December, 2014, the Chief of Ciothirai and Sgt. Murungi found the accused selling on alcoholic drink known as Mugacha without a licence. She was arrested and charged. P.Exh. 1(a), (b), (c) and (d) – and 80 litres of Mugacha in 20 jericans.

Accused: The facts are true.

Court: Accused is convicted on her own plea of guilty. The accused person is a second offender having been charged in Meru CMCR No. 2161 of 2014 and fined KShs.5,000/=.

Accused in Mitigation: I plead for mercy.

Court: I have considered the mitigation by the accused. However she is not a first offender having been convicted of a similar offence before. Her conduct calls for a deterrent sentence. The accused is fined KShs.80,000/= in default to serve eighteen (18) months imprisonment.

Right of appeal 14 days.

M. Nasimiyu

Resident Magistrate

17.12.2014”

It was the duty of the prosecution to explain to the court ingredients of the offence so that the

appellant would know exactly what she was pleading to. The facts should also have been explained to accused before pleading guilty. **See Ada v Rep. 1973 EA 445**.

Evidently, the trial court did not explain to the appellant what constituted the offence charged failure of which rendered the plea equivocal.

Mr. Otieno also urged that accused did not understand the language of the court. The record shows the plea was taken in Kiswahili. The accused responded and even asked for mercy in mitigation. This court believes and finds that she understood the language of the court which was Kiswahili and nothing turns on that ground.

However, having found that the plea was equivocal, the conviction cannot stand and it is hereby set aside and the sentence quashed. The exhibits were destroyed and the court cannot therefore order for a full trial. The appellant is set at liberty forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 22nd DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

22/2/2016

PRESENT

Mr. Mungai for State

Mr. Nyaga Holding Brief for Mr. Otieno for Appellant

Present, Appellant

Ibrahim/Peninah, Court Assistants