



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 42 OF 2015

(CORAM: J. A. MAKAU – J.)

JOSEPH OMONDI OMIJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence OF 14.4.2016 in Criminal Case No. 377 of 2016 at Siaya Law Court before Hon. C. A. OKORE – S.R.M.)

JUDGMENT

1. **JOSEPH OMONDI OMIJA** was charged with an offence of manufacturing Alcoholic drinks namely (*Changaa*) 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 are that on the 13th day of April 2016, Ulafu sub-Location in Siaya District within Siaya County, was found manufacturing changaa to wit 100 litres of Kangara without licence in contravention of the said Act.

2. That after the charge was read to the appellant he stated “*True*” and court entered a plea of guilty. The Prosecution stated the facts as follows “*100 litres of Kangara to be exhibit 1*” to which the appellant replied “*facts are correct*” and court proceeded to record “*plea of guilty entered*” and convicted the appellant on his own **plea of guilty**. The appellant was then fined Kshs.50,000/= in default to serve 6 months imprisonment.

3. Aggrieved by both the conviction and sentence he preferred this appeal setting out the following grounds of appeal:-

(a) The learned trial Magistrate erred in law and fact in entering a plea of guilty against the Appellant when the charge before the court did not disclose an offence.

(b)The learned trial Magistrate erred in law and fact in convicting the Appellant on a defective charge.

(c)The learned trial Magistrate erred in law and fact in convicting the Appellant on his alleged plea of guilty when, in fact, no such plea could be entered against the Appellant since the purported plea of guilty could not be said to be unequivocal.

(d) The learned trial Magistrate erred in law and fact by imposing on the Appellant a harsh,

oppressive and excessive sentence totally disregarding the Appellant's past record and ill health.

4. That at the hearing of the appeal Mr. Madialo learned Counsel held brief for the firm of M/s. Amuga and Company Advocates, while M/s Mourine Odumba, learned prosecution Counsel appeared for the State.

5. Mr. Madialo learned Advocate for the appellant in support of the appeal urged that the trial Magistrate erred in entering a plea of guilty against the appellant when the charge did not disclose any offence, that the charge was defective, that the purported plea of guilty was not unequivocal plea of guilty, and that the sentence was harsh, oppressive and excessive in view of the appellant's past record and his ill health. The learned Counsel in support of his submissions referred to **HCRA No. 104 of 2015 Hilda Atieno V. R.**

6. The State conceded the appeal through M/s Mourine Odumba on the ground that the proceedings for plea-taking were not proper, especially on the language used, that the plea of guilty was not unequivocal plea, that facts were not stated, that the particulars do not support the charge and that the sentence meted against the appellant should not stand as procedure adopted by court was improper.

7. The charge sheet reveal that the appellant faced an offence of manufacturing **Alcoholic Drinks namely Changaa contrary to section 7(1) (a) as read with Section 62 of the Alcoholic Drink Control Act No. 4 of 2010.**

Section 7(1) (a) of the Alcoholic Drinks Control Act No. 4 of 2010 Provides:-

“(1) No person shall:-

(a) manufacture or otherwise produce;”

8. **Section 2 of the Alcoholic Drinks Control Act No. of 2010 defines “Alcoholic drinks.” as follows:-**

“alcoholic drink” “alcohol” is also defined as follows:-

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, 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;”

“alcohol” is also defined as follows:-

“the product known as ethyl alcohol or any product obtained by fermentation or distillation of any fermented alcoholic product rectified either once or more often, whatever the origin, and shall include synthetic ethyl alcohol, but shall not include methyl alcohol and alcohol completely denatured in accordance with the prescribed formulas;”

9. The particulars of the charge with which the appellant was charged with stated the appellant was found manufacturing changaa: to wit 100 litres of Kangara without licence. The particulars of the charge did not state that **“kangara”** was an alcoholic drink neither did it state it was a spirit or traditional alcoholic drink christened **“kangara”** otherwise one cannot talk of **“changaa”** and **“kangara”** at the same time as the two different substances. It is either appellant was found manufacturing one of them but not both as **“kangara”** is not an alcoholic drink nor is it in the list of alcoholic drinks, but is a substance used in distilling **changaa** which is an alcoholic drink. In the case of **Hilda Atieno V R HCRA No. 104 of 2015** of Siaya High Court, in my judgment I held thus:-

“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.”

10. In view of my holding that “**kangara**” is not an alcoholic drink” but substance used for manufacturing changaa which itself is an alcoholic drink, I find the particulars of the charge did not support the charge but were incomplete variance with the charge. The particulars did not support the charge nor disclose any offence and as such the same is and was defective. That no plea could then be taken nor stand in respect of a defective charge. That the State stated the appellant was found manufacturing changaa but contradicted itself by stating the appellant was found with 100 litres of **kangara** without licence in contravention of **Section 7(1) (a) of the Alcoholic Drink Control Act**. This Section has not criminalised being in possession of “**Kangara**”

11. Whether the plea was unequivocal plea of guilty? The trial magistrate's court proceedings reveal that interpretation was in Dholuo language, however, the court when it came to stating and explaining the charge and every element thereof to the appellant it stated the language as English/Kiswahili and on being asked whether he admits or denies the truth of the charge his reply was in English/Kiswahili/Dholuo.

12. The facts were purportedly given as follows:-

“100 litres of kangara to be exhibit 1”

and the record show the appellant as stating:-

“Facts are correct.”

13. In the instant case where there facts given by the prosecution to which the appellant could respond? The production of 100 litres of kangara with all due respect to the prosecution could not be said to be a substitute for giving facts in support of a charge. The production of kangara by the prosecution did not amount to giving facts nor disclosure of the offence the appellant was facing. There were no facts from which the court could have called the appellant to admit or deny. I think the prosecution treated the matter casually and failed to put forward facts in support of the charge. I agree with both counsel that the alleged facts were no facts at all and the alleged facts did not disclose any offence of any nature and further “**kangara**” remains uncriminalized substance and being in possession of it is not an offence until the law is amended or made to criminalize being in possession of kangara.

14. In view of the casual manner in which plea was taken and the facts given I feel that it would be proper to restate what is required in plea-taking and the language that is required to be used and how the same should be recorded.

15. The starting point in taking a plea is when the trial court enquires as to the language the accused understands and/or the language he wishes to be used in the proceedings. The trial Court is supposed to promptly record the specific language the accused understands and wishes the proceedings to be conducted in as this is a Constitutional requirement under **Article 50 (2) (b), (j), (k) and (m) of the Constitution of Kenya 2010**. The accused may understand more than one language and in such a situation the court should adopt a simple, clear and proper practice by enquiring from the accused as to the actual language that the accused feels comfortable with and understands better or prefers to be used and record should show the language of choice of the accused but the record should not read as in the instant case thus **English/Kiswahili/Dholuo** as it would be difficulty to know out of the three (3) languages which language the accused understands, preferred and chose as the language of his choice in conducting the proceedings.

16. The second phase in plea-taking entails the recording out the substance of the charge and explaining every essential element of the offence to the accused in the language he understands and wishes to be used in the proceedings. The language used must not only be indicated but it must be stated that the substance of the charge and every element has been stated by the court to the accused person in the

language that he/she understands. That without indicating the language that is used is not proper plea-taking. In **Meru HCCRA 164 of 2010 Silas Ithalie Muroki V Republic Lesitt and Makau J.J.** illuminated on this phase thus:-

“It is very important that the court takes interest to explain the accused every element of the charge and all its essential ingredients in a language he understands. The court of plea should in particular have an eye for details.”

17. I have purposely set out the legal dimensions on plea-taking and I therefore categorically state that where plea is not taken properly, the proceedings is fatally defective. I have perused the trial Court's record and have observed that the trial magistrate did not record the language the Appellant understands. It only recorded:-

“Accused – present interpretation – Dholuo

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

English/Kiswahili/Dholuo.”

18. The language indicated is English/Kiswahili/Dholuo, that in my view obscured the particular language that was used and even more so whether the language used is one that the appellant understand. The record of the trial court is confusing and that lapse affected the tenor of the proceedings thereby diverting the course of fair trial. Though constitution requires courts to use a language or interpret the proceedings into the language that accused understands the court in my view should record for example as follows:-

“Accused - I understand English and Dholuo/Language. I wish the proceedings herein to be conducted in Dholuo Language which I understand and prefer.”

In the instant case the trial court should have recorded the language the accused understands, wished and/or preferred used in the proceedings. That is the matter in issue in this appeal as the trial court herein did not record the language preferred by the accused and used in the conducting the proceedings, thus making the proceedings incurably defective

19. In view of the failure to conduct the proceedings in the language the appellant understood, thus Dholuo language but in using unclear language whether it is either English or Kiswahili or Dholuo, I find the proceeding before the trial court were tainted with serious irregularity meaning the proceedings were incurably defective.

20. The appellant herein stood trial on 14.4.2016. M/s. Maurine Odumba Learned State Counsel conceded the appeal on the ground that the substance with which the appellant was found with was not alcoholic drink within the meaning of the **Alcoholic Control Act No. 4 of 2010** and as such indicating that there is likelihood of the appellant to suffer prejudice if retrial is ordered, that the chance of sustaining conviction is remote though the trial court did not make an order for destruction of the exhibit and by its nature it is most likely to have been destroyed and if retrial is ordered exhibit may not be available. I therefore decline to order a retrial.

21. The office of Director of Public Prosecution should in view of this case take the drawing of charges seriously and ensure particulars in support of the charge are in conformity with the charge to ensure justice is done to all irrespective of their status as per **Article 159 (2) (a) of the Constitution**. Similarly trial courts should before taking plea peruse the particulars in support of the charge and ensure the same supports the charge as failure to do so in many occasions has resulted in unjustified convictions of parties or acquittals on technicalities.

22. Having come to the conclusion that I have come to, the appeal is allowed, the conviction is quashed and sentence set aside. The fine paid by the appellant (if any) be refunded and the appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED AT SIAYA THIS 26TH DAY OF MAY, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of:

M/S Madialo for the Appellant

M/s. Morine Odumba for State

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE