



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 9 OF 2016

BETWEEN

DOREEN ANYANGO OREMO.....1ST APPELLANT

PETER OSORE.....2ND APPELLANT

SALOME MONICA ACHIENG.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 923 of 2014

at Chief Magistrate's Court at Homa Bay, Hon. P. Gichohi, CM dated 14th July 2015)

JUDGMENT

1. The appellants, **DOREEN ANYANGO OREMO**, **PETER OSORE** and **SALOME MONICA ACHIENG**, were charged with the offence of being in possession of unlicensed *chang'aa* contrary to **section 27(1)(b)(4)** of the *Alcoholic Drinks Control Act (Act No. 4 of 2010)*, (“the Act”). The particulars of the charge were that on 9th August 2014 at Nduru area in Mbita District within Homa Bay County, they were found in possession of 313 litres of unlicensed *chang'aa* in contravention of the *Act*. After trial, they were convicted and ordered to pay a fine of Kshs. 100,000.00 each or to face five month's imprisonment in default. They now appeal against the conviction and sentence.

2. Four police officers; APC Jared Orale (PW 1), APC Jack Omondi (PW 2), AP Inspector Michael Dibor (PW 3) and PC Naomi Hagerera Jacob (PW 4), the investigating officer, all testified on behalf of the prosecution. The totality of their testimony was that after a tip off, PW 1, PW 2 and PW 3 went to a house in Nduru Village in Mbita, conducted a search and recovered 313 litres of *chang'aa* in jerricans. The accused were arrested after they produced an expired licence. PW 4 took samples of the *chang'aa* to the Government Chemist in Kisumu who confirmed that substance recovered was actually *chang'aa*.

3. Peter Osore Rabuogi (DW 1), who testified on behalf of the accused, stated that they were members of Mine Nyalo Dhuru Women's Group (“the Group”) which was issued with a licence to manufacture alcohol and which had already expired on the date they were arrested. He further testified that by an application dated 29th June 2014, they applied for renewal of the licence and paid the requisite application fee. Thereafter, the Mbita District Alcoholic Drinks Regulation Committee (“the Committee”) issued a

letter dated 29th June 2014 authorising the group to continue with business until 12th August 2014. The District Commissioner of Mbitya Sub-County and Chairman of the Committee, Aloise Obel Ojwang' (DW 2), confirmed that the Group had applied for renewal of the licence and that he issued the letter dated 29th June 2014 which allowed them to continue with their business as the Committee deliberated on the application. DW 1 further recalled that the Committee sat on 20th June 2014 and deliberated on the application.

4. After considering the evidence, the learned magistrate held that there was no doubt from the evidence that the accused were found in possession *chang'aa* when they were arrested. The learned Magistrate further held that the only issue before the court was, "*whether at the time they were so arrested, the accused persons were authorised to have chang'aa.*" The learned magistrate found as a fact that the licence had indeed expired and at the time the police officers came to the premises, they did not have any other documents to show that they were entitled to carry on business. As regards the defence that they had applied for a licence, the learned magistrate held that documents produced by the appellants and their witness were not reliable and could not support a defence under **section 14(4)** of the **Act**.

5. As this is the first appeal, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether we should uphold the conviction bearing in mind that we neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**). The facts as I have outlined elsewhere in this judgment are not in dispute. The respondents did not dispute the fact that they were in possession of alcohol but stated that they had a licence to do so.

6. On 11th December 2013 the Committee issued the Group with Licence No. 88769 which was set to expire on 30th June 2014 (D-Exhibit No. 1). Upon expiration of the licence, the appellants applied for renewal of their licence by an application dated 29th June 2014 (D-Exhibit No. 2). The Committee acknowledged the application by a letter dated 29th June 2014 authorising the appellants to continue manufacturing alcohol from 1st July 2014 to 12th August 2014 (D-Exhibit No. 4). After examining the documents and noting that DW 1 testified that the date the Committee deliberated on the application was 20th June 2014, the learned magistrate concluded that;

48. It is instructive to note that these two documents (DExh. 2 and 4) are dated 29/6/2014. If the Committee sat on 20/6/2014 and deliberated on the application for renewal of the licence (DExh. 2), then that does not make sense. They could not have been deliberating an application that had not been made. To that extent, the defence witnesses and the two documents are not reliable. In the circumstances, these documents do not support the defence as envisaged by Sec. 14(4) of the Act. The two documents have no effect on the prosecution case that the accused person had no valid licence when they were found in possession of the said chang'aa.

49. In light of the above and considering the prosecution and also the defence case I find the defence herein unreasonable and improbable. I hereby dismiss the same. Their licence had expired and they had not renewed it. They had no authority to continue with their operations or to have in their possession the said chang'aa

7. The thrust of this appeal is that the learned magistrate erred in appreciating the purport and import of **section 14(4)** of the **Act**. Mr Odhiambo, learned counsel for the appellants, argued that at the time of manufacture, the appellants had applied for renewal of the licence and by dint of the provisions of **section 14(4)** of the **Act**, they could proceed with manufacture while the Committee considered the licence. They urged that it was wrong for the learned magistrate to convict them on the basis of irregular documents when in fact the intent of the appellants was to apply for and procure a licence.

8. On the other hand, Ms Andabwa, learned counsel for the respondent, urged that at the material time, the appellants did not have a valid licence as the one in their possession had expired. She further argued that the letters produced by the appellants confirming application for renewal of their licence were

fabrications as was held by the learned magistrate, and which did not fall within **section 8(3)** of the **Act** which requires that the licence be gazetted. Counsel submitted that in the circumstances, the appellants could not rely on **section 14(4)** of the **Act** hence the appeal should be dismissed.

9. **Section 14** of the **Act** dealing with validity and renewal of licences provides as follows;

14(1) Except as otherwise provided in this Act, a District Committee may, subject to this Part, grant, renew, transfer or remove a licence, and may embody therein such conditions as it may deem appropriate, or it may refuse to grant, renew, transfer, withdraw or cancel a licence.

(2) Every licence and every renewal, transfer, withdrawal or cancellation thereof shall be sufficiently authenticated by the District Committee.

(3) Every grant of a licence or its every renewal or transfer shall—

(a) be subject to the payment of such fee or fees as may be prescribed

(b) expire at the end of twelve months from the date of issue

(c) specify in the licence the hours within which the sale of alcohol is permitted

(4) Where an application for the renewal of a licence has been made and the District Committee has not by the date of expiration of the licence reached a decision thereon, such licence shall continue in force until the decision of the District Committee is made known.

(5) Where an application for a licence has been refused, or a licence has been cancelled, no subsequent application by the former applicant or licensee for a licence of the same description shall be considered by the District Committee during the period of six months from the date of such refusal or cancellation, except at the discretion of the District Committee. [Emphasis mine]

10. **Section 9(3)** of the **Act** relied on by the respondent provides as follows;

9(3) The District Committee shall, within twenty-one days after the submission of application for a licence, prepare a notice setting forth the names of all applicants, the types of licences applied for, the premises in respect of which the licences are applied for and the time, date and place of the meeting, and shall forthwith cause a copy of the notice to be—

a. published in the Kenya Gazette and at the office of the District Commissioner for a period of not less than twenty-one consecutive days

b. posted in some conspicuous place at or near the applicant's premises

c. sent to the Commissioner of Police, or to such police officer as the Commissioner of Police may have notified the District Commissioner that he has appointed to receive it on his behalf

d. sent to the medical officer of health of the district in which the premises in respect of which the licences are applied for are situated; and

e. sent to the local authority of the area in which the premises in respect of which the licences are applied for are situated.

11. The central issue in this appeal as it was in the subordinate court is whether the appellants were entitled to rely on **section 14(4)** of the **Act**. The testimony of DW 2 in this event is decisive as he is the Chairperson of the statutory authority mandated to issue and renew licences. He confirmed that the Mine

Nyalo Dhuru Women's Group applied for renewal of their licence (D-Exhibit No.2) and he issued the letter dated 29th June 2014 (D-Exhibit No. 4). This letter is the one contemplated under **section 14(4)** of the *Act*. In considering the appellant's defence, the learned magistrate relied on **section 111** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* to hold that the application for renewal, which was within the appellant's knowledge, was not authentic as the official who signed it was not called to verify the same. I find that this approach is misdirection in law and in fact. **Section 111** of the *Evidence Act* provides as follows;

111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

12. DW 1 as the Chairman of the Committee did not raise any issues concerning the authenticity of the application. Further, the second proviso to **section 111** of the *Evidence Act* is clear that the accused need only raise reasonable doubt. Thus, the application being regular on its face supported the appellant's defence and raised doubt as to the prosecution case. If the prosecution was to succeed, it had to disprove the appellants' case beyond reasonable doubt. Under **section 14(4)** of the *Act*, the only obligation on the licence holder is to make an application for renewal of the license in the proper form. I further understand that the applicant is entitled to continue operating on the basis of the unexpired licence provided he had applied for renewal during the currency the unexpired licence.

13. The opening words of **section 9** of the *Act* which are that the, "District Committee" are clear that the obligation to ensure that the steps to be taken in approving a licence is upon the District Committee. The applicant does not bear any burden to ensure that the application is gazetted or that the conditions precedent therein are met. Likewise, the applicants do not set the dates for the Committee meeting. I therefore find that provided the conditions in **section 14(4)** of the *Act* are met by the applicant, the terms of the defence are fulfilled notwithstanding any irregularities in the manner in which the Committee processes the application.

14. I therefore find and hold that the learned magistrate erred in holding that the appellants could not rely on the defence set out in **section 14(4)** of the *Act*.

15. I allow the appeal and quash the appellants' conviction and sentence. I direct that the fines paid by them be refunded.

DATED and DELIVERED at HOMA BAY this 20th day of May 2016.

D.S. MAJANJA

JUDGE

Mr Odhiambo instructed by Odhiambo Oronga and Company Advocates for the appellants.

Ms Andabwa, Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.