



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.12 OF 2016

(An appeal from original conviction and sentence of

Ogembo PMCC Criminal Case No. 572 of 2016 by Hon. C.R.T. ATEYA RM dated 30TH March, 2016))

MERCYLINE BOYAKI BOKEA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Appellant herein, **MERCYLINE BOYAKI BOKEA** was arraigned before the Principal Magistrate's court at Ogembo on the charge of selling alcoholic drinks without a licence contrary to **Section 7 (1) (b)** as read with **Section 62** of the **Alcoholic Drinks Control Act No. 4 of 2010**.
2. The particulars of the charge were that on 29th March 2016 at Etoro sub-location in Sameta Sub-County within Kisii County, was found selling alcoholic drinks without licence to wit 180 litres of Kangara and 5 litres of changaa.
3. The appellant pleaded guilty to the charge and was as result convicted and sentenced to pay a fine of Kshs. 100,000/= in default one (1) year imprisonment.
4. The appellant has now appealed to this court against both the conviction and sentence and has, in her petition of appeal set forth the following grounds of appeal.

1. The learned trial Magistrate erred in law and in fact in entertaining proceedings with and convicting the Appellant on the basis of the Charge, which was patently and/or inherently unconstitutional. Consequently, the proceedings, conviction and sentence of the Appellant contravenes Section 72 (3) of the Constitution of the Republic of Kenya.

2. The learned trial magistrate erred in law and in fact in failing to discern and/or appreciate the inherent and/or discrepancies, apparent on the face of the charge sheet. Consequently, the conviction by the Learned Trial Magistrate does not accord and/or abide the weight of mitigation on record.

3. The learned trial magistrate erred in law and in fact in not taking into consideration that the appellant was a first offender and proceeded to mete out a sentence stipulated for a habitual offender without assigning any credible and/or reasonable basis, for so doing.

4. The learned trial magistrate erred in law, in disregarding, disbelieving and/or ignoring the Appellant's mitigation without assigning any credible and/or lawful reason. Consequently, Learned Trial Magistrate failed to simultaneously and/or cumulatively, address the facts of the case and mitigation on record.

5. The learned trial magistrate failed to set out the issues for determination, the determination thereof and the reasons for such determination. Consequently, the Conviction of the Appellant by the Learned Trial Magistrate was/is colored, with bias and/or error.

6. The Conviction and Sentence of the Learned Trial Magistrate offends the mandatory provisions of Section 169 of the Criminal Procedure Code.

7. The Learned Trial Magistrate failed to consider the Appellant's mitigation and thus meted out a sentence which was/is manifestly excessive, in the circumstances of the case.

5. When the appeal came up for hearing before me on 21st July, 2016, Mr. Kaburi advocate for the appellant informed the court that he had reached an agreement with the state counsel that the court considers revising the sentence imposed on the appellant in view of the fact that the appellant had already served 3 months in prison.

6. Mr. Otieno, state counsel, on his part denied having reached any agreement on sentence and submitted that while there was nothing wrong with the proceedings before the lower court the court still had the discretion to review the sentence.

7. I have perused the lower court record and I note that the appellant pleaded guilty to the charge of selling alcoholic drinks without a licence.

8. The plea was read out and all the elements thereto explained to her in the Ekegusi language which she understood.

9. The accused confirmed the facts of the offence were true after the same were read out to her by the prosecution.

10. In the celebrated case of **Adan Vs Republic (1973) E.A 445- 447** the court laid down the principles to be applied and the steps to be undertaken in plea taking as follows:

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded.”

11. In the case of **Njuki Vs Republic [1990] KLR 334**, the court emphasized the need to caution in recording a guilty plea. It was held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

12. In the instant case as I have already observed in this judgment, the appellant admitted the charge and confirmed the facts read out to her as true after which a plea of guilty was entered and the appellant convicted.

13. **Section 7 (1) (b) and 62 of the Alcoholic Drinks Control Act**, under which the appellant was charged provides as follows:

“7. Control of alcoholic drinks

(1) No person shall—

(b) sell, dispose of, or deal with any alcoholic drink except under and in accordance with a licence issued under this Act.”

“62. General penalty

Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.”

14. I have considered the appeal and the fact that the appellant pleaded guilty to the charge. An appeal does not ordinarily lie upon conviction where an appellant has pleaded guilty and the court is satisfied that the plea was unequivocal.

15. In the instant case, however, even though the court complied with the principles of taking a guilty plea, can the appellant be said to have made an unequivocal plea of guilty? In other words, did the prosecution establish that the substance found in the possession of the appellant was indeed alcohol in accordance with **Section 50 of the Alcoholic Drinks Control Act**?

16. When faced with a similar scenario in the case of **Fredrick Mburugu Vs Republic CRA 119/2013 (Meru)** Lesiit J. considered the ingredients to be proved under **Section 7 (1) (b) of the Act** to be as follows:

“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 licence to sell it and most importantly, that it was alcoholic drink within the meaning of Section 2 of the Act. Of these 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 the ingredient 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.”

17. In the instant case, the prosecution did not prove the last ingredient by having the liquid analysed and I therefore find that the plea was not unequivocal and ought to be set aside.

18. From the lower court record, when the charge was read to the appellant she responded- “It is true.” The facts were then read to her as follows:

“FACTS

On 29th March 2016 at Etora the chief and assistant chief on patrol found accused selling 180 litres of Kangara and 5 litres of changaa without a licence. She was arrested and charged. The 180 litres of Kangara in 5 containers and 5 litres of changaa are produced as exhibits.

Accused: The facts are true.

Accused found guilty of own plea.

Prosecution: No previous record.

Mitigation: I ask for pardon. I have 7 children and I am not married. I have no parents.

Court: Mitigation noted. Accused to pay a fine of Kshs. 100,000/= in default one (1) year in jail.

Right of Appeal 14 days.

C.R.T. Ateya

Resident Magistrate.”

19. It was the duty of the prosecution to explain the ingredients of the charge to the appellant so that she could know what she was pleading to. This failure to explain all the ingredients rendered the plea equivocal.

20. From the above foregoing findings, and taking into account the fact that the plea was not unequivocal by virtue of the fact that the substance allegedly found in possession of the appellant was not proved to be alcohol within the meaning of Section 2 of the Act, I hereby set aside the sentence and quash the conviction.

The appellant has already served a substantial part of the one (1) year sentence and I find that it would be prejudicial for her if this court ordered for a retrial. In the case of **Fatehali Manji vs Republic 1964 E.A 48**, the court held as follows:

“even where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

21. The appellant shall therefore be set free unless she is otherwise lawfully held.

Dated, signed and delivered in open court this 28th day of July, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Mr. Kaburi for the Appellant
- Omwoyo court clerk