REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 24 OF 2016

(An appeal from original conviction and sentence of Kilgoris PM's Criminal Case No. 780 of 2016 by Hon. M. MUNYENDO – SITATI RM dated 21ST June, 2016)

IRENE MORAA MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **IRENE MORAA MOMANYI,** the appellant herein was charged with the offence of selling alcoholic drink without a licence contrary to **Section 7 (1) (b)** as read with **Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010**. The particulars of the offence were that on 14th June 2016 at Emenwa Sub-location, Bassi Central Location within Kisii County was found selling alcoholic drink namely Kangara to wit (120) one hundred and twenty litres without a licence.

2. The appellant pleaded guilty to both counts and was subsequently convicted on her own plea of guilty and sentenced to pay Kshs. 120,000/= and in default to serve 14 months imprisonment.

3. The appellant has now appealed against both the conviction and sentence and has in her petition of appeal stated that her fundamental constitutional rights as enshrined under **Article 50 (2) (g) and (h) of the constitution** had been infringed. The rest of the grounds of appeal are made up of statements of mitigation in which the appellant pleads for the leniency of the court while stating that she is a poor widow with 7 young children to whom she is the sole bread winner and that as such, the sentence meted out on her was manifestly harsh and excessive.

4. At the hearing of the appeal, the appellant reiterated her mitigation by stating that she was remorseful and she had 2 children in high school.

5. Mr. Otieno, counsel for the state on his part conceded to the appeal while observing that the plea of guilty was not unequivocal in view of the fact that the alleged alcoholic drink that was found in the appellant's possession was not subjected to an analysis by the government chemists in order to confirm if indeed it was an alcoholic drink within the meaning of the **Alcoholic Drinks Control act No. 4 of 2010** (**hereinafter "the Act"**).

6. This being a first appeal, this court is under a duty to re-analyse and re-evaluate the evidence tendered before the trial court in order to arrive at its own independent findings while at the same time bearing in mind the fact that it neither heard nor saw the witnesses testify. See **Okeno vs Republic (1972) EA 32**.

7. In this case however, the appellant pleaded guilty to the charge in question and therefore no witnesses were called to testify in order to prove the prosecutions case. Under those circumstances, the court is still enjoined to peruse the lower court record in order to establish if the plea of guilty was properly recorded in line with the provisions of **Section 207 (2) of the Criminal Procedure Code** and the principles of taking a guilty plea as set out in the celebrated case of Adan **vs Republic (1973) EALR 445**.

8. **Section 207 (2) of the Criminal Procedure Code** provides as follows:

> **"207 (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> > **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."**

9. The principles for recording a guilty plea were explained in the case of **Adan vs Republic (supra)** 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."**

10. I have scrutinized the lower court record and I note that the plea was properly taken by the trial court in Kiswahili language which the appellant indicated that she understood.

11. The appellant respondent to the charge by stating:

> **"it is true."**

12. A plea of guilty was then recorded after which the prosecutor outlined the facts of the case as follows:

> **"On 14th June 2016, at around noon Chief Henry Nyabuto went to accused home within Emenwa location. They found accused with a hundred and twenty litres of Kangara. She was arrested after she failed to produce a license. We produce the 120 litres of kangara which is outside the court, we produce as exhibit 1. That is all.**
>
> **Accused – The facts are true. That is the alcohol I was found with.**
>
> **Court- accused convicted on own plea of guilty.**
>
> **Prosecutor- No record. The accused has a lot of alcohol. I pray for stiff sentence."**

13. Upto this point of plea taking, one can say that the court adhered to the law and the principles of recording a guilty plea save for the fact that as properly observed by Mr. Otieno, the alleged drink known as "kangara" was not subjected to an analysis by the government analyst to establish if indeed it was alcohol within the meaning of the Act.

14. **Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010** stipulates as follows:

> **"alcoholic drink" includes alcohol, spirit, wine, beer traditional alcoholic drink, and any one or more of such varieties containing one-half of one percent 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."**

15. The facts and particulars of the charge refer to the alcoholic drink that the appellant was selling to be "Kangara" to wit, 120 litres. **Section 2 of the Act** reproduced hereinabove does not have "Kangara" amongst the list of alcoholic drinks. In the case of **Gladys Cherotich vs Republic HCCRA No. 3 of 2015 at Bomet**, Ongudi J held as follows:

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

16. In view of the above cited decision, possession of a substance called Kangara per se has not been criminalised and therefore, it is my finding that the appellant could not have been charged with selling of non-existent alcoholic drink and in the same vein therefore the appellant could not have pleaded guilty to selling an undefined alcoholic drink. I agree with Mr. Otieno's submissions that the substance called kangara ought to have been subjected to analysis by the government chemist to confirm if it was indeed alcohol.

17. In a nutshell therefore and going by my findings hereinabove, I allow the instant appeal, quash the conviction, set aside sentence and order that the appellant be set free forthwith unless she is otherwise lawfully held.

Dated, signed and delivered in open court this 29th day of September 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Appellant in person for Appellant

Omwoyo: court clerk