REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 61 OF 2016

(CORAM: J.A. MAKAU – J.)

JOSEPHINE JUMA OUMA ……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Being an appeal against both the conviction and sentence on 23rd May 2016, in Criminal Case No. 313 of 2016 in Ukwala Law Court before Hon. G. ADHIAMBO – S.R.M.)

JUDGMENT

1. The Appellant **Josephine Juma Ouma** was charged within an offence of **Manufacturing and Packaging Alcoholic Drinks in unprescribed Containers Contrary to Section 32 (1) (b) as read with Sub-Section 8 of The Alcoholic Drinks Act No. 4 of 2010**. The Particulars are that on 23rd day of May 2016, at Rambula South Sub-Location in Ugunja Sub-County within Siaya County the Appellant was found having manufactured and packaged 250 litres of "Kangara" illicit brew in unprescribed containers. The Appellant also face **Count II of Manufacturing and Packaging Alcoholic Drinks in unprescribed Container Contrary to Section 32 (1) (b) as read with Sub-Section 8 of the Alcoholic Drinks Act No. 4 of 2010.** The particulars of the offence are that on 23rd day of May, 2016 at Rambula Sub-Location in Ugunja Sub-County within Siaya County the Appellant was found having Manufactured and Packaged 32 litres of illicit brew of "Changaa" in unprescribed containers.

2. The substance of the charge and every element thereof upon being read and explained to the accused in Luo language which she understands, she admitted the charge, facts of the case were given as follows:- That on 23.5.2016 Ugunja Police Officers were on Patrol when they came across the homestead of the appellant and found her with 250 litres of "Kangara" and 32 litres of "changaa". The said "kangara" and "changaa" were packed in plastic bottle and plastic containers meant for different or other than packaging alcohol. The appellant had no licence to possess the "kangara" and "changaa". The appellant was arrested and charged. The 32 litres of "changaa" in 5 litres of 6 containers and 2 litres of "changaa" marked as exhibit 1 (a) and 250 litres of "kangara" in green plastic produced as exhibit 2. The Appellant admitted the facts of the prosecution's case and was convicted on her own plea of guilty. The Appellant upon her mitigation was sentenced to pay a fine of KShs.150,000/= in default to serve 18 months imprisonment inrespect of count 1 and on count II the appellant was sentenced to pay a fine of KShs.32,000/= in default to serve 5 months imprisonment. The sentence was ordered to run consecutively.

3. Aggrieved by both the conviction and sentence the appellant preferred this appeal through the firm of M/s. Manwari and Company Advocates setting out six (6) grounds of appeal being as follows:-

a) The Learned trial Magistrate erred in law in convicting the Appellant on both counts on the basis of a defective charge sheet.

b) The Learned trial Magistrate erred in not finding that the particulars of the charge on both counts were totally at variance with the charges preferred against the Appellant.

c) The Learned trial Magistrate erred in not finding that the facts of the case as presented by the prosecutor did not disclose the offences charged.

e) The trial court erred in law in convicting the Appellant in the absence of any scientific finding that the substance which the Appellant was found with namely "Kangara" was an "alcoholic drink" in terms of Section 2 of the Alcoholic Drinks Act No. 4 of 2010.

e) The learned trial Magistrate erred in law in convicting the Appellant with the offence of "importing an alcoholic drink" in the absence of any proof of the element of "importation."

f) The respective sentences passed against the Appellant were manifestly excessive, harsh and unreasonable in all the circumstances of the case.

4. At the bearing of the appeal Mr. Manwari learned Advocate appeared for the Appellant whereas Mr. E. Ombati Learned State Counsel appeared for the State.

5. Mr. Manwari Advocates for the Appellant combined grounds Nos. 1, 2, 3 and 5 of the appeal and argued them together as one ground of appeal. He urged the appellant was charged with an offence of Manufacturing and packaging under **Section 32 (1) (b) of the Alcoholic Drinks Act No. 4 of 2016**. He urged **under Section 32 (1) (b) of the Alcoholic Drinks Control Act,** that Section deals with import and not manufacturing. He urged the charge was defective as particulars of the charge was at variance with the charge, that the drink referred to as "Kangara" is not an alcoholic drink as defined under Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010, and further as the said "Kangara" drink has not been criminalized, that the appellant was charged with a non-existent offence, that Section 2 defines what alcoholic drink contains and that was not proved in the case scientifically.

6. On ground No. 6 of the appeal Mr. Manwari urged that had the appellant been properly convicted, then the sentence meted against her was manifestly excessive and harsh as the appellant is a firsts offender and Probation Officers Report should have been called for before sentence, urging the appellant should have been sentenced under the community service order or put under probation. Mr. Manwari relied on the case of **Hilda Atieno V. R. HCCRA No. 104 of 2015 (Siaya).**

7. Mr. E. Ombati, Learned State Counsel concedes this appeal on the grounds that the Alcoholic Drinks Act No. 4 of 2010 is non-existent Act, that Section 32 (1) of the Alcoholic Drink Control Act No. 4 of 2010 deals with imports and not manufacturing, that the particulars of the charge did not support the charge and that the charge is defective.

8. The Appellant in the instant case was charged with manufacturing and packaging Alcoholic Drinks in unprescribed Containers Contrary to **Section 32 (1) (b) of** as read with **sub-section 8 of <u>the Alcoholic Drinks Act No. 4 of 2010</u>** ***(underlying mine to emphasize the Act referred to in the charge sheet)***. The purported Act, thus Alcoholic Drinks Act No. 4 of 2010 does not exist amongst our Kenyan Laws. The relevant Act under which the appellant ought to have been charged under is referred to as the Alcoholic Drinks Control Act No. 4 of 2010. I therefore find and hold that the charge was based on a non-existent Act. Further, under the relevant Act, thus the **Alcoholic Drinks Control Act No. 4 of 2010 Section 32 (1) (b)** it provides as follows:- ***"32 Information required on packages.***

1. Subject to this Section, no person shall:-

a. **……**
b. ***Import;***

c. **……**

An alcoholic drink unless the package containing the alcoholic drink conforms to the requirements of subsection (2).”

9. That even if the appellant was charged under the correct Act, the particulars as given in support of the charge were in variance with the charge as the particulars were in respect of manufacturing and not importation. It follows therefore that the particulars were at variance with the charge. I find the charge was therefore defective. The trial court should have rejected the same for being defective.

10. The particulars in support of count 1 reveal that the appellant was found in possession of 250 litres of “Kangara”. Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010 defines ***“Alcoholic drink”*** as follows:-

11.

“ 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;”

11. That in the instant case the prosecution did not subject “Kangara**”** to scientific testing nor did they produce any certificate to confirm that **“**Kangara**”** fell under the definition of alcoholic drinks as defined under Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010. “Kangara” was not shown to be either alcohol, or spirit or wine, or beer or traditional drink or any such a variety containing one-half of one per cent or more of alcohol by volume, such failure, failed to bring **“**Kangara**”** within the definition of an alcoholic drink as defined under the Act. In view of the above I agree with the Appellant’s Counsel that the Appellant was charged under Count 1 with a non-existing offence.

12, I have very carefully perused the charge sheet inrespect of Count I and Count II as well as the facts given by the prosecution in support of the charges, I have also considered the Appellant’s Counsel submissions and the State Counsel submissions conceding the appeal. I find that the appellant was charged under a non-existent Act, and non-existent offence inrespect of Count 1, and the particulars in respect f both counts being at

conceded the appeal.

13. On the sentences for offences under the **Alcoholic Drinks Control Act No. 4 of 2010** it is provided under **Section 62 of the Act** as follows:-

“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. That in sentencing where mandatory sentence is not provided for, the sentencing is at the discretion of the trial court depending on the facts of the case and in such cases each case must be treated independently.

15. The Upshot is that the appeal is merited, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant to be released forthwith and be set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 29TH DAY OF SEPTEMBER, 2016.

J.A. MAKAU

JUDGE

DELIVERED THIS 29TH DAY OF SEPTEMBER, 2016.

IN THE PRESENCE OF:

Mr. Manwari for Appellant.

Mr. E. Ombati for State.

Court Clerk – Kevin Odhiambo

Court Clerk:

J.A. MAKAU

JUDGE