REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 29 OF 2016

(An appeal from original conviction and sentence of Kilgoris PM's Criminal Case No. 1019 of 2016 by Hon. ROBERT OANDA RM dated 2ND August, 2016)

JANE NYABONYI MOREKWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **JANE NYABONYI MOREKWA** 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 1st August 2016 at Maji Mazuri Sub-location in Nyamache Sub-County within Kisii County, was found selling alcoholic drink namely Kangara to wit 300 litres without a licence.

2. The appellant also faced a second count of selling alcoholic drink without licence contrary to **Section 7 (1) (b)** as read with **Section 62 of the Alcoholic Drink Control Act No. 4 of 2016**, the particulars being that on 1st August 2016 at Maji Mazuri Sub-location in Nyamache Sub-County within Kisii County was found selling alcoholic drink namely changaa to wit 5 litres, without licence.

3. The appellant pleaded guilty to both counts and was subsequently convicted and sentenced to pay Kshs. 200,000/= in default 18 months imprisonment on the first count while she was discharged under **Section 35 (1) of the Penal Code**.

4. The appellant has now appealed against both the conviction and sentence and has set down the following grounds of appeal:

> **1. The learned trial magistrate erred in law and fact in sentencing the appellant on repealed law and as against the current law the Alcoholic Drinks control (Amendment) Bill 2013.**
>
> **2. The learned trial magistrate erred in law and fact by sentencing the appellant on nonexistent sections of the law.**
>
> **3. The learned trial magistrate erred in law and fact by sentencing the appellant on non existing terms i.e. Kangara and Chang'aa**

4. The learned trial magistrate erred in law and fact in sentencing the appellant without official report from the Government Chemist to ascertain and/or corroborate whether the purported exhibit were for sure Kangara and chang'aa respectively.

5. The learned trial magistrate erred in law and fact in sentencing the appellant without finding out whether the plea of guilty was unequivocal without any inducement, coercion, intimidation, harassment or promise to be acquitted or for mercy whatsoever from the prosecution.

6. The appellant prays for leave to add or amend any of above paragraphs in the circumstances the Appellant prays that the Hon. Court be pleased after admitting and hearing the appeal, quash the conviction and free the appellant or pass such other sentence as the ends of justice may dictate and your humble Appellant is duty bound to obey.

5. When the appeal came up for hearing before me on 15th September, 2016, Mr. Moracha counsel for the appellant submitted that she had been convicted and sentenced on a non –existent Sections of the law that had been amended by the **Alcoholic Drinks (Amendment Bill) 2013**.

6. The appellant's counsel further submitted that the terms "changaa" and "kangara" do not appear anywhere in the **Alcoholic Drinks (Amendment Bill) 2013** and further, that there was no government analysts report tendered by the prosecution to confirm if indeed the exhibits produced in court were "kangara" and "changaa".

7. The appellant also argued that the guilty plea was not unequivocal.

8. On his part Mr. Otieno for the state conceded to the appeal while submitting that even though the appellant pleaded guilty to both counts, the plea cannot be said to have been unequivocal because the facts of the case were not stated by the prosecution so that the appellant could confirm or deny them.

9. This being a first appeal, I am under an obligation to reanalyse and re-evaluate the evidence tendered before the trial court with a view to making my own findings on the same while at the same time bearing in mind the fact that I neither heard nor saw the witnesses testify. See **Okeno vs Republic (1972) EA 32**.

10. In the instant case however, the appellant pleaded guilty to both counts and as such, no witnesses were called by the prosecution to testify and therefore, I will peruse the lower court record 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 set out in the celebrated case of **Adan vs Republic (1973) EALR 445**.

11. **Section 207 (2) of the Criminal Procedure Code** stipulates 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."

12. The principles of recording a guilty plea were stated 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."

13. I have scrutinized the lower court's proceedings and noted that the plea was recorded as follows:

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

Count 1-

Accused: it is true

Court: plea of guilty entered.

Prosecutor: facts as per charge sheet. The 300 litres of Kangara in 3100 litre containers produced as exhibit 1. The 5 litres of Changaa in 95 jerican produced as exhibit no. 2.

Accused: facts are correct. That is alcohol I had.

Court: accused convicted on own plea of guilty."

14.14. On the appellant's argument that 'Kangara' is not an alcoholic drink, **Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010** defines "alcoholic drinks" 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 particulars of the charge in the first count in the instant case refers to the alcoholic drink that the appellant was selling as "Kangara" to wit 300 litres. **Section 2 of the Act** reproduced hereinabove does not have "Kangara" amongst the list of alcoholic drinks. Possession of a substance called "Kangara" has therefore not been criminalised and as such the appellant could not have been charged with selling a non-existent alcoholic drink and in the same vein therefore, the appellant could not have pleaded guilty selling a such a drink. 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. Turning to the plea taking process, it is clear that the facts of the case were not stated by the prosecution so that the appellant could confirm if they were true or not in line with the principles set out in the case of **Adan vs Republic (supra).**

17. It have severally been held that by the prosecution merely stating that "facts are as per charge sheet" without spelling out the facts translates to the plea not being unequivocal. Failure to clearly state the facts of the case was therefore fatal to the plea taking process as this is a mandatory requirement under **Section 207 (2) of the Criminal Procedure Code**. In the case of **Lusiti vs Republic (1977) KLR 143**, it was

stated that the provision enhances the necessity of being certain that the accused wishes to admit or deny the facts outlined by the prosecutor. It is not enough for the prosecutor to state that "facts are as per charge sheet" as the law requires that those facts be laid out even if it means repeating what is stated in the charge sheet.

18. The upshot of my above observations is that the instant appeal succeeds. I allow the appeal, quash the conviction, set aside the sentence and order that the appellant shall be set free forthwith unless she is otherwise lawfully held.

Dated, signed and delivered in open court this 26th day of September 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Bigogo for Mr. Moracha for Appellant

Omwoyo: court clerk