



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 116 OF 2016

FLORENCE AWUOR OKELLO APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against both the conviction and sentence dated 8.9.2016, in Criminal Case No. 860 of 2016 in Siaya Law Court before Hon. Hazel Wandere – P.M.)

JUDGMENT

1. The appellant **Florence Awuor Okello** faced two charges being as follows:- Count 1, Being in possession of **Alcoholic Drinks (Chang'aa) Contrary to Section 27 (1) (b) as read with Section 27 (4) of The Alcoholic Drinks Control Act No. 4 of 2010**, the particulars of the charge are that on the 7th day of September 2016 at Hono Sub-Location in Siaya District within Siaya County was found in possession of **Alcoholic drinks to wit 10 litres of chang'aa having not been prepared in accordance with the Alcoholic Drinks Control Act No. 4 of 2010**. Count II, **Manufacturing Alcoholic Drinks namely Chang'aa contrary to Section 7 (1) (a) as read with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010**. The particulars of the charge are that on the 7th day of September 2016 at Hono sub-location in Siaya District within Siaya County, was found with 100 litres of Kangara an ingredient of Manufacturing chang'aa without licence in contravention of the said Act.

2. That upon the substance of the charges and every element thereof being read and explained to the accused in Dholuo language which she understands, she replied it was true. The facts were given and the appellant replied that she admitted the facts and the exhibit. The trial court accordingly convicted the appellant and after mitigation the court in respect of count I fined the appellant KShs.20,000/= in default to serve three (3) years imprisonment. In count II the Court fined her KShs.50,000/= in default to serve six (6) months imprisonment.

3. Aggrieved by both the conviction and sentence the appellant preferred this appeal setting out the following two (2) grounds of appeal:-

(a) The learned trial magistrate erred in law and facts by convicting the appellant who the particulars of the offence and facts set out by the State Counsel did not doubt the charge.

(b) That the Magistrate erred when she did not consider the appellants mitigation and previous record.

4. At the hearing of the appeal the appellant abandoned her appeal against conviction and pursued her appeal against the sentence submitting that she is 45 years old, her husband died in 2003 and that she has five (5) children whose ages ranges from 15, 10, 6, 4 and 2 years and that she had engaged in the illicit trade to feed her children and send the children to school. She urged that she will look for other trade to support her child. She prayed for non-custodial sentence.

5. M/s. Odumba Learned State Counsel, opposed the appeal urging the offence is rampant in the area and the sentence imposed was lenient. She urged that the sentence should not be varied.

6. The facts of the prosecution case are that on 7.9.2016 at Hono sub-location, the appellant was arrested by A.P. while in the process of manufacturing chang'aa without licence. She was found with 100 litres of Kangara which she was using to prepare chang'aa and by which time she had already prepared 10 litres of chang'aa. That 10 litres of chang'aa was produced as exhibit 1 and 100 litres of Kangara as exhibit 2.

7. The punishment for an offence under **Section 27 (1) (b) of Alcohol Drinks Control Act No. 4 of 2016** is provided under **Section 27 (4) of the Alcoholic Drinks Control Act No. 4 of 2016** which provides:

“(27) Conformity with requirements

(1).....

(a).....

(b).....

(2)

(a).....

(b).....

(3).....

(4) A person who contravenes the provisions of this Section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.

8. The punishment for an offence under **Section 7 (2) of the Alcoholic Drinks Control Act** is provided for under **Section 7 (2) of the Alcoholic Drinks Control Act No. 4 of 2010** which provides:-

7(2) For the purposes of subsection (1), an alcoholic drink shall be deemed to have been exported when it is placed on a ship, aircraft, train or any other vehicle within Kenya for the purposes of export.

9. The appellant in this case was found with ten (10) litres of chang'aa and 100 litres of Kangara an ingredient or substance used during the alcoholic manufacturing process. She admitted the offence and in her mitigation she stated that she was a widow and have children to feed and asked for forgiveness. The State Counsel in opposing this appeal urged the offence is rampant in this area but produced no documentary evidence to that fact effect and as such I believe each case should be treated on its own merits. The appellant who is a widowed mother of five (5) Children, whose ages ranges from 15, 10, 6, 4 and 2 years respectively in this appeal argued that she committed the offence as she was trying to raise money to feed and educate her children. Yes an offence was committed and I do not condone the appellant's acts but where a widowed mother is without a job and with five mouths to feed and five children to educate she will go out of her way for the sake of ensuring her Children gets food and a better life like those of the other Kenyans who are well to do. Our constitution under **Article 43** provides for **economic and Social rights**, which provides every person has the right to be free from hunger, and to

have adequate food of acceptable quality, to social security and to education. These are the rights which every Kenyan is entitled to and in absence of the same the appellant in her mitigation urged that led her to commit this offence. The appellant though in my view has no basis of committing this offence should have found better ways of making decent earnings or sought support from both National and Local Government.

10. Having made that remark, I find the sentence against the appellant was lenient, however in view of the minor children who looks upon the appellant as their mother and doubles as their father, I will substitute the custodial sentence against her in respect of Count 1, thus in respect of the 3 months imprisonment and Count II, in respect of 9 months to non-custodial sentence and as they arise from the same transaction, I order the sentence to run concurrently instead of consecutively.

11. The upshot is that the conviction is upheld. The custodial sentences in count I and count II are substituted with non-custodial sentence in respect of both counts. The sentence shall run concurrently instead of consecutively as the two charges had arisen out of the same offence and same facts. (See the case of **Robert Njogu Mburu V Republic CR. A 553 of 2010**).

12. The Appellant shall therefore serve CSO for the remainder of the sentence under supervision and direction of Probation Officer Siaya County.

DATED AND SIGNED AT SIAYA THIS 27TH DAY OF OCTOBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 27TH DAY OF OCTOBER, 2016 IN THE PRESENCE OF:

APPELLANT IN PERSON

M/S. ODUMBA FOR STATE

J. A. MAKAU

JUDGE