



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 92 OF 2016

CORAM: J. A. MAKAU – J.)

TOBIAS APINA OTIENO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both conviction and the sentence dated 4.8.2016 in Criminal Case No. 755 of 2016 in SIAYA Law Court before Hon. T.M. OLANDO – R.M.)

JUDGEMENT

1. The Appellant **TOBIAS APINA OTIENO** faced a charge of **Manufacturing Alcoholic Drinks namely Changaa Contrary to Section 7 (1) (a)** as regard with **Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010**. The particulars of the offence are that on 3rd day of August 2016, at Bar-Osimbo sub-location in Siaya District, within Siaya County was found with 60 litres of Kangara, an ingredient of Manufacturing changaa without licence in contravention of the said act.

2. After the charge was read and explained to the appellant he replied that it was true and immediately a plea of guilty entered. The facts of the case were given and the appellant stated that the facts were correct, consequently he was convicted on his own plea of guilty and sentenced to pay a fine of KShs.60,000/= in default to serve 4 months imprisonment.

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

a. That the trial Court erred in law and fact by convicting the appellant when the particulars of the offence and facts set out by the State Counsel did not support the charge.

b. That the manner to which the plea was taken was not proper.

4. At the hearing of the appeal the appellant appeared in person whereas Mr. Ombati, Learned State Counsel appeared for the State.

5. The Appellant in support of his appeal relied on the written submissions which he handed over to the Court. The Appellant urges that the particulars of the offence and facts given by the Prosecution are at variance with the charge and do not support the charge, of Manufacturing an alcoholic drink as the particulars of the offence are that of being found with 60 litres of Kangara, or ingredients for Manufacturing Changaa, urging that being in possession and Manufacturing are two different occurrences which ought to have been set out quite expressly and distinctively, that the manner in which

the plea was taken was not proper as the court did not record the specific language which the appellant, understands and he wished to speak as per the constitution under **Article 50 (2) (b) (j) (k) and (m)** and also urged that the sentence meted was harsh and excessive.

6. Mr. E. Ombati, Learned State Counsel, opposed the appeal submitting that the plea as it is, is unequivocal, that the charge was read to the accused who admitted the offence and the facts of the case. He urged the plea taking was proper, however as the record is not clear on what language the proceedings were conducted, Mr. E. Ombati, learned State Counsel, stated on that basis, it was not necessary to oppose the appeal, otherwise he submitted the charge as drawn is proper and that facts supports the charge. He urged should the court allow the appeal on the ground that there was mistrial on basis of non-disclosure of the language used, a retrial should not be ordered as a retrial may not be successful as the exhibits have already been destroyed.

7. The facts of the prosecution case are as follows: That the appellant was arrested at Bar-Osimbo when he was in possession of 60 litres of the Kangara meant to make changaa and that he did not have licence.

8. The appellant in ground No. 1 of his appeal contends that the particulars of the offence and the facts set out by the State Counsel do not support the charge. The appellant was charged with an offence of Manufacturing alcoholic drinks namely changaa contrary to **section 7 (1) (a) of the Alcoholic Drinks Control Acts as read with section 62 of the same Act. Section 7 (1) (a) of the Alcoholic Drinks Control Act No. 4 of 2010** provides:-

“7 (1) No person shall:-

a. Manufacture or otherwise produce;

b.

c.

d.

Any alcoholic drink except under and in accordance with a licence issued under this Act.

9. The particulars as per charge sheet were that on the 2nd day of August 2016 at Bar-Osimbo Sub-Location in Siaya District, within Siaya County, the appellant was found with 60 litres of Kangara, an ingredient of Manufacturing changaa without licence in contravention of the said act.

10. The facts briefly are that the appellant was found in possession of 60 litres of Kangara meant for Manufacturing changaa without licence.

11. Before dealing substantially with ground No. 1 of the appeal, it is of paramount importance to look at some relevant definition as per the **Alcoholic drinks contrary Act No. 4 of 2010** which I feel are of great importance in determining this appeal. The following definition under **Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010** will enable this court come into a well analyzed decision. **Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010** defines the following terms as follows:-

a. “ALCOHOL” means the product known as ethyl alcohol or any product obtained by fermentation or distillation of any fermented alcoholic product, rectified either once or more often, whatever the origin, and shall include synthetic ethyl alcohol, but shall not include methyl alcohol and alcohol completely denatured in accordance with the prescribed formulas;

b. “ALCOHOLIC DRINKS” 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;

c. ***“INGREDIENTS” means substances used during the alcohol manufacturing process;***

d. ***“LICENSEE” means a person who holds a licence granted under this Act:***

e. ***“MANUFACTURE” means the processing of an alcoholic drink and includes the packaging, labeling, distribution or importation of an alcoholic drink for sale in Kenya;”***

12. The particulars of the charge are not in variation with the charge. The charge is that of Manufacturing alcoholic Drink namely changaa. The particulars of the charge are that the appellant was found with 60 litres of Kangara, an ingredients of manufacturing changaa without lincence in contravention of the **Alcoholic Drinks Contrary Act**. The Manufacture as defined under the Act means the processing of an alcoholic drinks. The particulars of the offence clearly point out that the appellant was found with 60 litres of kangara, an ingredient of manufacturing changaa. The appellant having prepared the 60 litres of Kangara, which as per definition of ingredients is a substance used during the alcohol manufacturing process, was as per definition of manufacturing found processing an alcoholic drink namely changaa. The facts as given by the State Counsel, was that the appellant was found in possession of 60 litres of Kangara meant to make changaa. He was in the processing stage of manufacturing changaa and therefore I do not find any variance between the particulars of the charge and facts as given by the state counsel. I find as per definition of “alcohol” changaa is a product obtained by fermentation or distillation of fermented alcoholic product, Kangara is a substance that is used in the process of fermentation leading to distillation of a fermented alcoholic substance that produces changaa. I therefore find no merits in grounds No. 1 of the appeal and I dismiss the same.

13. Whether the plea taking was proper? The Court proceedings reveal that the interpretation was in English/Kiswahili/Dholuo language, however the proceedings show that the substance of the charge and every element therefore was stated by the court to the appellant in the language that he understands, thus English/Kiswahili but the appellant replied in English/Kiswahili/Dholuo. It is therefore not clear which particular language the proceedings were conducted in and which language the accused understands and was used during the proceedings. The language English/Kiswahili and English/Kiswahili/Dholuo as recorded by the trial Court obscures which language the accused understands and which language was used.

14. Article 50 (2) (m) of the Constitution Provides:-

“50 (2) Every accused person has the right to a fair trial which includes the right –

(m) to have the assistance of an interpreter without permanent if the accused person cannot understand the language used at the trial;”

15. The use of English/Kiswahili in reading the substance and explaining the charge, in a language which the appellant did not understand and recording a reply in English/Kiswahili/Dholuo language confuses the whole proceedings, it obscures the language used and completely violated the constitutional rights of the accused to a fair trial. The proceedings in my view did not comply with Article 50 of the Constitution of Kenya. The whole process violated, breached and infringed on the appellant’s Constitutional rights to a fair trial. It amounted to a mistrial. The conviction obtained through violation or breach or infringement of one’s constitutional rights to a fair trial as enshrined under Article 50 of the Constitutional Court, in my view cannot be allowed to stand.

16. The State Counsel do not root for a retrial as the exhibits herein have been destroyed and were not subjected to scientific testing and a report produced as an exhibit. In view of the fact that a retrial may not sustain a conviction, I shall not order a retrial.

17. The upshot is that the appeal succeeds, the conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith otherwise lawfully held.

DATED AND SIGNED THIS 13TH DAY OF OCTOBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 13TH DAY OF OCTOBER, 2016.

IN THE PRESENCE OF:

APPELLANT PRESENT IN PERSON

MR. OMBATI FOR STATE.

C.A. 1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE