



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO. 3 OF 2015**

**GLADYS CHEROTICH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

1. The appellant (Gladys Cherotich) was charged and convicted by the Resident Magistrate Bomet of the offence of being in possession of Alcoholic Drinks without a licence contrary to section 27(1) (2) as read with section 27(4) of the Alcoholic Drinks Control Act No. 4 of 2010 Laws of Kenya.
2. The particulars in the charge sheet were that the Appellant on the 1<sup>st</sup> day of February 2015 at Chebungun village in Kapsimotwa sub-location within Bomet County was found in possession of 30 litres of a substance (kangara) used to distill chang'aa without a licence.
3. The appellant was convicted on admission and sentenced to nine(9) months imprisonment. Being dissatisfied with the conviction and sentence filed this appeal raising 4 grounds. I reduce them into two grounds namely:-
  1. The plea was equivocal.
  - 2.The sentence was too harsh.
4. When the appeal came for hearing, Mr.Rono for the appellant submitted on the grounds raised and asked the Court to allow the appeal.
5. The state through M/S Kiptoo opposed the appeal saying the plea was unequivocal as the particulars had been read to the appellant and she pleaded to the facts which equaled the particulars.
6. She further submitted that section 2 of the Act defined what an Alcoholic drink is and that kangara was part of changaa. The appellant had no licence allowing her to possess the kangara.
7. I have before me the record of what transpired before the lower Court on 2<sup>nd</sup> February 2015 when the appellant was first arraigned before the trial Court.
8. The record shows the charge was read to her and she responded in Kipsigis. She could not have responded if she did not understand. Secondly the language of Kipsigis was one of the languages of interpretation that day of plea.

9. The main issue I am going to deal with is the charge itself. The appellant was charged with the offence of being in possession of an alcoholic drink without a licence contrary to section 27(1) (2) of the Act. Section 27 of the Alcoholic Drinks Control Act provides;-

“No person shall”

- a. Manufacture, import or distribute; or
- b. Possess.

An alcoholic drink that does not conform to the requirements of this Act

(2) Sub-section (1) shall not apply to person who:-

- (a) Is authorized under this Act to be in possession of the Alcoholic drink or
- (b) Has possession of the alcoholic drink in a premises Licenced under this Act.

10. A quick glance on the charge sheet shows the appellant was charged under section 27(1) (2) as read with section 27(4) of the Alcoholic Drinks Control Act. The latter provision deals with the punishment. I have set out above what section 27(1) and section 27(2) entails. For these two subsection to have formed part of the charge sheet is an anomaly. The appellant could not have been manufacturer/importer/distributor and/or possessor at the same time.

11. Applying the wrong provision of the law to particulars/facts Makes a charge defective. The proper section ought to have been section 27(1) (b) of the Act.

12. Section 27 of the Act clearly refers to an alcoholic drink. The Act at section 2 describes an alcoholic drink “to include Alcohol, spirit, wine, beer, traditional alcoholic drink..... capably of being consumed by a human being.

13. Is kangara therefore an alcoholic drink? The charge sheet Refers to it as a substance used in the distilling of changaa. This confirms that kangara is not an alcoholic drink but a substance used in distilling changaa which is an alcoholic drink.

14. The issue is, where in the Alcoholic Drinks Control Act, **possession of such substances has been criminalized**? I have gone through the whole Act and I do not find any. The Appellant could therefore not be charged for a non-existent offence.

15. I therefore allow the appeal and quash the conviction. The Sentence is set aside, and the appellant to be set free unless lawfully held under a separate warrant.

**Dated, signed and delivered this 27<sup>th</sup> February 2015.**

**H.I ONG’UDI**

**JUDGE**

In the presence of:

M/s Kiptoo for state

Mr. Rono for the Appellant

Lagat- Court Assistant

Appellant