



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 2 OF 2015

SELLY CHEPNGETICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant (Selly Chepngetich) was charged and convicted of two offences under the Alcoholic Drinks Control Act. These were:-

Count 1- Possession of a substance (kangara) used in distilling changaa without a licence contrary to section 27(1) (2) of the Act.

Count 2- Possession of 10 litres of changaa without a licence.

2. Upon conviction, she was sentenced as follows:-

Count 1- A fine of Khs.60,000/= in default one year imprisonment.

Count 2- A fine of Kshs.20,000/= in default one year imprisonment.

There was a further order that if the fines were not paid, the sentences were to run concurrently.

3. The appellant appealed against both the conviction and sentence raising 4 grounds which I reduce to 2. Namely:-

- i. The plea was not unequivocal.
- ii. The sentence was harsh and excessive.

4. The appellant was not represented in the Lower Court and in the appeal. I have before me the record of what transpired on 16th October 2014 when the appellant was first arraigned in Court.

5. When the appeal came for hearing, the appellant submitted that her dissatisfaction was only with the sentence which she wanted substituted. The state did not object to that request.

6. As I have stated elsewhere in HCRA NO. 3/15, there is no offence in the Alcoholic Drinks Act called "**Possession of a substance used in distilling an alcoholic drink.**"

7. Further that section 27 (1) and 2 under which the appellant was charged was a combination of several offences none of which was relevant to the particulars in the charge sheet. I therefore find

count 1 to be a defective charge as the offence with which the appellant was charged is non-existent.

8. Coming to the 2nd count, I find the plea to have been unequivocal. The only issue is the sentence. I note the following errors on the sentence.

i. In count 1 where the fine was Kshs.60,000/= the default sentence is one year imprisonment. In the second count where the fine was Kshs.20,000/= the default sentence is one year imprisonment. This disparity cannot be explained.

ii. The order that the sentences run concurrently is an unlawful order. In an instance where there is a default sentence, the said default sentence can never run concurrently, with another sentence. Each default sentence runs separately. Even without an order being made the sentences run consecutively.

9. The appellant was found in possession of 10 litres of changaa. I find the default sentence of one year to have been too harsh. The appellant has been in prison for 4 months now. I set aside the default sentence of one year.

10. The result is that the appeal on count 1 succeeds, and the conviction is quashed while the sentence is set aside.

11. For count 2, the conviction is confirmed. The appeal only succeeds in terms of the sentence which is set aside, and substituted with a sentence of the period already served.

12. The order that sentences run concurrently is set aside. The Appellant be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Dated, signed and delivered this 27th February 2015.

H.I ONG'UDI

JUDGE

In the presence of:

M/s Kiptoo for state Appellant

Lagat- Court Assistant