



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.3 OF 2015
THOMAS NYAKUNDI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Ag. Chief Magistrate Hon. S. Soita at Kericho in Cr. Case No.187 of 2015 on 21.01.2015)

J U D G M E N T

1. **Thomas Nyakundi** the appellant was charged with two counts of offences under the **Alcoholic Drinks Control Act No.4 of 2010** namely;

Count 1

Selling alcoholic drinks without licence contrary to **Section 27 (1) (b)** as read with **Section 27 (4)** of the **Alcoholic Drinks Control Act No.4 of 2010**

The particulars being that the appellant on the 11th day of January 2015 at about 12.30pm at Kapkelek Trading Centre in Kericho West District in Kericho County was found selling Alcoholic Drinks to wit 6 litres of changaa to members of the public without a licence as required of the said Act.

Count 2

Selling alcoholic drinks without licence contrary to **Section 27 (1) (b)** as read with **Section 27 (4)** of the **Alcoholic Drinks Control Act No.4 of 2010**.

The particulars being that the appellant on the 21st day of January 2015 at about 5.00am at Kapkelek Trading Centre in Kericho West District in Kericho County, was found in possession of 4 litres of changaa without a licence as required by the said act.

2. He appeared for plea on 21st January 2015 and when the charges were read to him he admitted both of the counts. The prosecution stated the facts which he admitted and he was convicted.

After mitigation he was sentenced to six (6) months imprisonment on each count with an order that the sentences run concurrently.

3. The appellant being aggrieved with the conviction and sentence filed this appeal raising five (5) grounds which are as follows;

1. *That, the Honourable trial Magistrate erred in both law and fact in convicting and sentencing the Appellant without considering the fact that the charge was defective.*
 2. *That, the Honourable trial Magistrate erred in both law and fact in convicting the Appellant on equivocal plea of guilty.*
 3. *That, the Honourable trial Magistrate erred in law and in fact in failing to consider the appellant's mitigation.*
 4. *That, the learned trial Magistrate erred in law and fact in handing down a sentence that was harsh and excessive given the circumstances of the case.*
 5. *That, the learned trial Magistrate erred in both law and in fact in sentencing the appellant to imprisonment without the option of a fine.*
4. When the appeal came for hearing Mr. Akinyi appearing for the appellant argued two main points of the appeal after consolidating the grounds.

He submitted that the charge sheet was defective as the particulars did not establish the offence.

Secondly, he stated that the appellant was denied an option of a fine which is provided for by the Law. Further he said the appellant's mitigation was not considered.

5. In conceding the appeal M/s Kivali for the State submitted that the charge was defective, as wrong provisions of the law were quoted. Further she stated that the offence and particulars were contradictory and there was therefore a mistrial.
6. This is a first appeal and I have looked at the record of the court below. I have also considered the grounds of appeal and the submissions by both counsels.
7. It has been conceded by the State that the appellant pleaded to a defective charge.
8. A look at the charge sheet shows that the appellant was in the 1st count charged with the offence of selling alcohol without a licence. This offence is covered under **Section 37 (b)** of the Act and not **Section 27 (1) (b)** as stated in the charge sheet.

The particulars in the 1st count indicate that the appellant was selling alcohol to members of the public. The facts given to the court are not in conformity with the particulars in the charge sheet.

The learned trial Magistrate should not have accepted this without an amended charge sheet.

9. Coming to the 2nd count the appellant was again charged with selling alcohol contrary to Section 27 (1) (b) of the Act. The particulars in the charge sheet and the facts given to the court show that he was in possession, but the offence is **selling** and not **possessing**. Similarly the court should not have accepted the facts without an amendment of the charge sheet.
10. The rules for framing charges are set out in **Section 137** of the **Criminal Procedure Code**. **Section 137 (a) (ii)** provides among other things that.....

“If the offence charged is one created by enactment it shall contain a reference to the Section of the enactment creating the offence.”

11. In this case the Alcoholic Drinks Control Act creates offences called **POSSESSION** and **SELLING** without a licence, under distinct sections of the said Act.
12. The particulars must conform with the offence charged and so should the facts. In this instant case the particulars and facts did not conform with the offence charged and the prosecution did not deem it fit to apply to amend the charge sheet. The learned trial Magistrate did not also take note of the disparity.

13. My finding is that the appellant pleaded to a defective charge, was convicted and is serving sentence. In the circumstances, I will not order that a fresh plea be taken. The state has correctly conceded the appeal.

14. I allow the appeal, quash the conviction on both counts. The sentences are set aside.

The appellant to be released unless lawfully held under a separate warrant.

Dated, signed and delivered in open court this 17th day of February, 2015

H.I.ONG'UDI

JUDGE

In the presence of

M/s Kivali for State

Mr. Akinyi for Appellant

Lagat- Court Assistant