



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 5 OF 2015

EMILY CHERONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Decision and Sentence awarded by the Senior Resident Magistrate at Kericho, Chief Magistrate Court (Hon. L. Kiniale) in Cr.Case No.254 of 2015)

J U D G M E N T

1. **EMILY CHERONO** (the appellant) was charged with the offence of selling an alcoholic drink without a licence contrary to **Section 27 (1) (b)** as read with **Section 27 (4)** of the **Alcoholic Drinks Control Act No. 4 of 2010**, Laws of Kenya.
2. She pleaded guilty to the charge and was convicted and fined Kshs.50,000 in default twelve (12) months imprisonment.
3. Being dissatisfied with the conviction and sentence she filed this appeal raising the following grounds:
 - a. *The trial Magistrate erred in law and in facts by failing to satisfy himself that the plea was totally unequivocal and that the appellants understood the elements of the offense and their penalty.*
 - b. *The sentence awarded was harsh and excessive in all circumstances as the appellant was first offender.*
 - c. *The trial Magistrate erred in both law and fact by convicting the appellant on defective charge sheet.*
 - d. *The trial Magistrate did not warn the appellant of the consequences of pleading guilty.*
 - e. *The appellant herein prays this court to allow the appeal set aside the sentence or in the alternative the appellant be placed on probation and/or c.s.o.*
4. When the appeal came for hearing the appellant basically asked the court to consider her sentence explaining why she was selling the alcoholic drink.
5. Mr. Mutai for the State only addressed ground No.C of the appeal as he conceded the said appeal. He submitted that the charge was defective as the appellant ought to have been charged under **Section 7(1) (b)** as read with **Section 62** of the Act.

6. Section 27 (1) (b) provides

“No person shall-

b. possess,

an alcoholic drink that does not conform to the requirements of this Act.”

Section 27 (4) provides

“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.”

Section 7 (1) (b) provides

“No person shall

(b) sell, dispose of, or deal with

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

Section 62

“Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.”

7. The facts given to the court by the Prosecution on 2nd February, 2015 were that the appellant was found selling busaa without a permit/licence. Section 27 (1) (b) of the Act under which she was charged speaks of possession and not selling.
8. It follows that the charge that the appellant pleaded to, was brought under the wrong provisions of the law. The charge, the particulars and the facts did not correspond to the provisions of the law cited.
9. I therefore find that the charge was defective. Mr. Mutai for the State did not apply for a retrial.
10. The appellant has been in prison now for about six (6) weeks. It would be an injustice to order for a retrial.
11. The result is that the appeal is allowed, and the conviction quashed.

The sentence is hereby set aside. The appellant will be released unless otherwise lawfully held under a separate warrant.

Dated, signed and delivered this 12th day of March, 2015.

H.I. ONG'UDI

JUDGE

In the presence of

M/s Kivali for State

Appellant- present in person

Lagat- court assistant

Interpretation – English/Kiswahili