



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 209 OF 2013**

**LESIT, J.**

**ROSEMARY WAITHIRA KIMANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from sentence contained in the judgment of Hon. J. W. Onchuru (Ag. Principal Magistrate) in the Chief Magistrates' Court at Kiambu Criminal Case No. 1549 of 2012 delivered on 21<sup>st</sup> June 2013)*

**JUDGMENT**

1. This is an appeal against both the conviction and sentence of the trial court. The Appellant was charged with the offence of selling alcoholic drinks without a valid liquor licence contrary to **Section 37(1)** as read with **Section 62** of the **Alcoholic Drinks Control Act**. The particulars of the charge are:

**That on the 20<sup>th</sup> day of May 2012 at about 3.00p.m. at Banana Motel Bar in Banana Township within Kiambu county was found selling alcoholic drinks to wit 25 bottles of Tusker Lite beer without a valid liquor license.**

2. After the trial, the Appellant was convicted of the offence as charged and sentenced to pay a fine of Ksh. 10,000/- and in default serve six (6) months' imprisonment.
3. The Appellant filed an appeal out of time with the leave of the court. She relies on the following grounds of appeal:
  - a. **The trial Magistrate erred in holding that the Appellant was operating an unlicensed liquor business when she was not the owner of the establishment.**
  - b. **The trial Magistrate erred in holding that the liquor business was not licensed when there was no communication of the refusal of licence.**
  - c. **The Magistrate erred in finding there was communication of refusal of the operating license when no evidence tendered as proof of that communication.**
  - d. **The entire judgment is against the weight of the evidence.**

4. Both parties argued this appeal by way of oral submissions when the appeal came up for hearing on 25<sup>th</sup> March 2015. Mr. Thuo appeared for the Appellant while Ms. Aluda, Learned Prosecution Counsel represented the Respondent.
5. Mr. Thuo submitted that the Appellant was not the owner of the premises where the liquor business was operated. He reiterated the testimony of DW2 who confirmed that he was the proprietor of the liquor business and that he had applied for a liquor license, but was never informed that his application for a licence had been rejected. Mr. Thuo urged that DW2 had continued operating his business on the strength of Section 10 of the **Alcoholic Drinks Control Act**, herein after referred to as the Act. Mr. Thuo also contested failure by the police to arrest **DW2** who is the proprietor but instead charged the Appellant who was just an employee. He urged the court to find that **DW2** ought to have been charged pursuant to **Section 37** of the Act. Thus, the trial court ought, in this respect, to have established the owner of the premises.
6. Ms. Aluda for the Respondent opposed the appeal. Learned Counsel submitted that the Appellant was charged for selling liquor without a licence since the application for a licence had been rejected and the said decision communicated. Learned Counsel submitted that the charges against the Appellant were supported by the testimony of **DW3** who was a Licensing Officer. Ms. Aluda observed that **DW2** was not even in possession of a temporary license. In response to the submission that the Appellant was not the owner of the premises, Ms. Aluda submitted that owning premises and selling liquor were distinct acts and therefore the conviction was proper and the sentence lawful. She urged the court to dismiss the appeal.
7. This being the first appellate court, I am duty-bound to re-examine and re-evaluate the evidence afresh and come to my own independent conclusion, bearing in mind that I did not have an opportunity to observe the demeanor of the witnesses.
8. The prosecution relied on the testimony of two witnesses. **PW1**, Robert Ochola and **PW2**, P.C. Moris Musyoka both police officers attached to the Karura Police Station who were the arresting officers. They testified that on 20<sup>th</sup> May 2015, while in the company of other police officers including the OCS, CI Baraza were patrolling within Banana area when they encountered the Appellant selling beer at the Banana Motel and Bar. When the OCS inquired about the license, the Appellant called the owner of the business who indicated that he did not have an operating licence. The Appellant was then arrested. The police officers also took the beers that had been stocked at the premises. PW1 identified them in court.
9. The Appellant gave a sworn testimony in her defence and called two witnesses, **DW2**, Paul Hinga Mungai, the owner of the business premises and **DW3**, the Kiambu Deputy County Commissioner who chaired the Kiambu Licensing Committee.
10. It is not in contention that the Appellant was found selling liquor. It is also not in dispute that the business was not licensed. Based on the testimony of **DW2** who testified that he is the proprietor of Banana Motel and Bar; and also confirmed that the Appellant was his employee; and further confirmed that he had never received a licence since the commencement of the **Alcoholic Drinks Control Act** despite having submitted his application for a licence. I find that it is confirmed that the Bar business was not licenced. **DW2** indicated that he did not receive any communication that the application was rejected.
11. **Section 40** of the Act places the burden of proof upon the person carrying out the business as follows:

***“The onus of proving that a person is licensed under this Act shall lie on that person”***

12. DW2, being the owner of the premises did not prove that he was licenced. Indeed, his testimony confirms that he was operating without a licence.

13. The main issue is whether or not the Appellant bears the criminal responsibility for the offence she is charged with. The Appellant's contention is that the owner of the premises ought to have been charged instead of the Appellant who was merely an employee. To determine this issue, on which this appeal mainly stands, I have considered the provisions of the law alleged to have been contravened. **Section 37(1)** of the **Alcoholic Drinks Control Act** under which the Appellant was charged provides for the offence of selling liquor without a licence in the following terms:

**“If any person purchases any alcoholic drink from a licensee whose licence does not cover the sale of that alcoholic drink for consumption on the premises, and drinks the alcoholic drink on the premises where it is sold, or in any premises adjoining or near to those premises, if belonging to the seller of the alcoholic drink or under his control or used by his permission, or on any highway adjoining or near any such premises, and it is proved to the court that the drinking of the alcoholic drink was with the privity or consent of the licensee who sold the alcoholic drink, the licensee commits an offence.**

14. Sub-section 2 further provides that:

**“If a licensee whose licence does not cover the sale of alcoholic drink to be consumed on his premises himself takes or carries, or employs or suffers any other person to take or carry, any alcoholic drinks out of or from his premises for the purpose of being sold on his account, or for his benefit or profit, and of being drunk or consumed in any place (whether enclosed or not, and whether or not a public thoroughfare) other than the licensed premises, with intent to evade the conditions of the licence, the licensee commits an offence, and, if the place is any house, tent, shed or other building belonging to the licensee or hired, used or occupied by him, the licensee shall be deemed, unless the contrary is proved, to have intended to evade the conditions of the licence.**

15. **Section 62** of the Act is a general penalty clause. It prescribes sentences where no penalty is provided under the provisions of the Act. The offence under **Section 37** does not have a specific prescribed sentence, therefore, Section 62 applies. Under this provision, the sentence prescribed is a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.

16. A reading of **Section 37(1)** shows that the offence arises out of the purchase of an alcoholic drink from a licensee whose licence does not cover the sale of the particular alcoholic drink and the taking of those drinks on the premises where the drinks are sold or in the premises adjacent to or near those premises if they belong to the seller of the drinks. It is an indication that the offence in question is attached to the taking out of an operating licence. A licensee is defined under **Section 2** of the Act as *‘a person who holds a licence granted under this Act.’* Read together with **Section 9**, it is clearer where the criminal culpability arises. This provision concerns the application for a licence in the following terms:

**“(1) A person intending to manufacture or otherwise produce any alcoholic drink in Kenya or to operate an establishment for the sale of an alcoholic drink shall make an application in a prescribed form to the District Committee in the district where the premises is to be situated and shall pay a prescribed fee.”** (Emphasis added).

17. Even though the licensee bears the burden to obtain a licence for his business and therefore the criminal culpability for the offence of selling alcohol without a licence, attempting to escape the responsibility by employing someone else to carry out the business on his behalf, while fully aware of the fact the business was not licenced will not afford such employee any defence.

18. **Section 21(2)** of the Act is clear. The licensee is not exonerated from his duty. This section reads as follows:

**“No licensee shall permit any other person to manage, superintend or conduct the day-to-day business of the premises in respect of which he is licensed except with the written**

**consent of the District Committee and every person in respect of whom such consent is given shall be subject and liable to the same duties, obligations and penalties under this Act as the licensee.”**

19. The responsibility contemplated under **Section 21(2)** of the Act lies on the owner of the business and that responsibility shifts to persons upon whom the licensee permits to manage or conduct the day to day running of the business. The section is clear that once the licensee permits another to carry out the business, that other person shall be subject to the same duties, responsibilities and penalties as prescribed under the Act. The Appellant had the responsibility to ensure the business was licensed. The Appellant cannot be heard to say that she was not the licensee as under **section 21(1)** she bears equal responsibility as the licensee.
20. The Appellant was fined 10, 000/- and in default six months imprisonment. The default sentence flouted the provisions of **section 28 (2)** of the Penal Code which provides that for a fine of 10, 000/-, the maximum default sentence is one month's imprisonment. Accordingly I correct the error on the face of the record by setting aside the default sentence of six months and in substitution thereof order a default sentence of one month's imprisonment.
21. Subject to the correction as herein above, I find that the Appellant's appeal has no merit and is hereby dismissed.

**DATED AT NAIROBI THIS 27<sup>th</sup> DAY OF MAY 2015**

**LESIT, J.**

**JUDGE**