



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO.119 OF 2013

FREDRICK MBURUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the original conviction and sentence in Chief Magistrate Criminal Case No. 1611 of 2013 by
Hon.D.O. ONYANNGO SPM)*

JUDGEMENT

The Appellant was convicted of one count of selling alcoholic drinks without a license contrary to section 7(1) 1(b) Alcoholic Drink Control Act No 4 of 2010. The particulars of the offence are that the Appellant was found selling Alcoholic drink namely Changaa and had 2 litres of the said drink at the time of his arrest. He was found guilty on his own plea of guilty and convicted for the offence and sentenced to a fine of 80,000/- and in default 12 months imprisonment. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He has five grounds of appeal namely.

1. **That the learned Principal Magistrate erred in law and in fact in convicting the appellant on a defective charge.**
 2. **That the learned Principal Magistrate erred in law and in fact in convicting the appellant on an alleged plea of guilty which was equivocal.**
 3. **Principal Magistrate erred in law and in fact in convicting the appellant on non-existent charge.**
 4. **That the conviction is against the weight of the evidence and the law.**
 5. **That the sentence is manifestly excessive and or wrong in law.**
2. The Appeal was filed by Mr.Kariuki. Advocate. He argued 3 points in his oral submission in

- support of ground 1 and 2 of the appeal. Mr. Kariuki submitted that the learned trial magistrate did not explain the ingredients of the offence to the Appellant. He said under section 2 of the Act the definition of alcoholic drink required and alcohol content of one per cent or more of alcohol by volume.
3. Mr. Kariuki urged that only officers appointed under section 50 of the Act could examine the liquids and issue certificates of analysis under the Act. He submitted that the content of the stuff the Appellant was charged with is unknown.
 4. Mr. Jason Makori represented the state and opposed this appeal. Mr. Makori submitted that the Appellant pleaded guilty to the charge and that the only thing he could challenge was the legality of the sentence. Counsel submitted that the plea of guilty entered against the appellant was unequivocal on the sentence. Counsel urged that the sentence was lenient as the Appellant was liable to a maximum fine of 500,000 or imprisonment for 3 years or both and that he had only been fined 80,000/-
 5. I have considered this Appeal. The Appellant pleaded guilty to the charge. The Appeal would only lie against the sentence if the court is satisfied that the plea recorded in this case was unequivocal.
 6. I have perused the record of the lower court. The appellant was charged with selling alcoholic drink without a license contrary to section 7 (1) (b) of the alcoholic drink herein after the Act. The particulars of the charge show that he was found in possession of 2 liters of changaa and was selling it without a license. The prosecution gave the following facts

“Prosecution: it was on 5.11.2012 accused was found selling changaa without license and was arrested and charged. 2 litres of changaa were recovered. 2 litres of change Exhibit”

7. The accused in response stated “facts are correct” Mr. Kariuki for the Appellant urges that the plea was equivocal because the learned trial magistrate in his explanation of the charge did not state the content of the alcohol in the liquid found with the Appellant. He also argued that had the content been given it is unlikely the Appellant would have pleaded guilty. Mr. Kariuki also submitted that it was necessary to have a certificate of analysis issued by an authorized officer as provided for under section 50 and 57 of the Act.
8. Mr. Makori's view was that the plea was properly taken and therefore could not be challenged.
9. The charge and the facts of the case are on record. The duty of a trial court when taking plea is to explain all the ingredients of the offence to the accused person. The purpose of so doing is to ensure that an accused person understands what it is he is accused of having committed and the manner in which it is alleged he committed it. This is very important especially if the accused is unrepresented as was the case here. In the facts for the prosecution case, the prosecution is expected to give further details showing what the accused person is accused of either doing or not doing which constitutes the offence charged. These facts should also be explained to the accused by the trial court before the accused person is required to plead. I am guided by Adan vs Republic 1973 EA 445; Kariuki vs Republic 1984 KLR at page 89 and Meru Nkirote Vs Republic Meru High Court Criminal Appeal No. 48 of 2010.
10. The plea entered in this case has been challenged on the basis that the alcohol content in the liquid found with the Appellant was not proved to have exceeded the alcohol content allowed. It is true the liquid that was found on the Appellant was not subjected to any analysis and therefore the content level is not known whether it was within the required percentage or not.
11. The offence under section 7(1) (b) of the Act has several ingredients in it. First of all the prosecution should show that the Appellant was in possession of the liquid in question; that he was selling it; that he did not have a license to sell it and most importantly that it was an alcoholic drink within the meaning of section 2 under the Act, of these ingredients the prosecution made no attempt to establish the two liters of liquid described as changaa under the charge met the requirements of an alcoholic drink as defined under the Act. The only way to prove that the ingredients is by having the liquid analyzed by a government chemist and a report made establishing that the alcohol content in the liquid exceeded 1% as required under the Act.
12. The prosecution did not adduce any evidence to support that very important ingredient of the charge against the appellant. Consequently the plea entered by the Appellant was equivocal and

- ought to be set aside.
13. Mr. Kariuki submissions about analysis by authorized officers under section 50 and 57 of the Act does not apply to this case. The officers mentioned under section 50 are those appointed under the Act for purposes of the Act. The Appellant in this case was arrested by Police Officers who were on duty under the Police Act. Mr. Kariuki submissions in that regard have no relevance to this case.
 14. Having considered this appeal I am satisfied that the plea entered against the Appellant was equivocal and ought not to stand. Consequently I allow this appeal quash the conviction and set aside the sentence. The Appellant should be set free if in custody in regard to this case. If he paid any part of the fine the same should be refunded.

DATED SIGNED AND DELIVERED THIS 22nd DAY OF MAY 2014

J. LESIIT

JUDGE.