REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE No. 57 of 2013

MERCY KENDI KATHAMBI……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGEMENT

1. The Appellant was arraigned before the Senior Principal's Magistrate's Court Nkubu with one count of selling alcoholic drinks without a license contrary to section 7(1) (c) as read with section 62 of the Alcoholic Drinks Act. She was convicted on her own plea of guilty and sentenced to 3years imprisonment without the option of a fine.

2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. There are 5 grounds of appeal namely that the learned trial magistrate erred in both law and facts in:

i. **Convicting and sentencing the Appellant in proceedings conducted in a language the Appellant did not properly comprehend.**

ii. **In meting a sentence that was excessively harsh.**

iii. **In failing to consider the Appellant's statement in mitigation.**

iv. **In relying on the misleading and unsubstantiated averments by the prosecution that the Appellant had previous convictions.**

v. **Convicting and sentencing the Appellant on the basis of a defective charge sheet.**

3. When the appeal came up for hearing Mr. Muriithi for the Appellant urged that the proceedings leading to the conviction of the Appellant were flawed for reason the learned trial magistrate did not indicate the language in which the plea was taken. For that preposition Mr. Muriithi urged the court to consider its own decision in two cases. These are **Judy Nkirote vs. Republic Meru HCCA 48/2010**and **Abdi Ahmed vs. Republic Meru HCCA 87/2010 .** In the **Nkirote** case, supra, counsel cited the observations this court made drawn from the celebrated case of **ADAN VRS REPUBLIC 1973 EA 445**where the Court of Appeal for Eastern Africa set out the steps that a plea court should take in order to record a proper plea. The Court of Appeal held:

i. **The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**

ii. **The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**

iii. **The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

iv. **If the accused does not admit the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**

v. **If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**

4. Mr. Muriithi relied on paragraph 5 of the judgment of this court in **Abdi Ahmed**, supra, where I observed as follows:

> **"With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case umber and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record**."

5. Mr. Mulochi Prosecution Counsel represented the state in this matter. He conceded to the appeal on account of the fact that the language of the court was not indicated and secondly for the reason that the government analyst's report was not produced in evidence. Mr. Mulochi submitted that he would not be asking the court to order for a retrial because there is no indication on the file whether the exhibits which are an integral part of the proceedings were destroyed or preserved.

6. I have carefully considered this appeal. The appeal is unopposed. The facts of this case are that the Appellant pleaded guilty to the offence charged of selling alcoholic drinks without a license. The first point taken against the conviction is the failure by the learned trial magistrate to record the language in which the plea was taken.

7. The trial court has a duty to ensure that the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

8. I have perused the record and the proceedings. The record does not show the language in which the plea was taken. The trial court stated that it used the language known to the Appellant. The Appellant has raised an issue urging that she did not comprehend the proceedings. The record of the court should be clear as to the language first of the court, and secondly the language in which the plea was explained to the Appellant. There is nothing on record to show either the language of the court, or the language into which the plea was read over and explained to the Appellant. The Appellant's contention that the language used was not comprehended by her has not in the circumstances been controverted.

9. I have come to the conclusion that the plea to the charge against the Appellant was not properly taken. Proceedings were materially defective. Consequently the plea recorded was equivocal. In the light of the defect the conviction entered is null and void and is quashed and the sentence set

aside. The Appellant questioned the mode of presenting the previous records of the Appellant which the prosecution adopted in this case. I can do no better on this point than the observations and holding I arrived at in the cited case of **Abdi Ahmed**, supra. It is included herein above and I need not repeat it here.

10. The final matter to decide is whether this court should order a retrial. The State has already indicated that it will not seek a retrial for reason there was nothing on the record to show whether the exhibits, which are crucial for the retrial, were preserved or destroyed.

11. Faced with a similar question, the Court of Appeal in the case of **David Kiplagat Bunei Vs. Republic** Criminal Appeal Case No. 370 of 2006 observed:-

> **"We have considered the past decisions of this Court which includes the decision in the case of Richard Omolo Ajuoga V. Republic, Criminal Appeal Case No. 223 of 2003, in which several past cases were considered and fully analyzed as towhat circumstances need to be considered before a re-trial is ordered. We have considered thedecisions in the case of Pascal Ouma Ogolo V. Republic Criminal Appeal No. 114 of 2006 (unreported),Henry Odhiambo Otieno V. Republic Criminal Appeal No. 83 of 2005 (unreported) and the case of Bernard Lolimo Ekimat V. R, Criminal appeal No. 151 of 2004 (unreported). In the Ekimat Case, it was stated**:-
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> > There are many decisions on the question of when appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.'
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> **I have stated that this trial was defective for reason this court discharged assessors before the case was concluded therefore denying the accused a statutory right he was enjoying. The above case has set out the principle that should inform the court when deciding whether a retrial should be ordered. The interest of justice is the cardinal principle that should inform that decision. The other principle include a determination whether an order for retrial will occasion in justice or prejudice to the appellant; whether it will accord the prosecution an opportunity to fill up gaps in his evidence as the first trial; and whether upon consideration of the admissible or potentially admissible evidence a conviction may result."**

12. I have considered the principles which must inform a court before an order for a retrial can be made. In this case, three key principles emerge. First whether upon consideration of the admissible or potentially admissible evidence a conviction may result. To secure a conviction the prosecution must be able to avail the alleged alcoholic drink the Appellant is alleged to have been found selling without a license. Furthermore the prosecution must adduce proof through government analyst's report that the drink was an alcoholic drink as defined under the Act applicable. The State has indicated through the Prosecution Counsel that the alcoholic drinks availability for the retrial if ordered cannot be guaranteed.

13. The second principle is a determination whether an order for retrial will occasion injustice or prejudice to the Appellant. In this case the Appellant was sentenced to three years imprisonment on the 2nd July, 2013. That means she has served about half the sentence taking the third remission of imprisonment sentence, which is applicable to this case, into account. In the circumstances, if a retrial is ordered, the Appellant will have to go through the rigors of a trial. That is hardly desirable. I am satisfied that it will cause the Appellant hardship and prejudice if an order of retrial is made.

14. The final principle is that of interest of justice. Without a guarantee that exhibits and analysts report will be available, it will be acting in vain as there will be no possibility of securing a conviction. It would be against the interest of justice to make an order for retrial in vain.

15. Having taken all these principles into consideration I have come to the conclusion that it will not be in the interest of justice to order a retrial. I decline to order a retrial. The Appellant should be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014.

LESIIT, J.

JUDGE