



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

**CRIMINAL APPEAL NO. 21 OF 2014**

**ROTICH GINNERY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. Bii Limo, Resident Magistrate Honourable Trial Magistrate, in criminal case no.1434 of 2014 handed down on 13/5/2013)*

**JUDGMENT**

**INTRODUCTION**

**1. Rotich Ginnery**, the appellant herein was tried on a charge of selling alcoholic drinks without a licence contrary to **Section 37(2)** of the **Alcoholic Drinks Control Act No.4 of 2010**. The Appellant appeared before Hon. Limo, learned Resident Magistrate where upon he pleaded guilty to the aforesaid charge. The learned Resident Magistrate convicted and sentenced the Appellant to serve twelve(12) months imprisonment. Being dissatisfied, the Appellant appealed through the firm of Ogaro Orayo & Co.Advocates.

**GROUNDINGS OF APPEAL**

2. The Appellant put forward the following grounds in his Petition:

- i. **THAT the learned trial Magistrate erred both in law and in fact in convicting the appellant on a perceived plea of guilty and/or a plea of guilty that was not equivocal.**
- ii. **THAT the learned trial Magistrate erred in law and in fact in convicting the appellant without reading out the facts of the case to him and by failing to give him a chance to state whether the facts were correct or not.**
- iii. **THAT the learned trial Magistrate erred both in law and in fact in conducting the proceedings irregularly and therefore convicting the appellant irregularly against the law and procedure hence there was miscarriage of justice.**
- iv. **THAT the learned trial Magistrate erred both in law and in fact in handing down a sentence that was harsh and excessive.**
- v. **THAT the learned trial Magistrate erred both in law and in fact in sentencing the appellant to imprisonment without an option of a fine.**

3. When the appeal came up for hearing, Mr. Mutai, learned Senior Principal prosecution counsel, conceded the appeal on the above stated grounds.

### **BACKGROUND OF THE APPEAL**

4. Before considering the merits of the appeal, it is important to set out the brief background of the case that was before the trial court. The particulars of the offence are that on the 11th day of May 2014 at Chepseon Trading Centre in Londiani District within Kericho county, was found selling alcoholic drinks namely spirits (Bestgin, Afrigold gin, Furaha Brandy) at Mashariki Bar without a licence as required. The record is clear that the Prosecutor did not outline the facts when called upon to do so but instead decided to inform the court that the facts were as per the charge sheet. Having set out the factual basis of this appeal let me now consider the substance of the same.

### **SUBSTANCE OF THE APPEAL**

5. Though the appellant put forward a total of five grounds of appeal in his Petition, the same may be summarized to two broad grounds. **First**, Is a question as to whether or not the plea was equivocal. **Secondly**, is whether the sentence mete out is in accord with the principles of sentencing.

6. In the first ground, Mr. Nyaingiri, learned advocate for the Appellant was of the view that the plea was equivocal. Mr. Mutai agreed with. The Court of Appeal for East Africa laid the principles of plea taking in the *locus classicus* case of **Adan =vs=R (1973) E.A.445** when it held *inter-alia* as follows

- 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 agree with 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 facts relevant to sentence together with the accused's reply should be recorded.**

7. Let me examine the manner in which the trial Magistrate took plea and determine whether or not he applied those principles in this case. The charge together with the particulars of the offence were read and explained to the accused (appellant) in Kiswahili language and the appellant answered the same in Kiswahili language. For now I will presume that the Appellant understood the language of the court. A plea of guilty was recorded upon the accused admitting the charge.

8. The proviso to **Section 207(2)** of the **Criminal Procedure Code** enjoins the court after conviction and before passing sentence to give the prosecution a chance to outline the facts upon which the charge is found.

9. The accused will also be required to confirm or deny the veracity of those facts.

10. In the case before the trial court, the prosecution instead of outlining the facts as required by law merely stated facts as per charge sheet. The particulars of the charge cannot by any stretch of imagination be categorised as the facts of the case. In short, the facts were never outlined and the appellant was not called upon to admit or deny those facts nor make any comment.

11. The learned Resident Magistrate further entered into the arena of the dispute by proceeding to order

the production of the alleged alcoholic drinks yet he was not prompted to do so by the prosecution.

12. It is obvious from the face of record that the plea was equivocal hence a plea of guilty cannot be sustained. The learned Resident Magistrate completely misapprehended the point. In fact, the record shows that instead of recording a plea of guilty he recorded a plea of not guilty and thereafter proceeded to ask the prosecution to give the appellant's criminal past. He also asked the appellant to Mitigate but the Appellant offered no facts in Mitigation. In my humble view the learned Resident Magistrate did not adhere to guidelines given by the East African Court of Appeal vide Adan =Vs=R (Supra). Consequently, the plea of guilty cannot be sustained.

13. The second ground of appeal is the question, as to whether the learned Resident Magistrate adhered to the principles of sentencing. Messrs Nyaingiri and Mr. Mutai are of the view that the learned Resident Magistrate completely went off the mark and pronounced a harsh and excessive sentence for a first offender.

14. There is no dispute that the appellant was sentenced under **Section 37(2)** of the **Alcoholic Drinks Control Act No.4 of 2010**. That Section is the Section which defines the offence. The appellant should have been convicted and sentenced under the Section which creates the offence.

15. Under **Section 62** of the **Alcoholic Drinks Control Act**, the offence the appellant was convicted for attracts a maximum sentence of a fine of Kshs.500,000 or a term of imprisonment for three years or both. The appellant was sentenced to serve 12 months imprisonment without an option of a fine. One of the cardinal principles of sentencing is to the effect where the law provides an option of a fine, the court is enjoined to first give an accused person, first, an option of a fine. This did not happen in this appeal.

16. With respect, I agree with learned counsels that the learned Resident Magistrate misapplied the principles of sentencing.

17. In the end, I find the appeal to be meritorious. It is allowed as prayed. The order on conviction and sentence are hereby quashed and set aside respectively. The Appellant is hereby ordered set free forthwith unless lawfully held.

**Dated, Signed and delivered in open court this 26th day of June, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

**Mr. Motanya holding brief for Mr. Orayo for Appellant**

**Miss. Kivali for Director of Public Prosecutions**