



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 29 OF 2014
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 30 OF 2014

BETWEEN

MILDRED AJIAMBO ONYANGO 1ST APPELLANT

THOMAS JOSEPH OWITI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 800 of 2014 at Chief Magistrate's Court at Homa Bay, Hon. P. Mayova, SRM dated on 17th June 2014)

JUDGMENT

1. The appellants in this consolidated appeal, **MILDRED AJIAMBO ONYANGO** and **THOMAS JOSEPH OWITI** were charged with the offence of dealing with alcoholic drinks without a license contrary to **section 79(1)(b)** as read with **section 62** of the ***Alcoholic Drinks Control Act, Act No. 4 of 2010***. The particulars of the charge were as follows:

On the 16th day of June 2014, at Mbita Township in Mbita district within Homa Bay County jointly were found transporting alcoholic drinks to wit 66 cartons (1330) bottles of assorted alcoholic drinks in motor vehicle registration number KBR 576F make Toyota Premio without license in contravention to the said Act

2. They also faced a second count of dealing with alcoholic drinks packed in plastic containers contrary to **section 31(2)** as read with **section 31(3)** of the ***Alcoholic Drinks Control Act***. The particulars of the charge were as follows;

On the 16th day of June 2014, at Mbita Township in Mbita District within Homa Bay County jointly were found transporting alcoholic drinks with alcoholic (assorted) to wit 50 cartons)1000 bottles packed in plastic containers of 205 ml in contravention of the said Act.

3. The appellants were convicted on their own plea of guilty on both counts and sentenced to a fine

of Kshs. 200,000/= each in default one year in prison on the first count and fined Kshs. 30, 000/= each or four months jail in default on the second count.

4. They appealed against the conviction and sentence on the following four grounds:
 - a. *That the trial magistrate failed to arrive at a finding that it was necessary to grant more time to re-evaluate the appellant's decision of pleading guilty to the charge before imposing two year sentence on the appellant.*
 - b. *That the trial magistrate erred in law and failing to inform the appellant the charge with sufficient detail to answer it which includes the nature and consequences of pleading guilty since that was a first arrest.*
 - c. *That the appellants have young families and that the appellants are the sole bread winners and had just pleaded guilty after yielding to the pressure from the police who persuaded the appellant to plead guilty so as to be set free.*
 - d. *That since the appellants were not found selling the alleged items, but just ignorantly pleaded guilty.*
5. The appellants, who were unrepresented, entirely relied on the grounds of the appeal and urged the court to set aside the conviction and sentence. Both appellants submitted that they did not know that they were carrying unlicensed goods and pleaded for leniency.
6. Mr. Oluoch, learned counsel for the State, opposed the appeal on the ground that the plea was unequivocal and that the sentence was appropriate in regard to the severity of the offence.
7. I have read the proceedings from the lower court and I am satisfied that at the time of plea taking, the requirements of a plea of guilty provided in **section 207** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** were adhered to. The principles applied in plea taking were elucidated in ***Adan v Republic [1973] EA 445*** where the court held:-
 - i. The charge and all the essential ingredients of the offence should be read 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 immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or 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 a 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.
8. The proceedings show that the procedure elucidated above was adhered to and I have no reason to intervene in the conviction.
9. The appellate court has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that in the circumstance of the case, the sentence is harsh and excessive (see ***Wanjema v Republic [1971]EA 493***).

10. **Section 7(1)(b)** of the ***Alcoholic Drinks Control Act*** provides as follows;

(1) *No person shall*

- a.
- b. *Sell, dispose of or deal*
- c.

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

Section 62 of the **Act** further provides that:-

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 both. [Emphasis mine]

On the alternative charge, **section 31(2)(a)** of the **Act**

no person shall sell, manufacture , pack or distribute an alcoholic drink in sachets or such other form as may be prescribed.....

(a) no person shall manufacture, pack, distribute or sell an alcoholic drink in a container less than 250 millilitre.

The penalty for the offence is provided under **section 31(3)** of the **Act** provides that

A person who contravenes this section commits an offence and shall be liable to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months, or to both. [Emphasis mine]

11. In his sentencing notes, the learned magistrate took into account the fact that although the appellants were first offenders; the offence for which they were convicted was serious as evidenced by the penalty prescribed by the law. He also noted that there was a need for a deterrent sentence in view of the recent events where people have lost lives due to consumption of unlicensed alcohol in various parts of the country. He imposed the fine in order, “to send a deterrent message to others.”

12. From the facts outlined and the reasons given by the learned magistrate, I find no reason to interfere with the sentence as it is within the law.

13. The appeal is therefore dismissed.

DATED and DELIVERED at HOMA BAY this 4th August 2014

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.