REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 42 OF 2012

AGNES WANJIRU MIANO……..……..……..…..……APPELLANT

-VERSUS-

REPUBLIC …….RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 779 of 2011 in the Senior Principal Magistrate's Court at Kerugoya – HON. S.N. NDEGWA (SRM)

JUDGMENT

AGNES WANJIRU MIANO the Appellant herein is appealing against the conviction and sentence handed to her by Senior Resident Magistrate Honourable S.N. Ndegwa in Senior Principal Magistrate's Criminal Case NO. 779 of 2011 for the offence of selling traditional liquor without license contrary to **Section 33(1)** o the **Alcoholic Drinks Control Act NO. 7 of 2010.** The appellant was arraigned in court on 1st September 2011 and pleaded guilty to the charge and as a result was convicted and handed a fine of Kshs 60,000/- or 8 months in prison. The appellant was dissatisfied aggrieved and filed this appeal against both the conviction and sentence.

The Appellant has listed six grounds of appeal in her appeal and filed submissions which reduced grounds to three which are:

1. That the language used by the trial court which the plea was taken was Kiswahili and she did not understand the language and the court did not find out if she clearly understood the language used in by the court.
2. That she was not given a chance to plead to the facts as the same was not explained to her.
3. That she was not given a chance to mitigate before the sentence which was meted out.

That state represented by Mr Sitati for Director of Public Prosecution has conceded to this appeal for reasons that are quite apparent from the record of the subordinate court.

The record shows that the charge was read over to the Appellant in Kiswahili to which she pleaded guilty. The record however does not show if the accused was asked if she understood the language of the court which is English or Kiswahili. I find that the plea taken was not unequivocal and taken without adherence of **Section 207** of the **Criminal Procedure Code.** The Learned Magistrate clearly erred on this score and ended up convicting the accused under an erroneous assumption that the Appellant understood Kiswahili language well.

I also find that two very critical procedural steps were erroneously overlooked or disregarded by the court. These are:

i. Facts of the charge were not read out to the Appellant and called upon to answer to the same. Having recorded a plea of guilty, the court was under obligation to read the facts upon which the charge was founded and call upon the accused to answer to the same. The same was not done because the record just shows the prosecutor stating **"Facts as per sheet"** but whether the accused was called upon to answer the said facts is not shown. The Appellant's ground that she was not accorded a chance to plead to the facts therefore as conceded by Director of Public Prosecution has merit.

This court made a decision in **KERUGOYA HIGH COURT CRIMINAL APPEAL NO. 27/12 GEOFFREY MACHARIA WAWERU –VS- REPUBLIC** that the practice by prosecution of just stating "**Facts as per charge sheet"** when called upon to read facts to the accused person is bad practice and a violation of the Constitutional right of an accused person. In the first place usually the charge sheet is with the prosecutor and the court. An accused person is most of the time not provided with a copy of the charge sheet. I therefore find that under **Article 50(1) (b)** the right to be **"informed of the charge with sufficient detail to answer to it"** requires courts to ensure that facts are read out clearly to an accused person to enable him/her plead to the same .This is clearly lacking in the case of the Appellant in the subordinate court.

ii. The appellants have also faulted the Learned Magistrate for not giving her a chance to mitigate after conviction.

I have looked at the record and have noted that it is true the Appellant did get a chance to mitigate before the sentence was meted out against her. This omission by the Learned Magistrate was an error. This position was also held in the case of **ADAN –VS- REPUBLIC (1973) EAR 445.** In view of the submissions made by the Appellants in court it would appear that the Appellant had a lot of mitigating factors which could have been relevant to the Learned Magistrate in the exercise of discretion in handing an appropriate sentence. By locking out mitigation from the Appellant, the Learned Magistrate erred and meted a fine that appeared excessive in the face of the mitigating circumstances. A court should always give an accused person upon conviction a chance to mitigate so that the court can be guided on proper and just sentence to pass for interest of justice.

In view of the above a find merit in appeal. The plea was not unequivocal. The conviction and the sentence is reversed and set aside. I would have ordered for a retrial but the State told the court that the plea was taken in 2011 and therefore there is no chance that the exhibit being alcohol can still be traced . An order for retrial may not have any useful purpose. The Appellant shall be acquitted forthwith unless lawfully held. I direct that the cash bail deposited be refunded to the depositor. Orders accordingly.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 14TH DAY OF NOVEMBER 2014 in the presence of**:**

The Appellant

Mr Sitati for state

Mbogo Court Clerk