REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CR. APPEAL 118 OF 2014

MARGARET MUSIMBI……..APPELLANT

=VERSUS=

REPUBLIC……..…….RESPONDENT

(***An Appeal arising from the original conviction and sentence in Criminal Case No. 4999 of 2014 in the Chief Magistrates Court at Eldoret- Hon. M. Njage(Senior Resident Magistrate).***

JUDGEMENT

1. The appellant ***Margaret Musimbi*** was charged in the lower court with the offence of dealing in changaa without a license contrary to ***Section 7(1) (b***) as read with ***Section 62*** of the ***Alcoholic Drinks Control Act No 4 of 2010***. It was alleged that on the 6th day of July 2014 at Kipkaren area in Wareng District within Uasin Gishu County, the appellant was found dealing in 120 litres of changaa without a license.

2. On 7th July 2014, the appellant was arraigned before the Chief Magistrates court at Eldoret and was convicted on her own plea of guilty by Hon M. Njage (SRM). She was subsequently sentenced to serve nine (9) months imprisonment.

3. Being aggrieved by the conviction and sentence, the appellant through the firm of Messrs Anassi Momanyi & Company Advocates lodged an appeal to the High Court. In her petition of appeal filed on 15th July 2014, the appellant challenged her conviction and sentence on the following grounds:-

1. ***The plea was not unequivocal.***
2. ***The conviction on the basis of a plea which was not unequivocal is unsafe.***
3. ***The sentence metted against the appellant is too harsh.***

4. The appeal was prosecuted by way of written submissions.

In the written submissions filed on the appellant's behalf on 29th August 2014,

Mr. Momanyi contended that the appellant's plea was equivocal as the learned trial magistrate did not enquire whether the appellant fell within the exceptions contained in ***Section 7(3)*** of the Alcoholic Drinks Control Act (***the Act***) and that the facts read to the appellant did not disclose the offence charged as they did not state how the appellant was found dealing with the changaa; that possession of alcoholic drinks is

not an offence under the Act. Counsel further argued that the response of "**Ni kweli** or "**it is true**" should never be construed as an admission of an offence.

In support of his submissions, Mr. Momanyi, relied on the following authorities:-

- ***Kato –Versus- Republic (1971) EALR 542***
- ***Andan –Versus-Republic (1973)EALR 445***
- ***Lusiti –versus- Republic (1977) KLR 143***
- ***Desai –Versus- Republic (1971) EALR416***

5. The appeal is contested by the state. In the written submissions filed by the Principal Prosecuting Counsel ***Mr. Job Mulati*** on behalf of the state on 2nd December, 2014, the state opposed the appeal on grounds that the appellant's plea of guilty was unequivocal because the particulars of the offence and the facts supporting the charge were read and explained to the appellant who admitted them to be true and as such, the court was certain that the appellant had no defence to the charges. Counsel further submitted that the appeal should be dismissed on the strength of ***Section 348*** of the ***Criminal Procedure Code*** which prohibits courts from allowing appeals against conviction by persons convicted on their plea of guilty by a subordinate court unless such an appeal was challenging the legality of the sentence imposed.

6. On sentence, ***Mr. Mulati*** submitted that the sentence of nine(9) months imprisonment was lawful and very lenient considering the seriousness of the offence and the fact that the penalty provided by the law for the offence which the appellant was convicted was three years imprisonment or a fine not exceeding Ksh 500,000 or to both. He urged the court to uphold both the conviction and sentence.

7. I have considered the grounds in the petition of appeal and the rival submissions made by ***Mr. Momanyi*** and ***Mr. Mulati***. I have also read the proceedings in the lower court.

I find that though the accused was charged with the offence of dealing in changaa without a license, the facts supporting the charges which were stated to the court by the prosecution and which the appellant confirmed were true thus her conviction did not disclose how the accused was found dealing with the said changaa. They did not allege that the accused dealt with the changaa in question in any way by for instance offering it for sale, transporting or distributing it.

The facts only alleged that on 6th July, 2014, police officers went into the appellant's home and recovered 120 liters of changaa for which she was not licensed.

8. Though the term "**dealing"** has not been defined in the ***Act***, the word "**deal**" from which the term dealing has been derived from has been defined in ***Blacks Law Dictionary 8th Edition at page 429*** as follows:-

   "***An act of buying and selling; the purchase and exchange of something for profit.…an arrangement for mutual benefit.…"***

   or "To distribute (something); to transact business with a person or entity.…"

I am inclined to agree with ***Mr. Momanyi's*** submissions that dealing was an essential ingredient of the offence and the manner in which the appellant allegedly dealt with the 120 litres of changaa found in her house ought to have been disclosed in the particulars and the facts supporting the charge in order to complete the offence.

Such disclosure was important because mere possession of alcoholic drinks without a license has not been made an offence under the Alcoholic Drinks Control Act.

Although it can be validly argued that the quantity of changaa allegedly in possession of the appellant

was too large as to give rise to an inference that it must have been for sale not just for the accused's own consumption. Thus bringing in element of dealing. It was an error for the prosecution not to expressingly state the manner in which the appellant allegedly dealt with the changaa in the particulars and facts supporting the charge. This is the only way that the appellant would have been informed of the nature of the allegations made against her in order for her to either refuse or admit the said allegations. A criminal charge cannot be founded on suppositions or possibilities.

A charge would in fact be defective if its particulars does not give reasonable information regarding the nature of the offence charged – See ***Section 134*** of the ***Criminal Procedure Code***.

In the instant case, the appellant pleaded to facts which did not disclose or support the offence charged.

The learned trial magistrate ought to have satisfied herself that the facts supporting the charges disclosed the offence charged before requiring the appellant to plead to them. This was regrettably not done with the result that the appellant's plea of guilty cannot be said to have been unequivocal. In the premises; I find that her conviction was unsafe and it cannot be allowed to stand.

I accordingly, find merit in this appeal and it is hereby allowed. The appellants conviction is hereby quashed and sentence aside. She will be released forthwith unless otherwise lawfully held.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVEREDAT ELDORET THIS 16TH DAY OF DECEMBER, 2014

In the presence of:

The Appellant

M/s Mwaniki for the state

Paul Ekitela- Court Clerk