



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

**AT MERU**

**HCCRA NO. 46 OF 2013**

***LESIT, J***

**MERCY NKIROTE.....APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

The Appellant was arraigned before Maua Chief Magistrate's Court with one count of Dealing with alcoholic drink without a licence contrary to section 7(1)(b) as read with S.62 of the Alcoholic Drink Control Act. The particulars of the offence are that on the 21<sup>st</sup> Day of June 2013 at Kilihi Location in Igembe South District within Meru County was found selling alcoholic drink to wit twenty liters of Ndume without a licence in contravention of the said Act.

The Appellant pleaded guilty to the charge and to the facts as led by the prosecution. The Appellant was then sentenced to a fine of Ksh.50,000/- in default six months imprisonment. Being aggrieved by the conviction or lack of it and sentence the Appellant filed this. There are five grounds of appeal in the filed "Memorandum" of appeal these are.

Mr. Gituma urged the appeal on behalf of the Appellant. He submitted that the learned trial magistrate did not enter a conviction after the Appellant admitted the offence which was a mandatory finding and that he proceeded to sentence her.

On sentence Mr. Gituma submitted that the court failed to emphasize reformation of the Appellant by failing to consider her mitigation, proceeded to consider extraneous matter that offence was notorious, and therefore passed a harsh sentence to Appellant who is a young girl.

The state was represented by Mr. Jackson Makori, learned State Counsel. He conceded the appeal on the grounds know conviction was entered and urged the court to order a retrial.

Mr. Gituma had no response to the request by the State to have an order of retrial made in the case.

I have considered the Appellants appeal. I have also examined the lower court proceedings. The proceedings filed by the Appellant are only ones before court. The original record is not here. However the proceedings have been certified as a true copy of the original and a court stamp impression from the lower court station put. There is therefore before court a certified record of the lower court station put. There is therefore before court a certified record of the lower court.

There was no dispute that the learned trial magistrate did not enter a conviction after the Appellant pleaded guilty to the charge. That is serious omission. The issue is whether it is a curable defect. Section 382 of the Criminal Procedure Code stipulates

**382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:9+9**

**Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. irregularity has occasioned a failure of justice:**

A conviction is a very important order to make as it brings a finality to the charge before the court and is the main ground of determining whether the person will be set free or whether they will face a sentence. Failure to enter a conviction is fatal to the proceedings and it occasions a failure of justice. It is a serious omission which was occasioned by the learned trial magistrate neither the Appellant nor the prosecution is to blame for it. Having failed to enter a conviction that rendered the entire proceedings defective and a mistrial. Accordingly I quash the conviction and set aside the sentence.

Should the court order a retrial the success of the case will be determined by a finding whether or not the Appellant was selling an alcoholic drink. I noted from the final orders of the learned trial magistrate that he ordered the destruction of the substance found with the Appellant. There will therefore be no exhibit and the trial of the Appellant will not be possible in the circumstances. In the result I decline to order a retrial and direct that the Appellant should be set free forthwith unless she is otherwise lawfully held.

**SIGNED AND DELIVERED AT MERU THIS 25<sup>TH</sup> DAY OF JULY 2013.**

**J. LESIIT**

**JUDGE**