



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 52 OF 2009

(From: Original Criminal Case No. 360 of 2009 TIGANIA; Mr. Kariuki SRM)

LESIT, J.

ROBERT

KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDE

NT

JUDGEMENT

The appellant pleaded guilty before the SRM's court at Tigania to one count of being in possession of Alcoholic Drink without a licence contrary to S.27(1)(b) as read with S.27(4) of the Alcoholic Drinks Control Act (hereinafter the Act). The particulars of the offence were that on the 14th March, 2011 at Thau Location, Tigania West District the appellant was found in possession of an alcohol drink to wit one and half litres of changaa, without a licence. He was fined 20,000/- in default six months' imprisonment. The appellant has raised seven grounds of appeal in the filed petition dated 28th March, 2011.

When the matter came up for hearing the appeal was argued for the appellant by one David Lekoona. In his submissions the learned counsel for the appellant relied on the grounds of appeal in the filed petition of appeal. Counsel submitted that the conviction was wrong because the charge was defective on grounds the Act was not against people possessing changaa. He also urged that the offence did not exist in law as being in possession of a drink without a licence was not an offence unless the person charged was selling the drink.

Mr. Kimathi learned state counsel represented the state in this appeal. Counsel opposed the appeal. Mr. Kimathi urged that the charge was "*being in possession of an alcoholic drink without a licence*" as envisaged under section 7(1) of the Act. Where provision is made for the licensing. Counsel submitted that the appellant had pleaded guilty to the charge and that he had said in court that he sold changaa for

his daily bread. Mr. Kimathi submitted that under S.27 of the Act the sentence for the offence was a fine of two million shillings in default, five years imprisonment and that in the circumstances the sentence was lenient.

I have carefully considered this appeal. The appellant was charged of being in possession of an alcoholic drink contrary to section 27(1) (b) as read with section 27(4) of the Act. When the charge was read to the accused in the lower court, he admitted the same. The prosecution then led the following facts of the case.

“On 14/3/2011 at 11.00 the Chief of Thau Location and his assistant received information that the accused sells changaa at his homestead without a licence. They proceeded to the accused’s home and upon search recovered 1 ½ litres of changaa. The accused was arrested and escorted to Tigania Police Station where he was charged. I produce the 1 ½ litres of changaa as an exhibit.”
Section 27(1) of the Act under which the appellant was charged provides as follows:

“(1) No person shall-

(a) Manufacture, import or distribute; or

(b) Possess,

an alcoholic drink that does not conform to the requirements of this Act.

From the very wording of the above section, it is clear that this is a general provision which provides for conformity with the requirements under the Act. This section does not create an offence. It can only be read together with the offence creating provision under the Act, in order to create an offence. Just by a way of an example the section requires conformity to the requirements of the Act generally by persons who either manufacture import or distribute; or who possess alcoholic drink. The prosecution had to quote the actual section the appellant contravened under the Act in the statement of the charge for the charge to be complete. It was not sufficient to quote in the statement of the charge that the appellant was in possession of an alcoholic drink without a licence, without stating which section under the Act the appellant breached.

Mr. Kimathi quoted Section 7(1) of the Act, another general provision requiring persons to obtain licences issued under the Act as a control measure. That section provides:

“7(1) No person shall-

(a) Manufacture or otherwise produce;

(b) Sell, dispose of, or deal with;

(c) Import or cause to be imported; or

(d) Export or cause to be exported.

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

If the case of the prosecution was that the appellant breached section 7(1) of the Act, they ought to have used that section in the statement of the charge. It cannot be relied upon as a submission from the floor before the court.

Even supposing that the prosecution quoted that section as the section contravened by the appellant, the charge would still make no legal sense. This is because no where under that section does the law make it an offence for a person to possess an alcoholic drink. The facts led by the prosecution were that the appellant was found at home, that his home was searched and 1 ½ litres of changaa found. In order for it to be an offence, the prosecution had to prove that the appellant had either manufactured or otherwise produced the changaa without a licence under the Act, or that he was in the process of selling, disposing or dealing with it without a licence under the Act. Alternatively the prosecution had to prove that the appellant had imported or caused to be imported; or had exported or caused to be exported the changaa without a licence under the Act. Mere possession *per se* does not constitute an offence under the Act. It is immaterial that the appellant in his mitigation said that he sold chang'aa for his daily bread as the case against him from the statement of the charge, the particulars of the charge and the facts led by the prosecution was not that he sold the changaa but that he had possession of the changaa. The offence charged does not exist under the Act and was to that extent defective null and void. I find that the appellants appeal has merit and therefore allow the appeal, quash the conviction, and set aside the sentence. The appellant should be set free forthwith If the appellant had paid the fine it should be restituted to him in full.

Dated, Signed and Delivered This 26th Day of May 2011

LESIT, J

JUDGE