REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 27 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 282 of 2010 of the Resident Magistrate's Court at Wundanyi – M. Chesang – DM II)

RODGERS MARTIN MBOGHO …….....…… APPELLANT

- Versus -

REPUBLIC…….....…… RESPONDENT

J U D G M E N T

The Appellant was arraigned before the Resident Magistrate's Court at Wundanyi on 3rd May, 2010 facing the following three charges-

"CHARGE COUNT ONE: SELLING INTOXICATING LIQOUR WITHOUT LICENCE CONTRARY TO SECTION 43(1) OF THE LIQOUR LICENCE ACT CAP 121 LAWS OF KENYA

PARTICULARS OF OFFENCE: on the 29th day of April, 2010 at about 1400hrs in Wundanyi District within Coast Province, was found selling intoxicating liquor to wit 100 litres of bangara without permit.

COUNT TWO BEING IN POSSESSION OF PALM WINE FOR SALE CONTRARY TO SECTION 8(1) OF THE COCONUT INDUSTRY ACT CAP 331 LAWS OF KENYA: On the 29th day of April 2010 at about 1400hrs at Masumbesunyi Village, Wundanyi Location in Wundanyi District within Coast Province, was found being in possession of palm wine for sale to wit 10 litres without permit.

COUNT III: BEING IN POSSESSION OF CHANG'AA CONTRARY TO SECTION 4(2) OF THE CHANG'AA PROHIBITION ACT CAP 70 LAWS OF KENYA:: On the 29th day of April, 2010 at about 1400hrs at Masumbesunyi Village, Wundanyi Location in Wundanyi District within Coast Province, was found being in possession of chang'aa to with ¼ (Quarter) litre in contravening of the Act."

After hearing three witnesses for the prosecution and two for the Defence the learned Magistrate returned a conviction as follows-

"The accused is therefore found guilty of the offence of selling intoxicating liquor without a licence and convicted accordingly."

Thereafter the court imposed a sentence of 1 year imprisonment.

This appeal challenges both the conviction and sentence and raises seven (7) grounds which can be conveniently considered under the following headings-

(a) That the learned Magistrate erred in entering and imposing an omnibus conviction and sentence contrary to Section 169 of the Criminal Procedure Code.
(b) That the conviction was based on hearsay and inconclusive evidence.
(c) That the entire proceedings were a nullity as they were conducted in breach of Article 50(2) (g) and (p) of The Constitution 2010.

The State did not oppose the appeal.

Section 169 of The Criminal Procedure Code deals with the contents of a judgment in criminal proceedings. Section 169(2) and Section 169(3) read as follows-

"(2) In the case of a conviction,, the judgment shall specify the offence of which, and the Section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

On the face of it the judgment of the learned Magistrate is irregular for failing to specify the Section of law under which the accused person was convicted. This court cannot however see what prejudice the appellant suffered as the Magistrate stated clearly that she found him guilty of the offence of selling intoxicating liquor without a licence. True, the Magistrate should have been more specific but the appellant was under no illusion as to the offence on which he was convicted. As to the sentence, it was not omnibus. The conviction was in respect to one offence and the sentence could only be in regard to that offence.

In Count 1, the appellant was charged with the offence of selling bangara without a licence contrary to Section 43 of the Liquor Licensing Act (now repealed) which reads as follows-

"any person who sells liquor or offers or exposes it for sale or who bottles liquor except under and in accordance with, and or such premises and on such premises as may be specified in, a licence issued in that behalf under this act shall be guilt of an offence and liable –
(a) for a first offence, to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding nine months, or to both;
(b) for a second or subsequent offence, to a fine not exceeding four thousand shillings or to imprisonment for a term not exceeding one year or to both,
And in addition to any penalty imposed under paragraph (a) or (b) it shall be lawful for the court to order, the forfeiture of all liquor found in the position, custody or control of the person convicted, together with the vessels containing the liquor."

My understanding of this provision is that it outlawed the sale, trade or bottling of liquor without a licence issued under the authority of the act. The evidence of PW1 and PW2 is that they found the 100 litres of Bangara in the house of the appellant. The appellant was alone at home. It is said that those who had been imbibing in it had fled. There was no evidence whatsoever that the appellant was selling the liquor, indeed the learned Magistrate was unable to find such evidence, she instead said-

"there is strong evidence pointing to the fact that the accused was indeed brewing illicit liquor."

It would seem that the learned Magistrate fell into error in convicting the appellant as charged when there was no evidence that he was selling or trading in the liquor.

I will now make some observations on the constitutional matters raised by the appellant. The Alcoholic Drinks Act which repealed the Liquor Licensing Act came into force on 22nd November 2010 and so that as at 3rd May 2010 when the appellant was arraigned in court the Liquor Licensing Act was still in force. Even though the judgment was delivered on 28th January 2011 (a date after the repeal) under the provisions of Section 23 of The Interpretation and General Provisions Act that repeal could not affect the legal proceedings, and criminal and penal liability commenced and incurred prior to the repeal date. It is not therefore true, as argued by the appellants counsel, that the appellant was convicted for a non-existent offence.

Secondly, the trial came up for the first hearing on 8th September 2010. The appellant applied for an adjournment to enable his advocate who was away in Mombasa, conduct his defence on another day. The Magistrate declined to grant the adjournment and proceeded to take the evidence of two of the three prosecution witnesses. This was the first request for adjournment and there was no good reason for the adverse order made by the learned Magistrate. This infringed on the accused's constitutional right to representation by Advocate (Article 50(2) (g) of The Constitution, 2010). But I say no more of this as I have already found that for other reasons, the conviction cannot stand.

The court has now dealt with the issues raised on appeal but there are some other irregularities in the proceedings and judgment which it feels compelled to address. The appellant was charged with three counts. The learned Magistrate I believe inadvertently, never stated her decision in respect to Count 2 and Count 3. In fact the judgment starts and ends as though the accused was facing only Count 1. In Count II the appellant was charged with contravening Section 8(1) of The Coconut Industry Act (Cap 331) a provision of the law which was repealed by Section 28 of Act No. 17 of 2006. The later Act came into effect on 1st May 2007 which was about three years prior to the time of the alleged offence. The effect is that the appellant was charged with a non-existent offence. In respect to this Count, this court, on the strength of the provisions of Section 354(3)(a)(i) of The Criminal Procedure Code renders an acquittal.

Then there is Count 3, under which the appellant was charged with being in possession of ¼ litre chang'aa contrary to Section 4(2) of The Chang'aa Prohibition Act. Although the charges should have been preferred under Section 3 of the Act read together with Section 4(2) that there was sufficient evidence tendered to return a conviction. On another occasion, circumstances of this nature would call for a re-trial. Here, though, the Appellant was sentenced to serve a 1 year prison term on a conviction which I shall presently upset. He served a jail term from 28th January 2011 upto 7th March 2011. That in my view, would be sufficient punishment for possessing ¼ litre of chang'aa. A re-trial is unnecessary.

The upshot is that the appeal succeeds, the conviction is quashed. The sentence is set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Those are my orders.

Dated and delivered at Mombasa this 19th day of December, 2011.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-
Miss Macharia holding brief for Jamii for state
Appellant in person
Court clerk - Moriasi