

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 138 OF 2009

JOEL MWANGI MUIGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged before the Lower Court with two counts firstly, Count I - being in possession of apparatus for preparation of chang'aa contrary to section 3(2) of the Chang'aa Prohibition Act (Cap 70 Laws of Kenya) and secondly Count II - being in possession of liquor without a brewer's licence contrary to section 4 (1)(A)(a) as read with section 50 of the Liquor Licensing Act (Cap 121 Laws of Kenya). The appellant pleaded guilty on both counts. He was convicted and sentenced to pay a fine of Kshs 3,000/= and in default six months imprisonment on the first count. In addition he was to serve six months imprisonment. He was on the 2nd count sentenced to a fine of Kshs 7,000/= and in default six (6) months imprisonment and he was also sentenced to an additional four months.

The appellant has appealed to this court pursuant to the provisions of Section 348 of the Criminal Procedure Code, that is to say, the extent and the legality of the sentence. During the hearing of the appeal the appellant asked for leniency in this matter.

Mr. Gumo the learned Assistant Deputy Public Prosecutor stated that he will leave the matter to the court's discretion. I have also looked at the probation report by the Probation Officer, Nakuru who states in his recommendation that the appellant was taken advantage of by an uncle who is a hardened chang'aa dealer and that the appellant was remorseful and indicates that he can reform given a chance.

The penalty for offence under section 4(1) of the Chang'aa Prohibition Act is either a fine not exceeding Shs 10,000/= or imprisonment for a term not exceeding two years, or both such fine and imprisonment.

The appellant was fined Shs 3,000/= or in default 6 months imprisonment and in addition 6 months imprisonment, in effect he was slumped with a fine of Sh 3,000/= and default sentence of 12 months.

Although this sentence was within the learned Magistrate's jurisdiction it was inelegantly expressed. It is usual to say, either you are sentenced to a fine of so much, or in default imprisonment for so long - OR you are sentenced to a fine of Shs ----- and to imprisonment of so long. That is what is meant by the expression "*or to both such fine and imprisonment*". In other words even if you pay the fine, you also serve the sentence.

The sentence on Count II was without jurisdiction. Section 50 of the Liquor Licensing Act sets out a general penalty of a fine not exceeding five hundred shillings or to imprisonment for a period of not exceeding one month or to both. A fine of Shs 7,000/= and imprisonment of 6 months had no basis. The conviction on the third count is therefore quashed.

In light of what I have said above, I am of the view that the appellant having been convicted on 15th May 2009 has already served more than six months of his imprisonment which in my opinion should have run concurrently. I think that is sufficient punishment for the appellant. I therefore allow this appeal and order for his immediate release unless otherwise lawfully held.

Dated, delivered and signed at Nakuru this 26th day of February 2010

M. J. ANYARA EMUKULE

JUDGE