



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 214 of 2004

RICHARD OMBATI KERAGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in the Senior Resident Magistrate's Court at Keroka
Criminal Case No.788 of 2004

by HON. MR. SHIUNDU ESQ., D.M)

JUDGMENT

The appellant was charged with supplying chang'aa contrary to **section 3(1)** of the **Chang'aa Prohibition Act** Cap 70 Laws of Kenya. The particulars of the offence were that on the 28th day of August 2004 at Keroka Bus Stage along Kisii/Sotik road in Nyamira district, the appellant was found supplying chang'aa, to wit, 220 litres in a motor vehicle Reg. No.KAR 760M Isuzu Bus belonging to Linear Bus Company.

The appellant pleaded guilty to the said charge. The facts of the case were read out to the court and the appellant admitted that they were true and correct.

The trial court sentenced the appellant to two years' imprisonment. Thereafter, the appellant was admitted to bail pending appeal. The appellant was aggrieved by the said conviction and sentence and filed an appeal against the same.

In the petition of appeal it was stated, **inter alia**, that the learned trial magistrate erred in law in convicting the appellant and sentencing him to two years' imprisonment without the option of a fine. The appellant also faulted the learned trial magistrate for imposing the maximum sentence for a first offender, adding that he was eighteen years' old and a student.

During the hearing of the appeal, Mr. Ondari for the appellant submitted that the charge sheet was defective because **section 3(1)** of the **Chang'aa Prohibition Act** only creates an offence but does not stipulate any penalty. He said that **section 4(1)** of the Act, which provides for the penalty, should have been cited as well. Counsel further submitted that the facts that were read out did not correspond to the particulars in the charge sheet. The charge was of supplying chang'aa but the facts and particulars of the offence referred to transportation of chang'aa. He cited the case of **COSMA NYADAGO VS R.** [1955]

EACA 451. In that case, it was held that the section of the law that created the offence and the one that provided for the punishment ought to have been stated in the charge. In response **Mr. Kemo, Senior Principal State Counsel**, submitted that though the charge did not specify the punishment section that omission did not occasion a miscarriage of justice. He added that the appellant pleaded guilty to the charge knowing about the particulars that had been read out to the court.

Looking at the record of appeal, the appellant pleaded guilty to the charge that he was facing and in my view the plea was unequivocal. It is true that the charge as framed did not cite the penalty section.

However, I do not think that any miscarriage of justice was occasioned by the said error. The charge informed the appellant the nature of offence that he had committed and he understood the same. He admitted that the facts as read out were true. The discrepancy between the contents of the charge and the facts as read out by the prosecutor was insignificant and did not equally occasion any failure of justice. The appellant was found in possession of a huge amount of chang'aa, 220 litres, and it was therefore obvious that it was not for his own consumption but must have been intended for sale or supply to an unknown destination. **Section 3(1) of the Chang'aa Prohibition Act** forbids, *inter alia*, sale supply and consumption of chang'aa. The aforesaid errors and/or omissions are all curable by the provisions of **section 382 of the Criminal Procedure Code**. Consequently, I dismiss the appeal against conviction

As regards the appeal against sentence, the appellant was a first offender and was a fairly young man although his age could not be verified. He only said that he was eighteen years' old. A trial court should not sentence a first offender to the maximum sentence provided by the law unless there are exceptional circumstances that justify the same. The fact that the appellant pleaded guilty should also have been taken into account in assessing sentence. The Court of Appeal so held in **NILSON VS REPUBLIC** [1970] E.A. 599. In my view a much more lenient sentence ought to have been passed. In the circumstances, I allow the appeal against sentence, set aside the two years' imprisonment and substitute therefor a fine of Kshs.5, 000/= in default six months' imprisonment.

DATED, SIGNED and DELIVERED at KISII this 27th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE