

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

Criminal Appeal 58 of 2008

JOSEPH KAMWEA MUSEMBI APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Joseph Kamwea Musembi was arrested and charged before the Kilungu SRM'S Court with the offence of being in possession of traditional liquor contrary to section 25 (1) of the Traditional Liquor Act, Cap 225. On 28/2/2008, he pleaded guilty to the charge and was sentenced to serve 4 months in prison.
2. The Appeal is substantially on the manner in which the plea was taken and on that point Mr Wang'ondy for the Republic concedes the Appeal.
3. I have seen the record of 28/2/2008 when the plea was taken. The learned magistrate never read the facts to the Appellant before convicting him. The Appellant never accepted the facts as being correct and the anomaly thereby is a fundamental error. The law as I understand it and as was well set out in Adan vs R (1973) EA 445 regarding plea taking was not followed in this case and the plea cannot be said to be unequivocal. That being the case, the proceedings thereafter were rendered a nullity and the conviction and sentence were also rendered a nullity.
4. Mr Wang'ondy, again correctly, does not seek a retrial because the Appellant had served more than 1 month of his sentence before he was released on bond pending appeal. The offence is minor and to subject him to another trial would be grossly unfair.
5. One more thing to say is that Cap 225 is the Kenya National Library Service Board Act and it has no section 25 (1) and it is not the Traditional Liquor Act either, so that in fact the whole charge was defective ab initio.
6. The Appeal has merit and the conviction is quashed, sentence set aside and the Appellant shall remain at liberty and shall have a refund of the Kshs.1,000/= cash bail that he had paid.
7. Orders accordingly.

Dated and delivered at Machakos this 4th day of June 2008.

ISAAC LENAOLA

JUDGE