REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
ATKISII

Criminal Appeal 16 of 2008

HELLEN NYABOKE GETANGE ………………… APPELLANT

VERSUS

REPUBLIC …….………………………………… RESPONDENT

(From original conviction and sentence in the Senior Resident Magistrate's

Court at Keroka Criminal Case No.961 of 2007 by HON ODUOR ESQ., S.R.M)

JUDGMENT

The appellant was charged with transporting chang'aa contrary to section 3(1) as read with section 4(1) of the Chang'aa Prohibition Act Cap 70 Laws of Kenya. The particulars of the offence were that on the 16th day of December, 2007 along Keroka-Kisii road in Masaba District, She was found transporting chang'aa in a matatu, registration number KAS 931Q, to wit, 20 litres.

The appellant pleaded guilty to the said charge. The prosecutor did not read out the facts of the case to the court. He merely stated: *"Facts as per charge sheet."*

The trial magistrate did not record that he had convicted the appellant on her own plea of guilty. He stated: "Accused plea of guilty entered." He then proceeded to sentence her to serve a jail term for a period of one year in addition to a fine of Kshs.10, 000/= in default three months' imprisonment.

The appellant was aggrieved by the sentence that was passed and appealed against the same. She argued that it was manifestly harsh and excessive. She further stated that the learned trial magistrate failed to consider her mitigation.

Mr. Kemo, Senior Principal State Counsel, did not oppose the appeal.

Section 4(1) of the Chang'aa Prohibition Act provides as follows:

"*Any person who contravenes any of the provisions*

of section 3 shall be guilty of an offence and

liable to a fine not exceeding ten thousand

shillings or to imprisonment for a term not

exceeding two years or to both such fine

and imprisonment."

From the above quoted penalty section of the law, the appellant could be sentenced to a fine or to imprisonment or to both fine and imprisonment upto such limits as stipulated therein. What is not clear regarding the sentence that was passed is the three months' imprisonment in default of paying the fine of Kshs.10, 000/=. Did the learned trial magistrate intend that the additional sentence be served concurrently with the one year imprisonment or consecutively? To that extent, the sentence was ambiguous. In such instances, the law requires that the trial court clearly specifies how the jail terms are to run.

There is one other serious issue regarding this appeal. The prosecutor did not read the facts of the case after taking plea. He simply stated –"*Facts as per charge sheet*".

In OMBENA VS REPUBLIC [1981] KLR 450 the Court of Appeal held that it was an error for a prosecutor to avoid reading out the facts of a case to a court and instead state – "*facts as per charge sheet.*" Reading of facts after entry of a plea of guilty is a mandatory step in criminal proceedings. It matters not that the facts may be almost identical to the particulars of the offence that are stated in the charge sheet.

As was stated in ADAN VS REPUBLIC [1973] E.A 445 as page 447:

"*The statement of facts serves two purposes:*

it enables the magistrate to satisfy himself

that the plea of guilty was really unequivocal

and that the accused has no defence and it

gives the magistrate the basic material on

which to assess sentence. It not infrequently

happens that an accused, after hearing the

statement of facts, disputes some particular

fact or alleges some additional fact, showing

that he did not really understand the position

when he pleaded guilty: it is for this reason

that it is essential for the statement of facts

to precede the conviction."

From the foregoing, the appellant's plea cannot be safely accepted as unequivocal. It is common

knowledge that in many instances Magistrates' courts have very many pleas to be taken and there may be pressure on the part of the prosecutors and the magistrates to go through the exercise as quickly as possible. That is fine, but an accused's rights should and must never be sacrificed at the alter of judicial expediency. In NDEGWA VS REPUBLIC [1985] KLR 535, the Court of Appeal held that no rule of justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of an accused person since he is the most sacrosanct individual in the system of our legal administration.

This appeal is hereby allowed. The conviction of the appellant by the trial court is quashed and the sentence set aside. The appellant is ordered set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISII this 14th day of July, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ondari for the appellant

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE