REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 151 of 2005

EVANS NJUNGE GATHONYE……..……. APPELLANT

-AND-

REPUBLIC……...……...RESPONDENT

(An appeal against conviction and sentence imposed by Mrs. M.W. Murage, Principal Magistrate, in Kikuyu

Law Courts Criminal Case No. 305 of 2005, on 14th March, 2005)

JUDGEMENT

The appellant had been charged with the offence of being in possession of the alcoholic beverage, *chang'aa*, contrary to s.3(1) of the *Chang'aa* Prohibition Act (Cap.70). That section provides as follows:

"*No person shall* ***manufacture, sell, supply, consume or be in possession of chang'aa."***

When the charge was read out and explained to the appellant, his response was: *"It is true."* He had nothing to say in mitigation, and, on that occasion, the learned Magistrate ordered the *chang'aa* the subject of the charge to be destroyed, and the appellant to serve for three months on Community Service Orders. A Probation Officer was required to prepare a report, and thereafter a mention was ordered to take place on 14th March, 2005. On that occasion the learned Principal Magistrate took note of the Probation Officer's report, and on that basis sent the appellant to jail for twelve months.

It is against the conviction and sentence that the appellant comes before this Court, and with a rather long petition of appeal which carries the following grounds:

(i) that, the trial Court erred in law in convicting him even when his plea of guilty was not unequivocal;

(ii) that, the trial Court erred in law, in not reading out the facts to the appellant;

(iii) that, the trial Court erred in law in failing to ensure that the charge was properly interpreted and was understood by the appellant who was unrepresented; that the trial Court erred in not recording the

exact language used, when the only language understood by the appellant was Kikuyu;

(iv) that, the trial Court erred in law, in convicting the appellant solely on the basis of the charge sheet, the facts on which were insufficient to disclose the nature of the offence, the type of *chang'aa* which led to him being charged, the penalty applicable;

(v) that, the trial Court erred in law in convicting the appellant, when the *chang'aa* the subject of the charge was not exhibited;

(vi) that, the trial Magistrate erred in law, in convicting the appellant without any expert analysis to confirm the contents of the *chang'aa* the subject of the charge;

(vii) that, the trial Magistrate erred in law, in sentencing the appellant to an excessive term of imprisonment (one year), without the option of a fine, at a time when she had already granted Community Service Orders and the same had not been set aside;

(viii) that, the trial Magistrate erred in law in sentencing the appellant to a term of one year's imprisonment, on the basis of a probation report which invoked records pertaining to another person (his wife), and which records were not produced in Court;

(ix) that, the trial Magistrate erred in law in sentencing the appellant to an excessive term of one year's imprisonment without considering his mitigation or the fact that his wife, ***Grace Waithera Kamau*** had been convicted on the same offence in Kikuyu Criminal Case No. 309 of 2005.

The foregoing detailed grounds of appeal were not, however, canvassed orally in Court; as the appellant, who appeared in person, confined himself only to a narrow range of points – and these did not necessarily coincide with the gravamen as formally lodged. The appellant chose to make his remarks only after learned State Counsel, ***Mr. Makora*** had presented the respondent's case.

Mr. Makora contested the appeal, as regards both conviction and sentence. He submitted that the appellant had verily pleaded guilty – and it was improper for him to make the claim now, that the plea before the trial Court had been anything but unequivocal. He urged that the sentence, as awarded by the trial Court, had not at all been excessive, and that, consequently, the appeal was for dismissing.

In his submissions for the respondent, learned counsel paid no regard to the several forensically-complex questions set out in the appellant's petition of appeal. And as already remarked, the appellant himself, who spoke after the State Counsel's submissions, made hardly any reference to those questions. All he said may be set out here:

"*The alcohol [in respect of which I was charged] was for my personal consumption. I ask that I be released. I have sufficiently reformed, and I am remorseful. I have already served three months of the jail term. I seek to be released."*

So, what effect is to be attached to the nine, apparently weighty grounds of appeal which had been set out as part of the petition of appeal?

The fact that the appellant did not canvass any of those grounds would show them not to have emanated from him, or that he had no conviction as to the merits of those grounds. On merits, therefore, those grounds are not at all part of the appellant's gravamen, and consequently he does not, in legal principle, deserve a hearing upon them. And so long as neither the appellant, nor the respondent's counsel would take up those grounds on appeal, they may be regarded as not being part of the appeal cause, and so are improperly before this Court.

And *afortiori*, the learned Judge (***Ochieng, J.)*** who on 9th May, 2005 admitted this matter to appeal hearing, had recorded that it was "admitted but only against ***sentence.***" The learned Judge, quite clearly, had considered the appellant's first ground of appeal: "that, the trial Court erred in law in convicting him

even when his plea of guilty was not unequivocal." It is clear to me, as it had been also to the learned Judge, that the appellant's response to the charge at plea-taking stage, *"It is true"*, could not have but one meaning: he was ***pleading guilty.***

It is provided in s.348 of the Criminal Procedure Code (Cap.75) that an appellant who has pleaded guilty in the trial Court can no longer question his conviction, but may only appeal *"as to the extent or legality of the sentence."*

Therefore, the appeal herein is only valid in law insofar as it questions the *sentence* meted out by the learned Principal Magistrate; and all the other grounds of appeal would have merited dismissal.

Yet, even in his presentation of the appeal the appellant did not expressly challenge the sentence of twelve months' imprisonment as awarded by the trial Court. Instead, the appellant urged that he should not have been convicted since the alcoholic drink which was the basis of the charge against him, was only for his personal consumption. The appellant, therefore, failed to conduct a proper appeal against *sentence,* before this Court. On that ground alone, the appeal, again, merited dismissal.

However, one of the grounds (No.(vii) as listed above) has raised a fundamental point that touches on the legal propriety of the sentence which is the subject of appeal.

On 7th March, 2005 the learned Principal Magistrate thus pronounced sentence:

"*Accused to serve 3 months' CSO [Community Service Order]. Right of Appeal, 14 days."*

With that pronouncement of sentence, it has to be considered, I think, that the Court had exhausted its jurisdiction, and what was now left was for the appellant to lodge an appeal as directed, within a period of two weeks. Yet, on that occasion, the learned Principal Magistrate still entertained an address by the Probation Officer, who said: "I seek mention on 14th March, 2005 [for the production of] a full [probation] report." And on 14th March, 2005 the learned Magistrate convened Court again, entertained the Probation Officer's full report, and varied the original sentence; in the learned Magistrate's words:

"*I have noted the [Probation Officer's Report]. A custodial sentence is called for…Accused to serve 12 months' imprisonment. Right of Appeal, 14 days."*

Learned counsel ***Mr. Makora*** in his submissions, did not address this Court on the legality of such variation of sentence. It is my belief that the Court, once it imposed the original sentence, lacked jurisdiction to reconstitute itself for the purpose of taking new evidence and on the basis thereof, pronouncing a different sentence.

It follows, therefore, that, in law, the new sentence of twelve months' imprisonment was an illegal one; and on this account it must be set aside as a nullity.

Owing to the illegal sentence handed down by the trial Court, the appellant has already been subjected to the hardship of serving a prison term, and it is not my inclination to further subject him to suffering. Consequently I hereby set aside the trial Court's sentence of 14th March, 2005, acquit the appellant, and order that he shall forthwith be set at liberty, unless held for some other lawful cause.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of May, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: G. Ndungu

For the Respondent: Mr. Makora

Appellant in person