



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

Criminal Appeal 163 of 2006

CATHERINE NKIROTEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the Judgment of A. K. Kaniaru, PM Nkubu on 6.11.2006 in Cr.Case No.2496/06)

JUDGMENT

This is an appeal from the decision of A. K. Kaniaru, PM. The appellant was charged before that court with being in possession of traditional liquor for sale without a licence contrary to Section 25(1) of the Traditional -Liquor Act (Cap.122-now repealed). The facts according to the charge sheet are that on 5th November, 2006 at around 9pm at Kariene area in Meru Central District, she was found in possession of 30 litres of traditional liquor, “Mugacha” for sale without a licence.

The appellant pleaded guilty and was sentenced, after conviction, to 6 months imprisonment on 6th November, 2006. Being aggrieved by this decision she preferred this appeal. She was subsequently granted bond pending the outcome of the appeal.

In her Memorandum of Appeal filed by the firm of V.P.Gituma, Advocate three grounds are listed, namely that the charge was not properly explained to the appellant, that no facts were presented by the prosecution; and that the sentence was excessive. Learned counsel for the respondent conceded the appeal on the ground that the facts were not read out.

I have looked at the original record as well as the record filed in this appeal and it is clear to me that in the original record what is translated in the typed record as “charge read over and explained” is simply recorded in an abbreviation as CRO&E. This is not acceptable in judicial proceedings where individual freedoms and rights to liberty are at stake. No amount of caseload would necessitate this kind of short-cut.

It is also clear from the record that the charge was read over and explained to the appellant “in English/Kiswahili/Kimeru. After that, the court prosecutor referred the trial court to the charge sheet for facts.

The correct manner of recording a plea of guilty and the steps to be followed by the court was laid down in the celebrated case of Adan V Republic, (1973) EA 446. This case was followed by Kariuki V R(1984) 809 where their Lordships reiterated those steps as follows;

(a) the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients

in the accused's language or in a language he understands;

(b) he should then record accused's own words and if they are an admission, a plea of guilty should be recorded;

(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply.

Turning to the appeal before me, it was not enough for the prosecutor to simply tell the trial magistrate and the trial magistrate to accept that "facts are per charge sheet". Charge sheets do not normally contain the details that would constitute facts.

Charge sheets contain only particulars of the offence. The prosecution is expected to outline the circumstances leading to the commission of the offence, although the proviso to Section 207(2) of the Criminal Procedure Code is not in mandatory terms.

In conclusion, the trial court failed to follow the provisions of Section 207(2) of the Criminal Procedure Code in recording the appellant's plea. This resulted into the appellant not having a satisfactory trial.

Where a suspect has not had a satisfactory trial the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant, as was held in the case of Muiruri, V R (2003) KLR 552.

Bearing in mind the repeal of the Traditional Liquor Act (Cap.122) by Act.No.17 of 2006, whose date of commencement is 1st May, 2007 it will not be in the interest of justice to direct that the appellant be retried. For these reasons, I will allow the appeal, set aside the sentence and quash the conviction. It is ordered that the appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MERU THIS 15TH OF JUNE, 2007.

W. OUKO

JUDGE