



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 11 of 2006

MARY AKEE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Mary Akee being aggrieved and dissatisfied with the conviction and sentence imposed upon him by Senior Resident Magistrate Mrs. S. Shitubi on 6th March has preferred this appeal on seven (7) grounds.

The charge is being in possession of chang'aa contrary to Section 3(1) as read together with Section 4 (1) of the chang'aa prohibition Act (Cap 70) Laws of Kenya.

The particulars are that on the 4th day of March 2006 at Malaba Township in Teso District within the Western Province jointly with 5 others namely, Moses Otieno, Joseph Okidi, Rose Nafula, Mary Otieno and Benard Kariuki, were found in possession of one litre of chang'aa.

The record of proceedings is as follows:

ACCUSED PRESENT

“The substance of the chang'aa and every element of it has been read to the accused and on being asked whether he admits or denies each and every element of the charge replies”

PLEA: Accused 1: True

Accused 2: True

Accused 3: True

Accused 4: True

Accused 5: True

Accused 6: True

PROS: Facts as per charge sheet. I produce the chang'aa (seen).

COURT: Each is convicted on own plea of guilty.

PROS: 1st accused has been severally convicted of the same. the rest are first offenders.

1ST ACCUSED: It is true.

MITIGATION: 1st accused: I pray for leniency.

2nd accused: I am a boda. It was a ceremony.

3rd accused: It was a ceremony.

4th accused: It was a ceremony.

5th accused: It was a ceremony.

6th accused: It was a ceremony.

SENTENCE: I have noted the sentiments expressed by the prosecution. 1st accused to serve 4 months in jail. Accused 2 – 6 each to pay a fine of Ksh.2000/= in default two months in jail. Right of appeal within 14 days.

Mr. Were for the appellant argued that the trial court erred in law in convicting the appellant when the plea was not unequivocal. That the facts were not read to the accused. The appellant was not given the opportunity to comment on the exhibits. The appellant was not given an opportunity to confirm if the facts were true or not. That the charge was defective in that the fact of being in possession was not sufficient. The charge should have stated that the accused was unlawfully in possession of the same. Last but not least the trial court never considered the mitigating circumstances.

Mr Onderi, for the Republic, did not oppose the appeal and in my view correctly. Facts as per charge sheet is meaningless. The charge contains the particulars. In any event the appellant was not given opportunity to plead to the alleged facts.

For those reasons, I allow the appeal, quash the conviction and set aside the sentence. The accused is set free unless held for some lawful purposes.

Dated and delivered at Bungoma/Busia this 9th day of May 2006.

N.R.O. OMBIJA

JUDGE

MR. ONDERI: For Republic

MR. WERE: For Appellant