



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 440 of 2005**

*(From Original Conviction and Sentence in Criminal Case No. 850 of 2005  
of the Principal Magistrate's Court at Kikuyu- M. W. Murage PM).*

**ALICE WAMAITHA NG'ANG'A.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was convicted on her own plea of guilty for the offence of being in possession of Chang'aa contrary to Section 3 (1) as read with Section 4 (1) of the Chang'aa Prohibition Act. The particulars of the charge were that the Appellant on the 26<sup>th</sup> day of July, 2005 at Kerwa Village in Kiambu District of the Central Province the Appellant was found being in possession of Chang'aa to wit two (2) litres.

Upon conviction on his own plea of guilty, the appellant was then sentenced to two years imprisonment. The appellant was aggrieved by the conviction and sentence and hence lodged the instant appeal through Messrs Muhuhu and Co Advocates. In petition of appeal, the appellant faults the trial court for convicting her on a plea that was not unequivocal, that the charge was not properly interpreted and understood by the appellant, that the date of the alleged offence differed from the date given in the facts by the Prosecutor, that the Chang'aa was not produced as an exhibit in Court and finally that the sentence imposed was manifestly excessive.

When the appeal came up for hearing, Mrs. Gateru, Learned State Counsel conceded to the same. The state conceded to the appeal on the ground that the Appellant was alleged to have been found in possession of was not tendered in Court as an exhibit. Counsel submitted that in the absence of such exhibit the Prosecution case was not proved.

Mrs. Muhuhu, learned counsel for the appellant wholeheartedly supported the states' position and prayed that the appeal be allowed, conviction quashed and the sentence imposed be set aside.

I have carefully, considered the facts of this case, the circumstances under which the alleged offence was committed and the submissions of the learned state counsel. In my view the offence for which the appellant was charged and convicted of was not proved to the required standard. Nowhere on the record is it indicated that the two litres of Chang'aa which allegedly found in possession of the Appellant were tendered in Court as an exhibit. This is not a matter that can be assumed. The Prosecutor ought to have satisfied the Court that the Chang'aa allegedly recovered from the Appellant was in Court and tendered the same as an exhibit. It was also necessary that the Prosecutor submits a Government analyst report to confirm whether what was being alleged to be Chang'aa was indeed Chang'aa. In the absence of such safeguards, I think the case for Prosecution as correctly submitted by the State Counsel was not proved.

I also noted that the dates given in the charge sheet and in the facts given by the Prosecutor differ materially. Whereas in the charge sheet it is indicted that the offence was committed on 26<sup>th</sup> July, 2005, however in the facts presented by the Prosecutor, the offence is alleged to have been committed on 26<sup>th</sup>

January, 2006. I have looked at both the original record as well as the typed proceedings and they are in tandem. This is a material discrepancy that cannot be easily overlooked. More so considering that the alleged Chang'aa was not introduced in evidence as an exhibit. On sentence, I note the Appellant was sentenced to two years imprisonment. This is the maximum sentence permitted under Section that the Appellant was charged. The Chang'aa if any was said to have been 2 litres. It was a small quantity to have attracted maximum sentence. I am aware that the appropriate sentence is a matter for the discretion of the sentencing Magistrate. This being the case the Magistrate must act judicially and not to award sentences capriciously. Of late, I have noted a trend where maximum and manifestly harsh sentences of imprisonment have been imposed on convicted persons on wrong factual basis. Though it is the duty of the Court to protect the public and punish and deter the Criminal, the trial Courts must adopt a uniformity of approach.

In the premises I allow the Appeal, quash the conviction and set aside the sentence imposed on the Appellant. The Appellant should forthwith be set at liberty unless she is otherwise lawfully held.

Dated at Nairobi this 14<sup>th</sup> day of June, 2006.

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**MAKHANDIA**

**JUDGE**