REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 38 OF 2006

(From original conviction and sentence of the Senior Principal Magistrate's Court at Kericho in Criminal Case No. 398 of 2006 – J. K. Ngeno [P.M.])

SUSAN WAMBOI…………………………...…..…APPELLANT

VERSUS

REPUBLIC……………………………..………..RESPONDENT

JUDGMENT

The appellant, Susan Wamboi was charged with being in possession of 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 21st of February 2006 at 6.30 p.m. at Majengo Estate in Kericho District, the appellant was found in possession of 13 litres of chang'aa in contravention of the **said Act**. When the appellant was arraigned before the trial magistrate, she pleaded not guilty to the charge. After a full trial the appellant was duly convicted as charged and was sentenced to serve one year imprisonment without an option of a fine. The appellant was aggrieved by her conviction and sentence and has appealed to this court.

In her petition of appeal, the appellant raised several grounds challenging her conviction and sentence. She was aggrieved that she had been convicted when no evidence had been adduced to connect her with the chang'aa which was produced in evidence. She faulted the trial magistrate for convicting her yet the prosecution had not established its case on the charge to the required standard of proof. She was further aggrieved that the trial magistrate had shifted the burden of proof and thus found her guilty of the offence charged. She was aggrieved that her defence was not considered by the trial magistrate before he arrived at the said decision convicting her. She was finally aggrieved that she had been sentenced to serve a custodial sentence which in her view was manifestly excessive without an option of a fine and without the trial magistrate considering her mitigation.

At the hearing of the appeal, Mr Oumo for the appellant submitted that the prosecution had not proved to the required standard that the appellant was in exclusive control of the chang'aa in question. He submitted that when the appellant was arrested, there were fifty other people at the scene who were drinking chang'aa. He submitted that the prosecution witnesses did not establish that the said chang'aa was found in exclusive possession of the appellant. He took issue with the fact that the chemical analysis report was produced by the investigation officer and not by the Government Analyst. He further submitted that there was evidence that the chang'aa which was produced in evidence was collected from

an office within the police station before it was labelled and allegedly confirmed to be the ones which were found in possession of the appellant. He submitted that the prosecution had not established to the required standard that it was the appellant who was in possession of the chang'aa at the time she was arrested. He urged this court to quash the conviction of the appellant and acquit her.

Miss Opati for the State submitted that the prosecution had led evidence which proved that on the 21st of February 2006 the appellant was found in possession of 13 litres of chang'aa. She submitted that the witnesses, who were police officers in civilian clothes laid an ambush and arrested the appellant. 13 litres of chang'aa were found in her house. The Government Analyst report was produced in evidence without the appellant making any objections. She recalled that the appellant had previously been convicted twice for committing the same offence. She urged this court to dismiss the appeal.

This being a first appeal in a criminal case, this court has a duty to re-evaluate the evidence adduced before the trial magistrate's court so as to reach a determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is mandated to put into account the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as regard the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the appellant to the required standard of proof beyond reasonable doubt. I have considered the submissions made before me by the parties to this appeal. I have also re-evaluated the evidence that was adduced before the trial magistrate's court.

Upon analyzing the evidence adduced by the prosecution witnesses, it is clear that the three police officers who testified before court caught the appellant red handed while she was selling chang'aa. The three police officers were dressed in civilian clothes and therefore did not raise suspicion on the part of the appellant. One police officer even bought a glass of chang'aa from the appellant. There is no doubt therefore that the said police officers identified the appellant as the one who was selling the chang'aa. Upon her house being searched, 13 litres of chang'aa were recovered. The said 13 litres of chang'aa were contained in one litre containers which were produced in evidence by the prosecution. Although the appellant claimed that they were more than fifty people at the scene drinking chang'aa, there is no doubt that it is the appellant who was selling the chang'aa. A case of mistaken identity does not therefore arise.

The appellant complained that the exhibits were tampered with when they were taken to the police station. Having evaluated the evidence adduced, it is clear that such tampering of the exhibits did not arise. The prosecution witnesses were positive that the chang'aa was recovered in 13 one litre containers. There was no evidence adduced to suggest that there were such similar containers at the police station when the said exhibits were taken to the police station. I therefore find the complaint made by the appellant in this regard to be without merit. The appellant further argued that the Government Analyst Report was produced in evidence without the maker thereof being called.

I have perused the proceedings of the subordinate court. When the investigating officer sought to produce the said report, the appellant did not raise any objection. **Section 77 of the Evidence Act** allows for the production of a Government Analyst Report without the maker thereof being called to testify before court. In the circumstances therefore the appellant is raising her objection before the wrong forum. She let the opportunity pass by when the said report was being produced at the trial. She cannot at this appellate stage complain that the said Government Analyst Report was improperly admitted in evidence. The upshot of the above reasons is that the appeal filed by the appellant against conviction lack merit and is hereby dismissed.

On sentence, the appellant was sentenced to serve one year imprisonment without an option of a fine. **Section 4(1)** of the **Chang'aa Prohibition Act (Cap. 70 Laws of Kenya)** provides the penalty to be meted out to a person who has been convicted for being in possession of chang'aa. It provides that such a person may be sentenced to a fine of Kshs 10,000/= or to 2 years imprisonment or both the fine and imprisonment. In the present case, the appellant was a repeat offender. She had previously been twice convicted for committing the same offence. In the two previous occasions she was fined. She paid the fines. It is obvious that the appellant still persisted in committing the offence. A deterrent custodial

sentence was therefore called for. The trial magistrate properly exercised his discretion when he sentenced the appellant to serve the said term of one year imprisonment without an option of a fine.

However, I have considered that the appellant, who has been in prison since the 22nd of August 2006 must have learnt her lesson. She now knows that if she is ever found in possession of prohibited liquor, she will serve a term in prison. In my opinion, she has sufficiently been punished. She is warned to desist from ever committing the offence again. I therefore exercise my discretion and set aside the sentence imposed by the trial magistrate on the 22nd of August 2006 and substitute it with a sentence of this court. I commute the sentence of the appellant to the period already served. The appellant is ordered released from prison and set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 30th day of November, 2006.

L. KIMARU

JUDGE