REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 150 OF 2005

GRACE WAITHERA KAMAU..……..……..APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

J U D G M E N T

The Appellant herein was sentenced to 12 months imprisonment after she pleaded guilty for the offence of **BEING IN POSSESSION OF CHANG'AA** contrary to Section 3(1) of the **Chang'aa Prohibition Act Cap 7**. The very first ground argued by the Appellant's advocate **MRS. MUHUHU** was that the charge was defective for being brought under Section 3(1) of the Act which provision does not create any offence. It provides: -

> ***"3(1) No person shall manufacture, sell, supply, consume or be in possession of chang'aa".***

The Respondent, through **MISS NYAMOSI** half heartedly conceded the point saying that the charge was defective and irregular for omitting to invoke the provisions of **Section 4(1)** of the **Act. MISS NYAMOSI** however, urged the Court to order a retrial since the Appellant would not be prejudiced.

Section 4(1) of the Act provides;

> ***"4(1) Any person who contravenes any of the provisions of section 3 shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both such fine and imprisonment."***

The charge as framed was fatally defective since the section of the law which created the offence and provided for the penalty was not quoted. Section 3(1) of the Act upon which the prosecution relied only prohibits, inter alia, the possession of Chang'aa. It does not make it an offence to possess the stuff. The omission to invoke that provision rendered the charge defective. The defect is incurable under **Section 392** of the **Criminal Procedure Code** and I doubt that any retrial could be ordered in the circumstances.

There were many other anomalies with the proceedings of the Court on that day. Despite being given an opportunity to do so, the prosecution did not lead any facts of the case. The prosecutor informed the Court that he relied on the particulars of the charge for the facts of the case. That was irregular and at that point the learned trial magistrate had a duty to enter a plea of not guilty and call the prosecution to adduce viva voce evidence to prove their case. It is now trite law that the facts of a prosecution case during the plea taking serves at least two purposes. It assists the Court in determining whether the accused person understood the charge and the circumstances of the offence charged. Secondly, it enables the Court to

satisfy itself that indeed the accused person had no defence for the offence. See the case of **Adan vs. Republic 1973 EA 445.**

After facts of the case are led by the prosecution, the accused person should be given an opportunity to either admit the facts or dispute, explain or vary them. By so doing the Court is able to determine whether the plea entered is equivocal or unequivocal. Without facts of a prosecution case the Court cannot be sure whether the Appellant really understands what it is he is accused of doing and whether he has any offence. It is prejudicial to the Appellant if the Court convicted the Appellant in such circumstances.

The learned counsel for the Appellant urged the Court to find the sentence excessive on grounds that no option of fine was made. Looking at the proceedings, I find that after convicting the Appellant on her own plea of guilty, the Court decided that the Appellant should serve under Community Service Order for a term of 3 months. Apparently, **MR. OCHILLO** a Probation Officer was in Court and he sought time to prepare a report. The report he prepared was unfavourable to the Appellant prompting the Court to sentence the Appellant to imprisonment for 1 year. **MRS. MUHUHU** challenged the decision to imprison the Appellant on grounds that the previous record quoted by the Probation Officer in his report was not produced in Court. Therefore, it could not have been relied on.

In her remarks on sentence the learned trial magistrate noted;

"SENTENCE

I have noted P.O.R. Accused is not a first offender. She has been fined severally. A deterrent sentence is called for. Accused is sentenced to 12 months imprisonment."

On the issue of sentence, I find that the learned trial magistrate erred in ordering that the Appellant serves under Community Service Order without first calling for a Probation Officer's Report. Section 3(3) of the Community Service Orders Act No. 10 of 1998 makes it mandatory for a report to be made by a Community Service Order Officer before a sentence under that order is passed.

Secondly the learned trial magistrate made no reference to the amount of Chang'aa found with the Appellant. If she did, I am persuaded that the learned trial magistrate would have imposed a much shorter sentence or would even have given an option of fine. Finally the learned trial magistrate adopted the Probation Officer's report on the Appellants previous record without giving the Appellant an opportunity to be heard. The Appellant had a right to be heard on that allegation particularly due to the fact that the alleged record was not in court. Having considered this Appeal for the foregoing reasons, I find that the plea was equivocal, the charge fatally defective and the sentence manifestly excessive. I quash the conviction and set aside the sentence.

The Appellant has been in prison since 7th March 2005. Even if it was open for this Court to order a retrial, the Appellant has suffered sufficient punishment for the offence charged. She should be set at liberty unless she is otherwise lawfully held.

Dated at Nairobi this 27th day of April 2005.

LESIIT

JUDGE

Read, signed and delivered in presence of;

LESIIT

JUDGE