

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 117 of 2005

**(From Original Conviction and Sentence of the Senior
Resident Magistrate's Court at Sotik in Criminal Case No.
2100 of 2005 (L.N. Mugambi –S.R.M.**

ZAKARIAH KIPTANUI LANGATAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Zakaria Kiptanui Langat, was charged with the offence of being in possession of traditional liquor contrary to **Section 25(1) of the Traditional Liquor Licencing Act Cap 121 of the Laws of Kenya**. The particulars of the charge were that on the. When the appellant was arraigned before the lower court, he pleaded guilty to the charge. He was sentenced to serve six months imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised three grounds of appeal challenging the decision of the trial Magistrate in convicting and sentencing him. He was aggrieved that he was charged and convicted under the wrong provision of the law.He was faulted the trial Magistrate for sentencing him to a custodial sentence without an option of a fine as provided by the law. The appellant was aggrieved that he had been sentenced to a harsh custodial sentence yet he was a first offender.

During the hearing of the appeal, Mr Rono the Counsel for the appellant, submitted that the serious issue that the appellant was challenging was the decision of the trial Magistrate on the issue of sentence. Mr Gumo, the Assistant Deputy Public Prosecutor, left the issue of said sentence to the court. I have considered the grounds of appeal put forward by the appellant. The appellant ought to have been charged under **Section 25(1)** as read with **Subsection (4) of the Traditional Liquor Act and not Section 25 of the Liquor Lincencing Act**. In the premises therefore the appellant was charged and convicted under a defective charge. However since the appellant did not challenge the defect to the charge when he pleaded to it before the trial Magistrate and the fact that he pleaded guilty to the said charge after the facts were read to him clearly shows that he understood the charge and pleaded to the correct charge.

Under **Section 382 of the Criminal Procedure Code**, such defect in the charge cannot be a reason for this court to reverse the said finding of guilty the appellant's on own plea as entered by the trial Magistrate. In the circumstances of this case, I hold that no failure of justice was occasioned to the appellant as a result of the said mistake in quoting the wrong law under which the appellant ought to have been charged. In the circumstances therefore, I will substitute the charge which the appellant pleaded guilty to and was convicted to be the charge of being in possession of traditional liquor contrary to **Section 25(1)** as read with **Subsection (4) of the Traditional Liquor Act**.

The appellant pleaded guilty to the charge and therefore cannot challenge his conviction on this appeal.

On sentence, the appellant ought to have been given an option of a fine before being sentenced to serve six months imprisonment. In the premises therefore, the sentence of six months imprisonment meted out without an option of fine was illegal. I will therefore set aside the said sentence of the lower court and substitute it with a legal sentence of this court. The appellant is hereby sentenced to pay a fine of Kshs.6,000/- or in default he shall serve six months imprisonment. The sentence shall take effect from

the 22nd of July 2005 when the appellant was convicted and sentenced by the trial Magistrate.

It is so ordered.

DATED at NAKURU this 3rd day of August 2005.

L. KIMARU

JUDGE