

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 258 of 2003

(From Original conviction (s) and Sentence (s) in Criminal Case No. 669 of 2003 of the Senior Resident Magistrate's Court at Kangundo N.N. NJAGI on 25/8/03)

MAGDALINE WANZA MWANZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original conviction (s) and Sentence (s) in Criminal Case No. 669 of 2003 of the Senior Resident Magistrate's Court at Kangundo N.N. NJAGI on 25/8/03)

J U D G E M E N T

Magdalene Wanza Mwanza, was convicted of the offence of Possession of Traditional Liquor Contrary to Section 25 (1) of the Traditional Liquor Act Cap 122 Laws of Kenya. After a plea of guilty, she was sentenced to a fine of Kshs.20,000/= in default 12 months imprisonment.

She was aggrieved by the conviction and sentence and appealed against both. She did not however wish to be present at the hearing of the appeal.

Mr O'Mirera, learned state counsel conceded to the appeal for reasons that the prosecutor who conducted the proceedings in the lower court was incompetent rendering the lower court proceedings a nullity. He did not ask court to order a retrial because the appellant has already served sentence and it would amount to double jeopardy and that it is a petty offence not worth going for retrial.

It is Police Constable Mbonge, who prosecuted before the lower court when the plea was taken on 25/5/03. Section 85 (2) Criminal Procedure code and Section 88 Criminal Procedure Code provides that a prosecutor will be appointed by the Hon. The Attorney General from police officers of the rank of acting Inspector and above or Advocates of the High Court. Police Constable Mbonge, was not an Advocate or a police officer above the rank of acting Inspector. The proceedings before the lower court are therefore a nullity and are declared as such.

From the record, it is not indicated what language the court used in reading the charge to the appellant; no facts were read to the court. Though it was a petty offence, the fact that the magistrate was going to mete such a harsh sentence called for all the facts being taken. In my view, the plea was not properly taken and the proceedings before the lower court were therefore defective.

Even the sentence meted out of the appellant was illegal. For an offence under Section 25 (1) the sentence is provided for under Section 25 (4) which is a fine not exceeding Kshs.6,000/= in default a term not exceeding 6 months imprisonment. Even if the prosecutor had been qualified the plea and sentence were both defective and illegal and the court has no otherwise but quash the conviction, set aside the sentence and the sum of Kshs.15,890/= paid to court as fine on 6/11/03 be released to the appellant.

R.V. WENDOH

JUDGE

Dated at Machakos this 12th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE