Lokai v Republic (Criminal Revision E004 of 2025)
[2025] KEHC 10628 (KLR) (Crim) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10628 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CRIMINAL

CRIMINAL REVISION E004 OF 2025

SC CHIRCHIR, J

JULY 17, 2025

BETWEEN

AKIRU LOKAI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant's Notice of motion dated 26/3/2025 seeks for a review of the trial's court rulings dated 17/3/2025 and 18/3/2025 delivered by the Chief Magistrate's Court at Isiolo in Criminal Case No. E048 of 2025. The court is being asked to determine the correctness, legality and propriety of the Rulings.

2. It is the Applicant's belief that the trial did not meet the threshold of a fair trial; that she was charged and convicted on the basis of a non-existent law, that the charge sheet was defective and that the plea was unequivocal.

3. The Applicant further states that the charges as framed, brought in unknown elements in law such as "illicit brew", that there were discrepancies on the dates of the alleged offence; that there was duplicity of the charges and finally that, the ingredients of the offence were not proved particularly with the use of the word, "Kanyara".

4. It is for the above reasons that the Applicant seeks that the decision of the trial court be quashed.

Applicant's Submissions

5. It is submitted that the wrong citation of the statute as No.4 of 2020 instead of 2010 likely misled the Accused, making the charge defective. In this regard, the decision in Sigilai v Republic was relied on.

6. It is also submitted that Section 4 of the Act was misused and misleading, as the Section simply outlines the functions of NACADA County Committee and has nothing to do with the offence herein.

7. The Applicant further submits that the combination of the word "chang'aa" and "Kanyara" in the charge sheet was duplicitous and violated the accused's right to understand and defend herself against specific allegations. It is further submitted that the term "illicit brew" is not defined in the Act or listed as a prohibited drink in the Act. Consequently, it is argued, the use of such terms rendered the offence uncertain and unsustainable in law. It is also submitted that due to the above defects in the charge sheet then the plea was unequivocal.

8. It is the Applicant's final submission that the trial court failed to consider the Applicant's mitigation , the option of a non-custodial sentence and utility of a pre-sentencing report. That the said omission amounts to unfair hearing and contrary to Article 5(2)(q) which grants the Accused the right to the benefit of the least severe sentence.

9. Respondent submissions?

Determination

10. Section 362 of the *Criminal Procedure Code* mandates the High Court to review the decisions , proceedings, orders or sentences of the subordinate courts with a view to ascertaining the correctness, legality or propriety of the such decisions.

11. The Applicant was charged with the offence of " being in possession of illicit brew contrary to section 27(1)(b) as read with section 4 of the *Alcoholic Drinks control Act* No. 4 of 2020(sic). The particulars of the offence were that on the 16th day of February 2025 at around 14. 30 hours t Archer's post township in Samburu East sub- county within Samburu county willfully and unlawfully was found in possession of illicit brew namely " kangara" to wit 200 litres which was packed in ten, 20 litre jerrycans and " chang'aa to wit 15 litres packed in 3.5 litres clear bottles that had neither a statement as constituents nor health warning messages which do not conform with the requirements of the Act in contravention of the said Act.

12. The Applicant has faulted the decision on a number of grounds. Firstly, the Applicant has cast doubts on whether the trial met the threshold of a fair trial. However, she has not pointed out the aspects of fair trial that have been violated. The same applies to the question of whether or not the plea was unequivocal. This has not been explained at all and from the proceedings of the trial court, I do not find any ambiguity or fault in the manner the plea was taken.

13. The other issue that has been raised is the defectiveness of the charge sheet.

14. The Applicant has questioned the validity of having the word " changaa" and "Kanyara" in the same charge sheet and whether the use of the two separate words amount to duplicity of the charge. It is also stated that the charge refers to Alcoholic Control *Act No. 4 of 2020* which is a non-existent law. The Applicant further contends that "illicit brew" is lacking in specificity and that the word "illicit brew" does not exist in law in any event.

15. She asserts that the above references, rendered the charge sheet defective. The question that arises is whether the word "illicit brew" which do not exist in the Act and the words " kanyara and "changaa" in the same charge sheet rendered the charge sheet defective.

16. section 134 of the *Criminal Procedure Code* sets out the components of a charge sheet. It provides as follows:-"Every charge or information shall contain, and shall be sufficient if it contains, a statement of

the specific offence or offences with which the accused person is charge, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

17. On the defects, Section 382 provides the effects of a defective charge sheet. . The section provides in part:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:..."

18. The test to be applied if the defects in a charge sheet renders it fatal is well settled. In Benard Ombuna v Republic [2019] KECA 994 (KLR) the court of Appeal adopted the findings of the supreme court of India in Willie (William) Slaney v State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], where it was held:- "Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

19. The court also cited its past decision in the case of Isaac Nyoro Kimita & another v R [2014] eKLR where

> " In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge?" [Emphasis added]

20. Back to the present case, on the existence of Alcoholic Control *Act No. 4 of 2020*, the error is on the year on which the Act was passed, as the Alcoholic Control Act No.4 is for the year 2010 ,not 2020. I believe the error was clerical, was inconsequential and did not occasion any prejudice to the Applicant.

21. It has also been contended that the description of the alcoholic drink as "illicit brew" has the effect of introducing new terminologies into the Act. However, the Act does not list specific brands of Alcoholic drinks. It simply defines what "alcohol" , "Alcoholic drink" and under part IV, the conditions which an Alcoholic drink must meet.

22. Section 2 of the Act defines " alcohol" as "the product known as ethyl alcohol or any product obtained by fermentation or distillation of any fermented alcoholic product, rectified either once or more often, whatever the origin, and shall include synthetic ethyl alcohol, but shall not include methyl alcohol and alcohol completely denatured in accordance with the prescribed formulas" . While "Alcoholic drink" is defined to include : "alcohol spirit, wine, beer, traditional alcoholic drink, and any one or more of such varieties containing one-half of one percent or more of alcohol by volume, including mixed alcoholic drinks, and every liquid or solid patented or not, containing alcohol, spirits wine or beer and capable of being consumed by a human being."

23. In my view therefore the name used whether "chang'aa" or "kanyara" is as inconsequential as if the brand had been described was "Tusker", "Vodka" or indeed " kanyara" etc. Such descriptive words

cannot be held to invalidate a charge sheet as the Act only recognizes an Alcoholic drink, not the various brand names.

24. Section 27(1)(b) under which the Applicant was charged, makes it an offence to possess an alcoholic drink that do not conform to the requirements of the Act. According to the charge sheet, the alcoholic drink in question did not have neither a statement as to its constituents nor health warning messages.

25. The above are the requirements set out under Section 32 of the Act. The section provides as follows:

> "
>
> "(1) Subject to this section, no person shall—
>
> a. Manufacture
>
> b. Input
>
> c. Sell or distribute
>
> An alcoholic drink unless the package containing the alcoholic drink conforms to the requirements of subsection (2)
>
> (2) Every package containing an alcoholic drink shall:
>
> a. Bear a statement as to its constituents; and
>
> b. have at least two health warning messages prescribed under Second Schedule in English and Kiswahili "(Emphasis added)

26. what must not be lost sight of therefore is that what constitutes the offence is failing to meet the set standards .

27. The Applicant has further argued that considering that the Applicant was alleged to have been in possession of "chang'aa" and "kanyara" then there should have been two separate charge sheets. As stated, before the Act or regulations thereunder do not list alcoholic drinks as such. Whatever named was used to identify it was is immaterial. What was material was that the Applicant was found in possession of an Alcoholic drink which do not meet the specifications set out by the Act. The same argument applies to the use of the word " ilicit brew". It was immaterial. Thus the separate reference or the use of the word " illicit brew" could not invalidate the charge sheet. Inversely, the charge sheet would have been defective if the above terminologies were used, but failed to indicate what specifications did the alcoholic drink failed to meet.

28. Am satisfied that the charge sheet was sufficiently drawn for the Applicant to have understood the charge she face and suffered no prejudice . I find no fault that warrants an order of revision on the conviction of the Applicant.

Sentence

29. On the sentence, it is submitted that the trial court failed to consider mitigation, the option of non-custodial sentence and utility of pre-sentencing report.

30. The proceedings of the lower court show that the Applicant was given a chance to mitigate and that her mitigation was considered. There is no mandatory requirement for the court to call for a pre-sentencing report, and therefore failure to order for a pre-sentencing report cannot be said to be incorrect, illegal or an act of impropriety.

31. The Applicant was however entitled to an option of a fine. Section 27(4) provides that a person who contravenes the provisions of this Section commits an offence and shall be liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding 5 years or to both".

32. The Applicant was a repeat offender and the record shows that the said fact informed the sentence meted out. However, that notwithstanding, I am of the view that where an option of a fine is available, an accused person should be given that option , and the fact that she was a repeat offender cannot be a reason to deny her a fine, save that the amount of the fine should reflect the aggravating effect of being a repeat offender.

33. In the end, it is my finding that:

    a). The Applicant was properly convicted.

    b). The sentence is hereby varied to the extent that he Applicant is hereby fined Ksh. 200,000 and in default, to a prison term of 12 months.

    c). The sentence is deemed to have taken effect from 17/3/2025 being the date when the Applicant was first arraigned in court.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 17 TH DAY OF JULY 2025.

S.CHIRCHIR

JUDGE.

In the presence of:

Roba Katelo- Court Assistant

Akiru Lokai- The Applicant

Mr. Ngetich for the Respondent.