



**Gichoho & 2 others v Republic (Criminal Appeal E026 of 2022)  
[2024] KEHC 8426 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E026 OF 2022  
DKN MAGARE, J  
JULY 8, 2024**

**BETWEEN**

**JOHN MACHARIA GICHOHO ..... 1<sup>ST</sup> APPELLANT**

**SABINA WANGARI NJOKI ..... 2<sup>ND</sup> APPELLANT**

**SAMUEL KAROKI NJERI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgement of the Trial Court, Hon. D.K. Matutu, Principal Magistrate in Mukurwe-ini PMCSO No. 347 of 2020.
  - i. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants was charged with the offence of contravening the provisions of prevention, control or suppression of COVID -19 Directive issued by the Cabinet Secretary pursuant to Section 36(m) as read with Section 164 of the [Public Health Act](#).  
  
The particulars of offences were that on 8<sup>th</sup> August 2020, at around 2030hrs at Mihuti Shopping Centre, of Mukurweini sub county within Nyeri County, were found selling alcoholic drinks at K10 Bar and Restaurant to customers who were drinking therein in contravention of the directions issued by the Cabinet Secretary for Health on prevention, control and suppression of the COVID-19.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were also charged on Count II with selling alcoholic drinks without a licence contrary to Section 37(1) as read with Section 62 of the [Alcoholic Drinks Control Act](#) 2010.
3. 1<sup>st</sup> and 2<sup>nd</sup> Appellants were charged with an alternative to this count, of failing to display a licence contrary to Section 20(1) as read with Section 63 of [Alcoholic Drinks Control Act](#).



4. The Third Appellant was charged with the offence of contravening the provisions of prevention, control or suppression of COVID-19 Directive issued by the Cabinet Secretary pursuant to Section 36(m) as read with Section 164 of the [Public Health Act](#); -

“The particulars of offences were that on 8<sup>th</sup> August 2020, at around 2030hrs at Mihuti Shopping Centre, of Mukurweini sub county within Nyeri County, was taking alcoholic drinks at K10 Bar and Restaurant to customers who were drinking therein in contravention of the directions issued by the Cabinet Secretary for Health on prevention, control and suppression of the COVID-19.”

5. The charges facing the Appellants had been consolidated. However, the Appeal appears to be for the three parties. It is composite appeal by appellants contrary to section 347 of the Criminal Procedure Code, which provides as follows: -

- “(1) Save as is in this Part provided-
- (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
  - (b) Repealed by Act No. 5 of 2003, s. 93.
- (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.”

6. An appeal shall thus be filed individually not as a crowd. This is buttressed by Section 347 of the Criminal Procedure Code, which provides as follows: -

- (1) Save as is in this Part provided—
- (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
  - (b) Repealed by Act No. 5 of 2003, s. 93.
- (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

7. The Supreme Court of India, in the case of; Prem Lala Nahata & vs Chandi Prasad Sikaria (2007) stated as follows on consolidation of cases: -

“...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the Court that, some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits



8. Section 135 (1) of the Criminal Procedure Code (cap 75) Laws of Kenya, that deals with consolidation of cases provides as follows;

“(1) Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information, if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.”

9. However, Appeals are to be filed separately and if need be, can be consolidated. In this case, I do not find it necessary to address the issue of a joint Appeal.

10. The Appellants were presented before the Trial Court and denied the charges against them and a plea of not guilty was entered. The matter proceeded to full hearing. The Trial Court considered the case and rendered the Judgement where he found the Appellants guilty of all the counts as charged. The Court found the Appellants guilty and convicted them for the offences.

11. The Appellants, aggrieved, lodged this Appeal. In the Petition of Appeal filed on 5<sup>th</sup> July 2022, the Appellants pleaded that the Trial Court erred in law and fact in:

- a. Failing to find that the charges against the 1<sup>st</sup> and 2<sup>nd</sup> Appellant did not raise any offence.
- b. Failing to find that the Prosecution had not achieved the required standard of proof beyond reasonable doubt.
- c. Ignoring the Appellants’ Defence.
- d. Ordering for the destruction of the 1<sup>st</sup> Appellant’s property.
- e. Meting out sentence that was harsh and excessive.

## **Evidence**

12. PW1 was PC Elizabeth Mwikali. It was her case that around 8.30 p.m., she visited the Mihuti Bar on information that it was operating and customers were drinking. They were in the company of SGT Jane, PC Mutembei, and PC Consolata. That the 1<sup>st</sup> Appellant refused to open the door and they broke into the bar to gain entry and found customers. She marked the inventory of the items that were recovered from the bar.

13. On cross examination, it was her case that the Appellants were selling when the bar should have been closed. They prepared an inventory which the accused declined to sign. The bar was closed. They used crowbars to open. They stated that they opened the bar and carted away several beers and assorted alcoholic drinks. At least there was no open one. There were 6 people who were arrested. Two people were selling and a third one was a customer. Evidence of previous offence, though not admissible was recorded. The customers were found dining.

14. The witness indicated that she did not know if the licence had been issued. She admitted that all bars had been closed in 2020. She stated that she did not read Nyeri Alcoholic Drinks Management Act. She stated that the establishment had hotel with accommodation license but the accused had no license for 2020. It is impossible to imagine what intelligence some people use, the licenses were suspended. In short no one had license to sell alcohol in 2020.

15. PW2 was PC Godfrey Mutembei. He was on duty and there was total closure of all the bars owing to COVID-19 Pandemic. He accompanied PW1 and observed movement of people around the bar.



- People were buying alcohol from the back door. The customers moved to first floor and continued taking drinks. The bar owners raised an alarm on them. In cross examination, it was his case that he was not the investigating officer. That the Appellants contravened COVID-19 Regulations.
16. PW3, was Sgt. Jane Mtagata. She stated that they could see people and drinks being served from a distance and raided the bar. That there was no license and none was produced. She stated that the revelers moved from ground floor to 1<sup>st</sup> floor and continued drinking. They broke into the bar and recovered several items which were inventoried in the police station. The alcohol was in some corridor. She produced 25 exhibits as listed.
  17. She stated that they did not carry glasses but carried half bottles taken by customers. The alleged missing half bottles were not produced but said to be in police custody. The cartons were unopened and could not be drunk by the 4 people alleged to be in the bar.
  18. She stated that she did not see any lodging. This is nice piece of evidence. There was no enquiry on the same. The county government had authority to issue the licences. The officers from the county, who had the duty and responsibility to issue licenses had already followed the law earlier and issued license for accommodation. A person cannot be jailed for inattentiveness, select amnesia and shoddy investigations.
  19. The court placed the Appellant on their defence. The first Appellant gave sworn testimony. He stated that he had 4 guests who were lodgers. That it was past curfew hours. He was asleep within the premises. He heard a bang and thought there were robbers and raised alarm. He later learnt that these were police officers.
  20. He further stated that the residents were flashed out and lodgers escorted to the police station. The witness was ordered to open where there was alcohol but stated that the key was in the office at Kiahungu. He had kept alcohol for all his three bars in the premises due to insecurity. The OCS ordered that all the Alcohol be moved to the van waiting outside. The three lodgers and his caretaker were booked. The lodgers were given 2,000/= bond and 10,000/= for caretaker. He stated that beer was in the store.
  21. He stated that beer was locked and not for sale. He stated that he paid 50,000/= for hotel and 32,000/= for restaurant. He stated that he had a license under Section 17(4) of the Nyeri Alcoholic Drinks Control Management Act. He stated that he could not display a license in a store. The license is displayed at the counter. The attendant has no responsibility to display the license.
  22. He stated that there were 5 rooms and they had been inspected in 2018. He produced the license. He also had an application for renewal together with the inspection report before licensing. He also had a search certificate and receipts for accommodation. And had a current license showing rooms were still in use. He also produced a clearance certificate. He questioned why no glasses were taken or keg cups. He invited the court to visit the premises at his cost.
  23. He was wondering how a person can come from Mweiga for beer? He stated he had their identity details. He stated the charges were instigated by his opponent for a civic seat.
  24. He stated in cross examination that the license expired on 30/6/2019. He also testified that the whole stock was taken and confiscated. That the premise was closed for about 4-6 months and the license was inside the counter.
  25. It was his case that the police officers broke into the premises to arrest and confiscate beer. No inventory was done at the store but at the police station.



26. The second Appellant was a worker at the hotel and she was the one who wrote receipts. She stated that she was charged earlier for selling alcohol during Covid-19. That she was advised by a police officer to plead guilty. This was irrelevant evidence that is useful only in sentencing.
27. DW2 continued that she was asleep in the premises. She stated that the police came at 10 p.m. as the curfew was starting at 9 pm. She stated that the police broke into the premises. They took Ksh. 770/= from her bag but was recorded in the cells.
28. The 3<sup>rd</sup> Appellant testified that he was from Muranga and was lodging in the hotel having completed his business of buying and selling tomatoes. He took a bath in his room. Later, he heard a bang and came out. He noted that some people broke windows and went into the premises. It is not indicated in which room he was but it was not raised.
29. He further testified that the owner called him to come out as it was the police. Unfortunately, he was arrested and charged. They found no alcohol, bill or bear on him. He swore that he did not breach of the COVID-19 Regulations.
30. It was his case that no alcohol test was done and the charges were false. That he was a lodger in the 1<sup>st</sup> Appellant's premises and was arrested as such. DW1 was recalled and testified and produced cash bail receipts and letter to Independent Police Oversight Authority and a response.
31. Submissions were filed and exchanged. The court stated that he had analyzed the evidence and found the appellants guilty of all counts and convicted the appellants. After mitigation the court sentenced the Appellants as follows:
  - a. On count 1, the 1<sup>st</sup> [and 2<sup>nd</sup>] Appellants were sentenced to pay a fine of Kshs. 15,000/- in default 3 months imprisonment.
  - b. On count 2, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to pay fine of Kshs. 15,000/- in default imprisonment of 2 months.
  - c. On count 3, the 3<sup>rd</sup> Appellant to pay Kshs. 5,000/= in default to serve 2 months imprisonment.
  - d. All alcohol drinks confiscated to be destroyed.
  - e. Books of accounts to be released to the 1<sup>st</sup> Appellant.
  - f. Crates and other containers forfeited to the state.
  - g. Proceeds forfeited.
32. The Appellants filed Appeal as aforesaid. The parties agreed to proceed by way of written submissions. The court already admitted the same despite its defect. The court herein cannot set aside those orders. The matter shall proceed as consolidated appeals.

### **Submissions**

33. The Appellant filed submissions on 12<sup>th</sup> July 2023. It was submitted that the charge was defective as Section 36(m) related to Minister making rules for the object of prevention, control and suppression of infectious diseases. They relied on *Sigilai v Republic (2004) 2 KLR* to submit that an offence charged must be known in law. Justice L. Kimaru as he then was stated as follows in that matter: -

“The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able



to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional underpinning.”

34. The Appellant relied on Section 17 (4) of the Nyeri County Alcoholic Management Act to submit that there was an application for license and so it would not be said that the Appellant had no license at the time of the arrest.
35. On the part of the Respondent, they filed submissions on 13<sup>th</sup> March 2024. It was submitted that the conviction and sentence were proper and should be upheld.
36. The Respondent submitted that the Appellants admitted that the license had expired. They submitted that the prosecution proved the offences beyond reasonable doubt.
37. The respondent submitted that the forfeiture of the items was conceded. On this, it was submitted that the court properly applied the proportionality principle. They relied on *Jones Nzioka & Another v Republic* (2020) eKLR.

### **Analysis**

38. The issue is whether the trial court erred in convicting and sentencing the Appellants as he did. It must be recalled that the Appellant had a specific offence and the state was under duty to show that the offence occurred. In the first court, two people were charged with failing to display a license. Before proceeding with such, the state was under duty to find who the duty bearer was. In this case, the 2<sup>nd</sup> Appellant was a caretaker of the 1<sup>st</sup> Appellants’ premises. She had absolutely no duty to ensure the firm was in compliance with any law, that is not personal to her.
39. If she was required to undergo medical examination and does not do so, the duty to be examined can be attributed to her. However, compliance with licensing requirements is the duty of the owner. In this case, it was the Appellant.
40. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

41. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

42. It was held by the Court of Appeal in *Moses Nato Raphael vs. Republic* [2015] eKLR as doth:
- “What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
43. The disputation is not whether or not there was a license or not. The dispute was that liquor was in a store and there had been closure for more than 6 months before the raid. It was not in dispute that the doors were firmly closed and no one was arrested serving at the counter. There were no glasses or any evidence of beer being found in the premises in a state of use. The only evidence was that there was liquor in the store.
44. In a bid to nail the Appellants, in what appeared to them as a water tight case, the police removed beer from the stores and loaded them into a van. An inventory was done at the police station. The chain of custody was lost. We do not know whose beer they were carrying. I have seen a hand written note purporting to be an inventory. One of the key elements of the inventory is to identify the batch number and possibly the date of manufacture and expiry date. An inventory done at the premises will identify each of the items. What was brought in court is a document the last person believed was from the premises of the 1<sup>st</sup> Appellant.
45. I do not find sufficient evidence to show that the chain of custody was maintained. I have no doubt that cartons of liquor were carted away by the police. There is no evidence that it is the same liquor produced in court.
46. The evidence was displaced by the defence evidence that they were sleeping. There was undisputed evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Appellant were in the premises but the 3<sup>rd</sup> Appellant was in the 1<sup>st</sup> floor. Surely, what was the 3<sup>rd</sup> respondent buying when he was not found with any item looking like liquor.
47. There was no dispute that the premises were having bar and accommodation, and possibly a restaurant. There were no non lodgers who were arrested. The people who were being sold to alcohol were not arrested. Why will anyone display a license at night with a closed door? Even if the license was expired or not the premises were closed at night. The 1<sup>st</sup> Appellant stated that the license was in the drawers. He produced the same. There is no requirement for display when the business is closed.
48. The Appellants submitted that as the Application for license renewal had been done, the expired license would be deemed applicable pending the issuance of the renewed license. They relied on Section 17(4) of the Nyeri County Alcoholic Management Act. I note the impugned section provided as follows:
- “Where an application for renewal of a license has been made and the county committee has not by the date of expiration of the license reached a decision thereon, such license shall continue in force until a decision of the County Committee is made known.”



49. There was no evidence from the county government of Nyeri that they authorized the police to swoop on the premises for their licenses. In any case, the licenses were not operational due to the restrictions owing to the Covid-19 pandemic. As such, there could not be said that a license was available to produce or display. Therefore, the conviction on the charge of selling alcoholic drinks without a license and failing to display a license were untenable.
50. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants could not produce or display a license when the licenses were suspended. Like was admitted by the 1<sup>st</sup> Appellant in his testimony, bars were closed owing to the Covid-19 pandemic menace. Why display a suspended license? When licenses are not in force, the requirement to display is equally suspended. There is no offence, of failure to display a suspended license.
51. As to the breach of Covid-19 Directives, I understand that the challenge herein revolves around the public order and public health measures that were adopted during the Covid-19 pandemic.
52. The consequential Public Order Rules were enacted pursuant to Section 8 *Public Order Act*, CAP 56 that provides for Curfew orders while the Public Health Rules were enacted pursuant to Section 36(m) of the *Public Health Act*, CAP 242 which provides for rules for prevention of disease.
53. Section 36(m) of the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 required that the minister for health makes rules in case of threat by the pandemic, for the purpose of prevention, control and suppression of the infectious disease; in this case Covid-19.
54. There was no evidence whatsoever that the 3<sup>rd</sup> Appellant breached the rules. It is unnecessary to go into the question of validity of the charge when the evidence available was that the 3<sup>rd</sup> Appellant was a lodger. He was entitled to sleep where he was. He was woken up when the police were breaking and entering into the premises.
55. They had no probable cause to do so. They did not know that the closed store or even bar did not have a license. This was not a cognizable offence. There was need for a warrant to be issued. None was issued. I shudder to imagine if the breakage occurred, hoping there was absence of owners. There was no explanation for the police presence in the premises. It was not pursuant to any serious intelligence. I do not take it seriously that the police were monitoring the premises and could not arrest anyone in the act or did they?
56. I find all the charges baseless and are accordingly set aside. The sentences are equally set aside. In any case the sentences were not severe. An appellate court would interfere with the discretion of a trial court on the issue of sentence. An appellate court would interfere only where there exists a marked departure or excessive sentence or illegal sentence. In the case of *Ogalo Son of Owuora vs. Republic* (1954) 21 EACA 270 as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James vs Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R vs. Shershewcity* (1912) C.CA 28 T.LR 364.”
57. The sentences were otherwise correct had the offences been proved.



58. Section 37(1) of the *Alcoholic Drinks Control Act* under which the Appellant was charged provides for the offence of selling liquor without a license in the following terms:

“If any person purchases any alcoholic drink from a licensee whose license does not cover the sale of that alcoholic drink for consumption on the premises, and drinks the alcoholic drink on the premises where it is sold, or in any premises adjoining or near to those premises, if belonging to the seller of the alcoholic drink or under his control or used by his permission, or on any highway adjoining or near any such premises, and it is proved to the court that the drinking of the alcoholic drink was with the privity or consent of the licensee who sold the alcoholic drink, the licensee commits an offence.

59. Section 62 of the said Act is a general penalty clause. It provides as follows: -

“Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.”

60. The police trespassed into closed premises on false pretense of looking for persons selling alcohol. They ignored the fact that the premises had lodgings. They could not produce any evidence of sale of Alcohol. Indeed, there were no glasses. I expect, those consuming alcohol to be brought with their alcoholic drinks.

61. The court below was not disturbed that the police were breaking into a store to get to alcohol. Storing alcohol is not a crime. The suspension of licenses did not authorize pouring of the alcohol in the store. The police were simply on a frolics terrorizing bar owners who had already closed their businesses.

62. It is rather abuse of powers to open and break into a store at night, like a thief without a probable cause. Though not proved, the defence that the raid was instigated by the opponents looks more plausible than imaginary.

63. The police needed a warrant to break into a store that was not an active crime scene. The defence of being lodgers was plausible. It was the duty of the State to displace that defence. It was a plausible defence.

64. The Appellants raised issue that they were lodgers and the alcohol was in a store. I do not expect 4 people to consume the cartons of alcohol of all assorted brands. I will have expected, to have drinking glasses for the keg. For the unschooled, this is a 20 litre metallic barrel. It cannot be consumed directly without being pumped out into glasses.

65. The evidence tendered by the defence raised reasonable doubt as to the charge of breaking Covid-19 protocols. It is irrelevant whether there were more lodgers than had been provided. They have not been charged for violating licensing requirements.

66. It is the county government to complaint on breach of its laws. The overzealous police action led to the unfortunate events where the police had to break into a lodging and store. The most drastic of all these is that the police failed to take inventory at the scene. It is my hope that this was not a heist. It is surprising that some exhibits could not be produced because they were in police custody. It is not beyond imagination that the missing exhibits were destroyed by consumption by persons other than the 3<sup>rd</sup> Appellant, before an order was issued.

67. In the circumstances, I find that the charges against all the Appellants in relation to Covid-19 are untenable. The court believes the Defence evidence. The 3<sup>rd</sup> respondent was a lodger. The 1<sup>st</sup> and 2<sup>nd</sup>



Appellants were adults and as such owed no one an explanation why they were sleeping at the lodge when there were no businesses.

68. Therefore, I set aside, conviction in all the three counts and order that a refund be given to the Appellant of the fines paid.
69. The offence under Section 37 does not have a specific prescribed sentence. Therefore, Section 62 of the *Alcoholic Drinks Control Act* applies. Under this provision, the sentence prescribed is a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.
70. The other sentence related to forfeiture is tied to licenses and cannot be enforced after setting aside. On the sentence, Section 389A of the Criminal Procedure Code provides guidance. The same provides as follows: -

“(1) Where, by or under any written law (other than section 29 of the Penal Code), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown; and, at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things: Provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.

(2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.”

71. The court did not conduct forfeiture proceedings. The alcohol forfeited and the proceeds are not shown to be subject of the charges. The alcohol was not sold. Further, it was in the store. The alcohol was equally not counterfeit. The owner was entitled to possession. If forfeiture was required, it is a sentence that has to be dealt with. I therefore set aside the order of forfeiture, was irregularly issued.
72. The appeal against licensing, having been allowed, the order for forfeiture is set aside. The state ordered that Alcoholic drinks, proceeds, containers and crates to be forfeited to state. The procedure for forfeiture was not followed. No notice of forfeiture was served.
73. In any case, the licensing offence was not proved and as such no basis was laid for forfeiture. The goods shall be returned to the owners within 30 days, in default the owners shall be entitled to recover the same in civil proceedings enforcing this judgment. It is unknown whether the goods are available but it is recoverable in civil suit.
74. In the upshot, I make the following Orders:



- a. Conviction and sentence on all the three counts against all the three Appellants is unsafe and as such the same is hereby set aside and in lieu thereof, I substitute with an order dismissing all the three charges against each of the Appellants.
- b. All fines paid should be refunded. The Appellants are set free unless otherwise lawfully held.
- c. The Appeal against forfeiture of Alcoholic drinks, proceeds, containers and crates is allowed. The state to return all the said containers, Alcoholic drinks, proceeds, containers and crates within 30 days failing which the owners to recover the same in a civil suit enforcing this judgment.
- d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 8<sup>TH</sup> DAY OF JULY, 2024.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms Kaniu for the State

The Appellants absent

Court Assistant - Jedidah

