



**Chemengu v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 15921 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E035 OF 2023
REA OUGO, J
OCTOBER 3, 2024**

BETWEEN

BEATRICE NAMACHI CHEMENGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from Judgment, Conviction and Sentence of Principal
Magistrate Court at Sirisia (Hon R.K Langat) delivered on 14th June 202)*

JUDGMENT

1. The appellant, Beatrice Namachi, was charged with the offence of dealing in alcoholic drinks without a licence contrary to section 7 (1) (b) as read with section 62 of the Alcoholic Drink Control Act No of 4 of 2010. The particulars being that on 4th June 2021 at Cheptais Market, in Cheptais sub-county within Bungoma County, the appellant was found with alcoholic drinks to wit 6 litres of Chang'aa without a liquor licence contrary to the requirements of the *Alcoholic Drinks Control Act*.
2. At the end of the defence hearing, the trial magistrate found that the prosecution had proved the offence beyond reasonable doubt. He convicted the appellant of the offence and sentenced her to a 6-month community service.
3. The appellant aggrieved by the conviction and sentence has lodged a memorandum of appeal raising the following grounds:
 1. The learned trial magistrate Hon. J.O Manasses failed to evaluate the prosecution evidence properly and left trial issues undermined.
 2. The learned trial magistrate failed to note that Exhibit No 2, report of the government analyst was not stamped by Government Chemist Department Kisumu Laboratory P. O. Box 2006-40100 Kisumu to prove it was an official document from that department.



3. That the learned trial magistrate failed to note that Exhibit No 1, five (5) litres yellow jerrican was not labelled by government chemist department Kisumu Laboratory to prove that it was sent to that department and was from the department and is official exhibit.
 4. That learned trial magistrate failed to note that it took the prosecution witness eleven (11) months and 27 days to take the exhibit to the government chemist and six months to record the statements whereas the appellant was arrested and charged in court after 3 days.
 5. That the trial court failed to note that the prosecution was overruled by contradiction i.e. Pw1 No 238803 Inspector Bernard Rono his statement in police station contradicts with his own statement in court and also contradicts with Pw2 No 90773 PC Elisha Sitienei.
 6. That learned trial magistrate failed to note that Pw2 No 90773 PC Elisha Sitienei his statement in the police station contradicts with his own statement in court and also contradicts with Pw1 statement in court.
 7. That learned trial magistrate failed to note that Pw1 No 238803 inspector Bernard Rono in his evidence in court testified that he recovered six (6) litres Chang'aa in yellow Jerrican while Pw2 No 90773 Elisha Sitienei in his evidence testified that he recovered yellow 5 litre Jerrican whereas in OB/NO 24/4/6/2021 booked 20 litres of Chang'aa (2) resisting arrest and (3) curfew order for Beatrice Namachi the appellant.
 8. That learned trial magistrate failed in law and facts swiftly discounted appellant written defence and submissions and misdirected himself by relying on the evidence of Pw1, Pw2 and unproved Exhibit No 1 and 2 and convicted the appellant to serve six (6) months CSO tangible manual work at chief's office whereas the appellant suffers from hypertension and arthritis unable to bent and walk.
 9. That learned trial magistrate failed to note that the offence escalated due to bad relationship between the appellant and the police officers from Cheptais police station arising from the collapse and stopped the business of exhibits from Cheptais Police Station and signing and guarantee of the appellant's ill depressed husband's loan for their own benefit.
 10. The record made by justice is raddled with omissions rendering the trial a nullity.
4. This being a first appellate court, I am under a duty to analyze and evaluate all the evidence adduced before the lower court afresh and draw my own conclusions, bearing in mind that I neither saw nor heard any of the witnesses testify (see Okeno vs. Republic [1972] EA 32).
 5. No 238808 Bernard Rono (Pw1) testified that on 4/6/2021 at 20:50 hours vide OB No 23/04/06/21 they were booked out on patrol within Cheptais sub-county. They proceeded to a residential house belonging to the appellant as she was suspected to be dealing in illicit brew. They found persons in the house taking illicit brew and after a thorough search they found 6 litres of illicit brew believed to be chang'aa that was hidden adjacent to the kitchen and covered with an iron sheet. The appellant was charged in court and the illicit brew was taken to the government chemist.
 6. No. 90773 PC Elisha Sitienei (Pw2) testified that on 4/6/2021 there was a general curfew in place due to the Ministry of Heath Covid-19 pandemic. Pw2 in the company of fellow police officers from the station set out on general patrol. They encountered a group of people who ran away when they saw them. The group came from the appellant's compound. They entered the appellant's compound and found a cup that had a pungent smell indicating illicit brew. They searched the appellant's house and in the room that serves as the kitchen, they found several 20-litre containers with water. They also found a stone placed on the wall and removed it. There was an iron sheet being shielded by the stone.



They removed it and found a yellow 5-litre jerrican that was full to the brim with the illicit brew. They arrested the appellant and charged her before the court. Pw2 testified that they later took the exhibit to a government chemist in Kisumu for analysis and the analyst confirmed the contents to be chang'aa. He produced the illicit brew as Pexhibit1 and the government analyst report as Pexhibit 2.

7. When placed on her defence, the appellant asked the court to adopt her defence plus annexures to her defence. In her statement of defence dated 15th June 2023, she testified that her relationship with the police at Cheptais Police Station was good and that the police even rented a room at her place where they sold their goods. In September 2020, Inspector Rono informed her that they had a stock of 15 twenty-litre jerricans of liquid and two bells of dried leaves worth Kshs 38,000/- and authorized her to find customers. However, in October 2020, the police ambushed some of their customers and took away goods worth Kshs 22,000/- and the customers blamed the appellant. The police had come to collect their money but she had given the goods to the customers without collecting money from them and a grudge developed. She testified that the police instigated Sasuri Co-operative Society Officials to grab her plot at Cheptais Market and the officials threatened to kill her. She testified on the material day Inspector Rono and Pc Sitienei stormed into her home and told her that she conned them Kshs 38,000/-. They arrested her and charged on 7th June 2021.
8. The appellant in her submissions argues that the statement of Pw1 contradicts his testimony in court and is further at variance with the evidence of Pw2. She pointed out that Pw1 testified that they recovered 6 litres of illicit brew while Pw2 testified that they recovered a 5-litre jerrican. The initial report OB/NO 24/4/6/2021 reveals that the appellant was booked with 20 litres while the charge sheet reads 6 litres. The appellant submits that there was no label from the government chemist to show Pexh1 was from their department and that Pexh2 was not stamped. It also faulted Pw1 and Pw1 for taking 11 months and 27 days to send Pexh1 to the government chemist.
9. She further submits that she was framed due to the grudge between her and Pw1, Pw2 and OCS Dinner Mwita. She appeals against the sentence because she is hypertensive, has arthritis and is unable to walk.
10. The respondent submits that the appellant was sentenced to serve six (6) months of community service. The judgment against her was delivered on 14th June 2023 and the same was to lapse on 14th December 2023. It was submitted that the prayers sought in the appeal were overtaken by events.

ANALYSIS AND DETERMINATION

11. I have carefully considered the evidence on record, the appeal, and the submissions by the parties, and the issues before the court are twofold: whether the prosecution proved its case beyond any reasonable doubt against the appellant's defence; and whether the sentence meted out by the trial magistrate was excessive.
12. The appellant was charged with the offence of dealing in alcoholic drinks without a licence contrary to section 7 (1) (b) as read with section 62 of the Alcoholic Drink Control Act No. of 4 of 2010. The relevant sections read:
 7. Control of alcoholic drinks
No person shall—
 - (a) manufacture or otherwise produce;
 - (b) sell, dispose of, or deal with;....



any alcoholic drink except under and in accordance with a licence issued under this Act.

62. General Penalty

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.

13. Pw1 and Pw2 testified that after searching the appellant's premises, they found the appellant with 6 litres of chang'aa. The appellant in her submissions has argued that from the testimony of Pw1 and Pw2, the amount of the chang'aa retrieved was not clear. However, Pw1 testified that they found 6 litres of the illicit brew while Pw2 testified they recovered chang'aa in a 5-litre Jerrican container that was full to the brim. Ordinarily, most 5-litre liquid containers always have some extra space and when filled to the brim, the weight of the contents is likely to be more than 5 litres. Pw1 and Pw2 pointed out that the jerrican was full to the brim and the chang'aa was 6 litres. Pexh 2 which was stamped noted that the contents in the jerrican were a colourless liquid that contained 34.48% alcohol by weight equivalent to 41.25% alcohol by volume or 72.20% proof spirit. The report by the government analyst concluded that the liquid was chang'aa.
14. The appellant in her defence testified that she was framed by Pw1, Pw2 and OCS Dinner Mwita after they gave her 15 twenty litres of jerrican full of liquid and two bells of dried leaves and she failed to give them money from the business. However, from the cross-examination of Pw1 and Pw2, it did not emerge that the appellant and the two witnesses had any business with the appellant. On cross-examination, she asked for the whereabouts of her husband who worked with Pw1 and the evidence from Pw1 and Pw2 was that on the material day, her husband was stationed at the duty reports office. The appellant in her submissions argued that there was a grudge on account of the officers having acted as guarantors to her husband's loan, however, no evidence was tendered to prove the same.
15. There was no evidence of a grudge between Pw1 and Pw2. Furthermore, the search was conducted by a team of policemen on patrol. Pw1 and Pw2 testified that people were running from the appellant's premises after curfew hours who had been drinking the illicit brew.
16. The appellant in her submissions also questioned the conduct of investigations. She took issue with the number of statements taken and the time taken to conclude the investigations including the time that lapsed before Pexh1 was sent to the government chemist. Criminal investigations are done by the inspector general and the officers employed thereunder. Article 245 (4) (a) of *the Constitution* provides that no person may give direction to the Inspector-General concerning the investigation of any particular offence. There was no evidence that investigations were not properly conducted by Pw2. The prosecution proved that the appellant had 6 litres of chang'aa and was dealing with alcoholic drinks without a licence.
17. According to section 62 of the Alcoholic Drink Control *Act No. 4 of 2010* the penalty for the offence is a fine not exceeding five hundred thousand shillings, or imprisonment for a term not exceeding three years. The trial magistrate before sentencing called for a pre-sentence report. The report indicates that the appellant was the breadwinner of her family, suffers from hypertension and arthritis and is remorseful. The trial magistrate therefore sentenced her to 6 months of community service. The sentence was thus proper in the circumstances.
18. In the end, I find no merit in the appeal, and the same is hereby dismissed in its entirety.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 3RD DAY OF OCTOBER 2024.

R.E. OUGO



JUDGE

In the presence of:

Beatrice Namachi Chemengu/Appellant - Present in person

Miss Mwaniki -For the Respondent

Wilkister -C/A

