REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.E014 OF 2021

JUDITH ADHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

[1] Judith Adhiambo (**The appellant**) was charged in the Chief's Magistrate's Court at Busia with two counts of selling alcoholic drinks, contrary to s. 7(**1**) (**b**) read with s.62 of the Alcoholic Drinks Control Act No.4 of 2010.

It was alleged that on the 15th June 2021 at Namuduru-Samia within Busia County, the appellant was found selling alcoholics drinks name "changaa" and "Mulingilo" to wit eighty (**80**) and one hundred (**100**) litres respectively, without a licence.

[2] After seemingly pleading guilty to both counts, the appellant was sentenced to pay a fine of ksh.40,000/= for count one and in default to serve six (**6**) months imprisonment and a fine of ksh.50,000/= for count two and in default to serve one (**1**) year imprisonment. The sentences were to run concurrently and the alcoholic exhibits were to be destroyed in the manner provided by law.

[3] Being dissatisfied with the sentence, the appellant preferred the present appeal on the basis of the grounds set out in the memorandum of appeal filed herein and dated 17th June 2021. She therefore prays for the appeal to be allowed, the conviction be quashed and the sentences set aside and/or varied. She appeared in person on the hearing of the appeal and fully relied on her written submissions in support of the appeal.

[4] The Republic/Respondent was represented by the learned prosecution counsel, **Mr. Mayaba**, who also relied on his written submissions in which the appeal is conceded on the main ground that the plea taking process or procedure undertaken by the trial court was faulty such that the appellant was prejudiced as the language used was not properly recorded and the facts did not inform the appellant the basis on which the charges were founded.

[5] Basically this appeal is on sentence. In the circumstances, the role of this court was to revisit the plea taking procedure undertaken by the trial court to determine whether or not the sentence was lawful and if so, whether it was excessive.

There can be no sentence without a conviction which must of necessity be proper, sound and lawful.

[6] Herein, it is pre-supposed that the appellant pleaded guilty on all the two counts and was convicted accordingly by the trial court. In normal circumstances, if the plea was properly and lawfully taken by the trial court, then the resulting conviction and sentence would be lawful. However, this was not the case in this matter. It is therefore very easy to understand why the respondent conceded the appeal and requested for a re-trial of the matter.

In sum, this appeal turns on the manner in which the plea was taken by the trial court.

[7] A perusal of the trial court's record clearly indicates that the plea taking process or procedure was manifestly faulty and resulted in an unlawful sentence against the appellant as it did not meet the threshold or guidelines provided by the Court of Appeal in the old case of **Adan Vs. Rep** (**1973**) **EA 445**, to wit:-

> **"[1] The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands,**
>
> **[2] The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.**

[3] The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

[4] If the accused does not agree the facts or raise any question of his guilty his reply must be recorded and charge of plea entered,

[5] If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

[8] It is axiomatic that the trial court failed to take into consideration the aforementioned guidelines, for instance, the language understood by the appellant was not indicated or recorded even though the record shows that the appellant used the Kiswahili language by saying "ukweli" or "si ukweli". It cannot be presumed that the appellant understood the Kiswahili language simply because the record shows that she gave an answer in that language. Nowhere in the trial court record is it shown that necessary translation was carried out during the proceedings.

[9] Most importantly, the trial court did not record the facts and read them over to the appellant accused. What was recorded is simply the words. "As stated". Ironically, no facts were stated by the prosecution as required. The omission by both the court and the prosecution effectively denied the appellant an opportunity to dispute or explain the facts. Indeed, the statement "As stated" was not sufficient to establish that the apparent plea of guilty was unequivocal (see, **Ombena Vs. Rep** [**1981**] **eKLR**).

[10] It is instructive to note that even after the appellant answered the charge by admitting the offences, a plea of guilty should have been entered immediately by the trial court but was not. Instead, the trial court seemingly asked for the facts of the case which in any event were not stated by the prosecution and thereafter the plea of guilty was entered. This was unprocedural as the plea of guilty should have been entered after the appellant admitted the charge. The facts of the case were to follow immediately thereafter.

[11] In the Adan case (**supra**), the court stated that:-

"The statement of facts serves two purposes. It enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional facts, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essentially for the statement of facts to precede the conviction."

[12] In normal circumstances, after the statement of facts is narrated to the accused and he approves it without any corrections, the court would record a finding of guilty on own plea and proceed to convict the accused accordingly. In this case, this procedure was ignored, neglected and/or flouted altogether by the trial court. As it were, the appellant was actually sentenced before being convicted. This clearly shows that the sentences imposed on the appellant on both counts were unlawful "*ab-intio*" and inasmuch as they were founded on "quicksand", this court is compelled to allow this appeal by quashing the purported conviction and setting aside both sentences without orders for a re-trial of the case as it is doubtful whether the subject alcoholic drinks are still in existence considering that the trial court made an order for their destruction. Ultimately, the appellant is forthwith set at liberty unless otherwise lawfully withheld.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED AND SIGNED THIS 12TH DAY OF OCTOBER 2021]