REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO.11 OF 2019

JANETH ROTICH...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the conviction and sentence in Bomet SPM Criminal

Case No. 1110 of 2017 (Hon. P. Achieng (PM) dated 27th February 2019)

JUDGMENT

1. The appellant herein was convicted by the Magistrate's Court at Bomet of possession of alcoholic drinks without a licence contrary to section 27 (1) (b) as read with section 27 (4) of the Alcoholic Drinks Control Act No.4 of 2010 and sentenced to serve two (2) years imprisonment on 27th February 2019.

2. She has now come to this court on appeal through counsel Kenduiwa Nelson Cheruyoit & Company Advocates on three grounds of appeal as follows-

> **1. The magistrate erred in law and facts by passing excessive sentence against the appellant herein, even after presenting to court her mitigation.**
>
> **2. The magistrate erred in law and facts by relying entirely on the evidence of the prosecution witnesses, not considering the defence of the appellant.**
>
> **3. The magistrate erred in law and facts by not granting the appellant an option of fine which is provided for by the Act.**

3. The appellant's counsel also filed written submissions to the appeal. At the hearing of the appeal, the appellant's counsel Mr. Kenduiwa relied on the written submissions filed and added that the magistrate did not consider the mitigation of the applicant before sentencing that the appellant who was a single parent. According to counsel, the magistrate also did not consider the option of a fine provided under section 27 (4) of the Act and felt that the appellant should not have been denied the option of fine only on the reason that she had two previous convictions.

4. Counsel submitted in the alternative, that the conviction of the appellant was not proper as the trial court relied only on the evidence of two chiefs to convict the appellant in the absence of any independent witness in light of the defence of the appellant.

5. Mr. Muriithi for the State opposed the appeal and said that on receipt of information, the two chiefs proceeded to the appellant's house and recovered the 20 litres of changaa. According to counsel, the investigating officer who conducted further investigations was an independent witness. Counsel also emphasized that the appellant tendered an unsworn statement which denied the State the chance to cross-examine her to establish its veracity.

6. With regard to sentence, Mr. Muriithi submitted that a deterrent sentence was necessary for this serial offender, as the illicit liquor could be harmful to the public.

7. I have considered the appeal and perused the proceedings, judgment and written submissions. I have also considered the oral submissions from both the appellant's counsel and counsel for the State. As a first appellant court, I am bound to re-evaluate the evidence and come to my own independent conclusions-see **Okeno –vs- Republic [1973] EA 32.**

8. The burden is on the prosecution to prove any criminal case against an accused person beyond any reasonable doubt. The case of the prosecution herein was grounded on the evidence of two witnesses both chiefs. They are PW1 Reuben Ngetich and PW2 Selina Kilele who said that they visited the home of the appellant on information received and recovered 20 litres of changaa in the presence of the appellant, when the customers of the appellant ran away. The appellant gave an unsworn defence stating that the changaa was found on nearby land which did not belong to her.

9. In my view, the evidence of PW1 and PW2 and that of the investigating officer PW3 PC John Cheruiyot proved the charge against the appellant beyond any reasonable doubt with regard to possession. PW3 produced the report of the Government Analyst confirming that the liquid substance recovered was changaa. It is noted that the appellant did not put any questions to PW1 and PW2 questioning their evidence that the substance was found in one of her two houses. The conviction was thus proper as the evidence of the prosecution was overwhelming.

10. With regard to sentence, there is no contention that the option of a fine was not provided for by the statute. However, since there is no doubt that the appellant was a habitual offender with two previous convictions for similar offences, I find that the trial court did not err in imposing a prison sentence without the option of a fine to deter the appellant from future similar offences.

11. It is not disputed that the appellant has young children, who are likely to be affected by the prison sentence. In view of the favourable conditions imposed by the Constitution under Article 53 on matters concerning or affecting children, therefore, I will reduce the sentence in order to create some relief in favour of the children of the appellant not the appellant herself. For clarity, Article 53 (2) provides as follows-

> "*53 (2) A child's best interests are of paramount importance in every matter concerning the child."*

I will thus interfere with the prison term imposed.

12. Since the prison term for the appellant herein, affects her children and the appellant has already served a year of the 2 years prison term, I order that the appellant will serve the sentence already served herein to date. In effect, the appellant is to be released from prison forthwith, unless otherwise lawfully held.

Dated and delivered at Bomet this 2nd day of March 2020.

George Dulu

JUDGE