



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL REVISION NO. 8 OF 2019**

**GRACE KETER.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case No. 371 of 2019*

*in the Senior Principal Magistrate's Court at Kapsabet delivered*

*by Hon. P.W. Wasike, RM on 29 January 2019)*

**RULING**

[1] On **29 January 2019**, **Grace Keter**, the Applicant herein, was arraigned before Kapsabet Senior Principal Magistrate's Court in **Criminal Case No. 371 of 2019: Republic vs. Grace Keter**, charged with two Counts under the **Nandi County Alcoholic Drinks Control Act, No. 6 OF 2014**. In Count I, she was charged with Manufacturing Alcoholic Drinks without a licence contrary to **Section 8(1)(b)** as read with **Section 64** of the **Nandi County Alcoholic Drinks Control Act**; in that on the **28 January 2019** at about 10.00 Hours at Silgam Village within Nandi County, she was found with 30 litres of Kangara, an ingredient she was using to brew an alcoholic drink, namely changaa, without a licence.

[2] In Count II, the Applicant was charged with Dealing with alcoholic drinks without a licence, contrary to **Section 8(1)(b)** as read with **Section 64** of the **Nandi County Alcoholic Drinks Act**. It was alleged that on the **28 January 2019** at Silgam village within Nandi County, she was found dealing with alcoholic drinks to wit Changaa without a licence. The Applicant admitted the Charges and was convicted on her own Guilty Plea, and was sentence to pay a fine of **Kshs. 30,000/=** on Count I, in default to serve 3 months Imprisonment; and in Count II, she was sentence to pay a fine of **Kshs. 10,000/=** in default to serve 1 month's Imprisonment.

[3] This application was promptly filed on her behalf on **1 February 2019** by Stephen Too seeking that the proceedings of the lower court be called for and scrutinized for propriety and legality pursuant to **Sections 362(1)(b), 364 and 365** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**. The record of the lower court was accordingly called for and has been scrutinized by this Court. That record confirms that the Learned Trial Magistrate took the plea in accordance with **Section 207** of the **Criminal Procedure Code**, and the steps set out in **Adan vs. Republic (1973) E.A. 445, followed. In the case aforementioned, those steps were set out thus:**

*“(i) 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;*

*(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*

*(iii) 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;*

*(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;*

*(v) 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.”*

[4] The record of the lower court shows that the Charges were read to the Applicant in Kiswahili language and her response recorded in that

language. The facts were then read and the 30 litres of Kangara and 5 litres of Changaa produced before the lower court as exhibits and marked **Prosecution's Exhibit 1 and 2**. The Applicant responded to the facts by unequivocally stating that the facts were true. Her response was recorded by the Learned Trial Magistrate in Kiswahili, whereupon a conviction ensued. The Applicant was then called upon to express herself in mitigation; which she did. It is manifest therefore that the plea was unequivocal.

[5] The Court has similarly scrutinized the provisions of the law pursuant to which the Charges were laid and note that, in respect of Count I, there appears to be a variance between the Charge, the Particulars thereof and the facts set out in support of that Count. The Charge in Count I was laid pursuant to **Section 8(1)(b)** of the **Nandi County Alcoholic Drinks Control Act**, which states that:

**"No person shall--**

**...**

**(b) sell, distribute or dispose of, or deal with any alcoholic drink in the County except under and in accordance with a licence issued under this Act."**

[6] However, the Charge in Count I, as laid, was Manufacturing Alcoholic Drinks without a licence, an offence provided for in **Section 8(1)(a)** of the Act. The facts were then stated as follows:

**"She was found making changaa (P Exhibit 1). Police officers on 28/1/2019 at 10.00 a.m. Administration Police Officer from Kaptumo reached home of the accused and found her with 5 litres changaa and 30 litres kangara (P Exhibit 2) without licence. She was making changaa."**

[7] It was therefore not demonstrated by the Prosecution that the Applicant was selling, distributing, disposing of, or dealing with an alcoholic drink as provided for in **Section 8(1)(b)**, the provision pursuant to which Count I was laid. Moreover, in **Section 2** of the Act, **"alcoholic drink"** is defined as including:

**"...alcohol, spirit, wine, beer, liquor, 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, modified industrial alcohol blended for human consumption and every liquid or solid, patented or not, containing alcohol and capable of being consumed by a human being;"**

[8] It is now settled that Kangara is not an alcoholic drink but an ingredient for making an alcoholic drink known as Changaa. In **Gladys Cherotich V. Republic in HCCRA No. 3 of 2015 (Bomet)** for instance, **Hon. Ongudi, J.** expressed the view that:

**"... Kangara is not an alcoholic drink but a substance used in distilling changaa which is an alcoholic drink."**

[9] *The same position, which I entirely agree with, was taken by Hon. Makau, J. in Hilda Atieno vs. Republic [2016] eKLR thus:*

**The particulars of the charge in the instant case refers to the drink found with the appellant as "Kangara" to wit hundred litres (100) an alcoholic drink that does not conform to the requirements of the Alcoholic Drinks Control Act 2010. Section 2, on definition of "alcoholic drink." do not have "Kangara" amongst the list of alcoholic drinks. The learned State Counsel submitted that "Kangara" is a substance used in distilling of changaa. The State Counsel confirmed Kangara is not an alcoholic drink but a substance used in making a changaa drink. The appellant should have been charged with a different offence other than being in possession of an alcoholic drink as "kangara" is not an alcoholic drink as pointed out but a substance used for the purpose of making changaa which itself is an alcoholic drink. I have noted from the aforesaid Act, that possession of such substance as "kangara" has not been criminalized and as such the appellant could not be charged with non-existent offence. Similarly a plea could not be taken on a defective charge as was the case in the instant case.**

[10] Consequently, the charge and sentence imposed on the Applicant in respect of Count I in **Kapsabet SPM's Criminal Case No. 371 of 2019** is clearly untenable. I would accordingly quash the conviction recorded against the Applicant in **Count I** and set aside the sentence imposed on her in respect of that Count. As for Count II, wherein the Applicant was charged with Dealing with Alcoholic Drinks without a Licence, the Charge was properly presented under **Section 8(1)(b)** of the **Nandi County Alcoholic Drinks Control Act** in respect of 5 litres of Changaa, an alcoholic drink for purposes of the Act. The particulars and the facts were also in accord with the Charge in Count II; and the sentence imposed for the offence is proper in every sense. Count II is therefore confirmed and upheld.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF MARCH 2019

OLGA SEWE

JUDGE