REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 13 OF 2016

PETERSON MAYIEKA MICHIRA.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM

dated and delivered on the 8th day of March 2016 in the Original Keroka

Principal Magistrate's Court Criminal Case No. 33 of 2016}

JUDGEMENT

On 8th March 2016 the Resident Magistrate Keroka Law Courts sentenced the appellant to a fine of Kshs. 140,000/= or three (3) years imprisonment for possession of 140 litres of chang'aa without a licence contrary to Section 7 (1) (b) of the Alcoholic Drinks Control Act No. 4 of 2010. The appellant had pleaded guilty to the charge. She nevertheless appealed and listed the following as her grounds of appeal: -

> **"1.The Learned Trial Magistrate erred in law and on facts on convicting the appellant on his own plea of guilty which was unequivocal.**
>
> **2. The sentence passed against the Appellant is unlawful and/or excessive harsh and punitive."**

By this appeal she urged this court to quash the conviction and set aside the sentence. The appellant was in the meantime released on bond pending appeal. When the Advocates for the parties appeared before me on 18th September 2018 they elected to argue the appeal by way of written submissions.

Counsel for the prosecution has conceded this appeal because although that issue was not raised by the appellant the court that tried the appellant did not have jurisdiction to do so. At the material time the Alcoholic Drinks Control Act defined "Magistrate" as a magistrate above the rank of Resident Magistrate. In essence therefore the Learned Magistrate N. Kahara who was then a Resident Magistrate did not have jurisdiction to try offences under that Act. This misnomer which resulted in a lot of hardship for the public as well as the court has now been addressed. Counsel for the appellant has raised issues concerning the manner in which the plea was taken and the sentence. In my view whereas the plea may have been unequivocal, the sentence was illegal as it went beyond that prescribed in **Section 34 of the Act** which states: -

> **"Any person who sells an alcoholic drink or offers or exposes it for sale or who bottles an alcoholic drink except under and in accordance with, and on such premises as may be specified in a licence issued in that behalf under this Act commits an offence and is liable –**
>
> **a. for a first offence, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding nine months, or to both;**
>
> **b. for a second offence, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year or both;**
>
> **……."**

The Learned Magistrate sentenced the appellant to a fine of Kshs. 140,000/= or three (3) years imprisonment which exceeded even that prescribed for a repeat offender yet the appellant was a first offender. The sentence was also therefore unlawful. It is also my finding that the entire trial/proceedings were a nullity as the Learned Magistrate did not have jurisdiction. The appeal is merited and it is allowed. The conviction is quashed and the sentence is set aside. This case would have been a proper case for retrial were it not for the passage of time and the fact that the substance for which the appellant was charged may no longer be in existence or if it still is not in the same condition it was. Accordingly, the order of this court shall be that the appellant is free unless otherwise lawfully held and as there is no evidence that the fine was paid there shall be no order for a refund.

Signed, dated and delivered in Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE