



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 1 OF 2019

MICHAEL KIPCHIRCHIR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 3142 of 2018 in the Senior Principal Magistrate's Court at Kapsabet delivered by Hon. P.W. Wasike, RM, on 10 August 2018)

RULING

[1] The Applicant was arraigned before the Kapsabet Senior Principal Magistrate's Court on **10 August 2018**, 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, 2014**. The particulars of the Charge were that on the **10 August 2018** at Kamimei Sub-location within Nandi County, he was found dealing with alcoholic drinks to wit 40 litres of Kangara without a license. The Applicant admitted the Charge and was convicted on his own pleas of guilty. He was consequently sentenced to 2 years' imprisonment.

[2] **Mr. Wambua Kigamwa, Advocate**, then approached the Court on his behalf pursuant to **Section 362** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. He did so through his letter dated **14 February 2019**; and his cause for complaint is that **Section 89** of the **Criminal Procedure Code** was not invoked by the lower court so as to reject the Charge as no offence known to law was disclosed by the Charge. It was further the Applicant's complaint that the lower court failed to adhere to the provisions of **Section 142** of the **Criminal Procedure Code**, granted the manner in which he dealt with the Applicant's previous conviction.

[3] The Court accordingly called for the proceedings of the lower court with a view of scrutinizing the same 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**. That record confirms that the Learned Trial Magistrate took the plea in accordance with **Section 207** of the **Criminal Procedure Code**, and duly complied with the steps set out in **Adan vs. Republic (1973) E.A. 445**. **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 with 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 his response recorded in that language. The Kangara in question was then produced before the lower court as an exhibit and marked **the Prosecution's Exhibit 1**. The Applicant admitted the facts and was accordingly convicted on his own plea. His sentence of 2 years imprisonment was informed by the fact that he had been before the same court the previous day for the same offence and had been fined **Kshs. 10,000/=** in **Kapsabet SPM's Criminal Case No. 308 of 2018**.

[5] Having perused the record of the lower court, I find no reason to fault the lower court for the manner in which the plea was taken. The sentence was also lawful, considering that **Section 64(1)** of the **Nandi County Alcoholic Drinks Control Act** provides for a fine not exceeding **Kshs. 500,000/=** or imprisonment for a term not exceeding three years, or both.

[6] As to the legality of the Charge, **Section 8(1)(b)** of the **Nandi County Alcoholic Drinks Control Act**, 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."

[7] This Court has had occasion to consider the legality of a similar Charge in **Grace Keter vs. Republic [2019] eKLR** and expressed the view, which I still hold, that:

"[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..."

[8] In the premises, and based on the same logic, I would allow the application herein and quash the conviction recorded against the Applicant herein and set aside the sentence imposed on him. It is hereby ordered that he be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF MAY 2019

OLGA SEWE

JUDGE