



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 16 OF 2019

PRICILLA MWENI OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 1450 of 2019 of the

Chief Magistrate's Court at Busia by Hon. Lucy Ambasi – Chief Magistrate)

JUDGMENT

1. **Pricilla Mweni Omondi**, the appellant herein, was convicted for the offence of being in possession of alcoholic drink without a licence contrary to section 7(1) (b) of the Alcoholic Drink Control Act No.4 of 2010.

2. The particulars of the offences were that on 17th July 2019 at **Emagombe village**, in **Butula** sub County of **Busia** County, was found in possession of 7 litres of chang'aa without a licence.

3. The appellant was sentenced to serve six months' imprisonment. She has appealed against both conviction and sentence.

4. The appellant was represented by Mr. Oye Ashioya, Advocate. She raised three grounds of appeal as follows:

a) That the learned trial magistrate erred in law and fact in sentencing her to six months' imprisonment without an alternative of a fine.

b) That the learned trial magistrate erred in law and fact in passing an excessive sentence.

c) That the learned trial magistrate erred in law and fact in not considering her mitigation.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel.

6. The facts of the prosecution case were briefly as follows:

The appellant was arrested in possession of 7 liters of chang'aa. When she was taken to court she pleaded that the chang'aa was hers.

7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

8. Section 7 (1) (b) of the Alcoholic Drink Control Act No.4 of 2010 provides as follows:

No person shall—

(b) sell, dispose of, or deal with;

(c) ...

(d) ...

any alcoholic drink except under and in accordance with a licence issued under this Act.

The mere possession of chang'aa is not an offence. It becomes an offence if the same is for sale, disposal or if one deals with it. The charge and the particulars were therefore defective for failure to include ingredients that make the possession an offence. This defect was fatal to the prosecution case.

9. Section 62 of the Alcoholic Drink Control Act No.4 of 2010 provides:

Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.

The sentence meted out has been criticized as harsh. I notice that the learned trial magistrate proceeded to pronounce a sentence without enquiring whether the appellant had a previous record or not. The response by the prosecution would have guided the court to mete out an appropriate sentence. This is an important step that cannot be skipped in the interest of justice. Had the charge been correctly drafted, I would have interfered with the trial magistrate's sentence.

10. Due to the erroneous drafting of the charge and the particulars I will allow the appeal. Consequently the conviction of the appellant by the learned trial magistrate is quashed and the sentence set aside. The appellant was out on bond pending appeal. The surety is accordingly discharged.

DELIVERED and SIGNED at BUSIA this 11th day of December, 2019.

KIARIE WAWERU KIARIE

JUDGE