**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 157 OF 2017**

**JACOB MURIUNGI alias MUNINJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. **JACOB MURIUNGI alias MUNINJA ("the appellant")** was on 19th April, 2016 arraigned before the Tigania Senior Resident Magistrates Court with a charge of being in possession of illegal alcoholic drinks contrary to ***section 27(1) (b)*** as read with ***sub section 4 of the Alcoholic Drinks Control Act No. 4 of 2010 ("the Act").*** It was alleged that on 16th March, 2016 at Mbeu Location within Meru County, the appellant was found in possession of illegal alcoholic drinks to wit 840 litres of Mukasa at his home which do not conform with the requirements of the Act in contravention of the said Act.

2. The accused denied the charge but after trial, he was found him guilty as charged. He was convicted and sentenced to pay a fine of KShs.420,000/-, in default to serve 7 years imprisonment.

3. It is against this conviction and sentence that the appellant is aggrieved and has appealed to this court. The grounds of appeal set out in his petition are to the effect that; the trial court erred in convicting the appellant on insufficient evidence; that the illicit brew was not recovered from the appellant's home; that the trial court erred in admitting the exhibit memo from an unqualified person; that the sentence was harsh and excessive and that the trial court had shifted the burden of proof to the appellant.

4. Mr. Anampiu, Learned Counsel for the appellant, submitted that there was no basis that was laid to allow an unqualified person to produce the exhibit memo and cited the cases of **Nelson Wainuku Maina v. Republic [2016]** , **Mary Kinya Meru HC CRA No. 27 of 2017 (UR)** and **James Onkoba Nyabando & Anor v. Republic [2012] Eklr** in support of that submission. Counsel further submitted that; the evidence tendered was contradictory and did not support the charge; that it was not established from whose house the liquor was recovered; that the court shifted the burden of proof to the appellant when it was not impressed with the appellant having opted to keep silent in his defence. Counsel concluded that in the circumstances of this case, the sentence was excessive.

5. Mr. Namiti Learned Counsel for the State did not oppose the appeal. He submitted that the prosecution had not laid a basis for allowing an unqualified person to produce the Exhibit Memo.

6. This being a first appeal, it behoves this court to re-evaluate and re-assess the evidence afresh and arrive at its own findings and conclusions. See **Ekeno v. Republic [1972] EA 32**.

7. **PW1 Jacob Manyara** told the court that on 16th March, 2016 he was in a party that raided the home of the appellant from where they recovered 4 jerricans of 210 litres illicit brew. That the premises was rented from one Joel Gichuru.**PW2 Jeremy Kirema,** the area chief told the court that on the material day, he in the company of **PW1** entered the homestead of the appellant and recovered from his house 210 litres of mukasa. In cross-examination, he admitted that he did not know whose house it was that the illicit liquor was recovered from. That the home of the appellant is about 1 km from where the lillicit brew was recovered.

**8. PW3 was IP. Benson Wafula.** He testified that on the material day, he received a call from **PW2** and went to a homestead whose owner he did not know. That he recovered therefrom 480 litres of mukasa brew. That he took samples thereof to the government chemist whose results confirmed that it was alcohol. He produced the Exhibit Memo and report as PExh 2 and 3, respectively. He confirmed that he never investigated whose home it was from where he recovered the liquor.

9. When called upon to defend himself, the appellant opted to remain silent.

10. The 1st ground was that the trial court erred in allowing the Exhibit memo and report to be produced by an unqualified person. The said exhibits were produced by **PW3 IP Benson Wafula.** He was neither the maker thereof nor was he professionally qualified to testify on the said exhibits.

11. The illicit brew as recovered on 16th March, 2016 and the Exhibit memo prepared on the same day. However, that Exhibit memo was received by the government chemist on 6th January, 2017. The report was prepared and signed on 9th February, 2017. There was no explanation why the exhibit remained with the Nchiru police station for nine (9) months. It was imperative that the government chemist should have attended to explain how the said liquid would have retained its potent nature for all that period.

12. I am alive to the provisions of ***section 77 of the Evidence Act Cap 80 Laws of Kenya*** on the production of such reports. However, a police officer is not a competent witness to produce a report of the government analyst. He cannot testify on the contents thereof. In any event, no basis was laid for such production. I agree with Mr. Namiti that the admission of the Exhibit memo and report was irregular.

13. The 2nd ground was that the trial court convicted the appellant on contradictory evidence. The charge sheet talked of the appellant being found in possession of 840 litres of mukasa. **PW1** told the court that thy found 4 jerricans of 210 litres of Mukasa while **PW2** stated that he recovered 480 litres of mukasa brew from the house wherein they allegedly found the appellant. If **PW1, PW2 and PW3** were referring to the same transaction that happened at the same time, why the discrepancy on the quantity of the brew that was allegedly recovered? Further, the evidence did not support the charge. The quantity in the charge sheet is too huge as to compared to wahr the witnesses said they recovered.

14. The other ground was that there was no evidence that the liquor was recovered from the appellant. That is a genuine complaint. There was no satisfactory evidence to show that the house from which the liquor was recovered belonged to the appellant. **PW1** was categorical that the house belonged to one Joel Gichuru. The said Joel Gichuru was not called to clarify whether he had rented the house to the appellant.

15. Finally, there was no evidence on how, where and why the appellant was arrested and by who. That evidence was crucial having in mind that the testimonies of the prosecution witnesses was that the appellant was not arrested at the scene where the offending substance was recovered.

16. The other complaint was that the trial court shifted the burden of proof to the appellant when it convicted him for remaining silent. The record is clear that after the prosecution case, the court placed the appellant on his defence. It did so because in its view, the prosecution had established a prima facie case to warrant the appellant to defend himself. ***Section 211 of the Criminal Procedure Code*** gives three modes on how an accused is to offer his defence. One of these modes is by remaining silent.

17. In its judgment, the trial court held in respect of this as follows:-

***"The accused further complicated his standing by opting to remain mute when placed on his defence. In the case of Murimi Vs. R (1967) EA 542 it was observed that a prima facie case would be that which would sustain a conviction should the accused offer no evidence in rebuttal during defence".***

18. I think the trial court proceeded on the wrong footing. It assumed that since a prima facie case had been established, the case had been proved. That is not the position. A prima facie case does not mean that a case beyond reasonable doubt has been established. It simply means a case which has raised issues that require an explanation by an accused. If the accused opts to remain silent, the trial court is still required to evaluate the evidence tendered by the prosecution to satisfy itself that theprosecution has proved the allegations against an accused beyond reasonable doubt. In the present case, the trial court did not do so and it thereby fell into error.

19. As regards the sentence, ***section 27 (4) of the Alcoholic Drinks Control Act ("the Act")*** provides for a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years, or to both. In the present case, the trial court sentenced the appellant to pay a fine of Kshs.420,000/- in default seven years imprisonment. The sentence to imprisonment for seven years is clearly illegal. It has no basis as the appellant was convicted under ***section 27(4) of the Act*** whose maximum sentence on imprisonment is five years.

20. In view of the foregoing, I find that the prosecution did not prove its case to the required standard. The appeal therefore has merit and is hereby allowed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED at Meru this 5th day of April, 2018.**

**A. MABEYA**

**JUDGE**