REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 18 OF 2018

BEATRICE AWUOR MBOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 19 OF 2018

VIOLET AOKO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeals arising from the convictions and sentences by Hon. C. M. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Cases No. 205 of 2018 and 206 of 2018 delivered on 07/06/2018)

JUDGMENT

1. The Appellants herein, **Beatrice Awuor Mboya** and **Violet Aoko Ochieng,** were separately charged on 07/06/2018 with the offence of **Manufacturing Alcoholic Drinks to wit *Chang'aa* without a license** contrary to **Section 7(1)(a)** as read with **Section 62** of the **Alcoholic Drink Control Act No. 4 of 2010**.

2. All the appellants admitted the charge and the facts of the case followed immediately. On being asked to respond to the facts the appellants stated that the facts were true. Pleas of guilty were entered and each of the appellants was convicted on her own plea of guilty. They were each sentenced to a fine of Kshs. 100,000/= and in default to serve one-year imprisonment.

3. On 15/06/2018 the appellants herein through Messrs. Odondi Awino & Company Advocates preferred the appeals against both convictions and sentences which appeals are subject of this judgment.

4. The appeals were consolidated at the hearing and disposed of by way of oral submissions. Mr. Awino Counsel for the appellants submitted that the pleas were not unequivocal as the charge was technical and the appellants did not understand them. He prayed that the appellants be instead discharged as they were mothers with young children and have various other young children at home and since they had already spent over one month in jail that amounts to adequate punishment.

5. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter.

6. In line with the foregone, this court in determining this appeal will principally endeavor to satisfy itself whether the plea as taken was unequivocal.

7. The record of the proceedings before the subordinate court has been availed before me and I have carefully perused the same. This court has also carefully considered the submissions of the parties on record.

8. The law on this subject is well settled. **Section 207** of the Criminal Procedure Code states as follows:

'207 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.'

9. The above provisions have previously been subject to Court's interpretation. And, in particular the procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- Republic (1973) EA 445** and in the Court of Appeal case of **Kariuki -vs- Republic (1954) KLR 809** as follows: -

(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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

10. In the case of **Kariuki -vs- Republic** (supra) the Court went on and stated that: -

"The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

11. In the case of **Atito -vs- Republic (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

12. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

"(2) Every accused person has the right to a fair trial, which includes the right-

(a)……..

(b) to be informed of the charge, with sufficient detail to answer it.

13. To therefore satisfy the above constitutional and statutory requirements, the Court when faced with a guilty plea scenario is called to exercise extreme care especially when the offence(s) involved carry serious legal penalties or are technical in nature more so when the accused is unrepresented. The Court is called upon to ensure that the charge is read and explained to the accused person in such sufficient detail to enable the accused person to make an informed decision and to plead with such knowledge and information about the charge. All that must be clearly captured in the record including the language which the accused communicates in.

14. Another equally important aspect relates to the taking of the facts of the case. The purpose of the facts is to establish the ingredients of the offence before Court. It is the duty of the Court to scrutinize and be sufficiently satisfied that indeed the facts, as presented, do establish the ingredients of the offence. It is not enough for a Court to proceed and enter a conviction simply because the accused has admitted the facts, the facts must establish the commission of the offence. The Court should therefore endeavor to be fully satisfied that the facts truly connect the accused to the commission of the offence and that there appears no cause to the contrary as so clearly provided under **Section 207** of the **Criminal Procedure Code**. (See: **Kakamega High Court Criminal Appeal No. 46 of 2014 Dishon Malesia vs Republic (2014) eKLR**).

15. The records before the trial court are very clear. The charges were read to the appellant and the others in English and interpreted in Dholuo Language. The appellants admitted the charge.

16. On whether the facts proved the ingredients of the charge of **Manufacturing Alcoholic Drinks to wit *Chang'aa* without a license**, I have equally analyzed the facts as presented before court and the same are clear that the offences were proved. The charges were not technical. They were on whether the appellants had licenses in their undertakings which perfectly came under **Section 7(1)** of the **Alcoholic Drink Control Act.**

17. I have therefore carefully considered all the grounds of appeal and do not see how the pleas were not unequivocal. I am satisfied and therefore find and hold that the appellants understood the charges and their particulars as well as the facts thereof and that there was no hinderance to the process of plea taking. The pleas were unequivocal. The appeals on convictions therefore fail.

18. On sentencing, **Section 62** of the **Alcoholic Drink Control Act** imposes the maximum sentence on conviction in respect of the offences in issue to a fine of Kshs. 500,000/= or to imprisonment not exceeding three years or to both. The appellants were both sentenced to a fine of Kshs. 100,000/= and in default to serve one-year imprisonment.

19. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

20. I have considered all the issues in these matters and note that the sentencing court took into account factual matters which were not brought before it in arriving at the sentence. The prosecution did not submit that the offences were rampant and negatively impacted on the youth. The court did not even state whether it had taken judicial notice of the said matters. The lower court therefore erred in considering matters that were not properly placed before it in arriving at the sentences. To that extent and with respect to the learned magistrate the sentence ought to be interfered with. I have considered the period the appellants have been in prison and the fact that they have very young children in jail. The appellants must by now have learnt their lessons. I am convinced that in the circumstances of these matters the appellants are to benefit from a conditional discharge under **Section 35** of the **Penal Code**, **Cap. 63** of the Laws of Kenya.

21. The appellants are hereby discharged on condition that they shall not commit any offence within three months of this judgment. The appellants are also warned that in the event they commit any offence within the said period of conditional discharge they shall be liable to be sentenced to the original offence. The appellants shall forthwith be set at liberty unless otherwise lawfully held.

22. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of July 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Odondi Awino, Counsel instructed by Messrs. Odondi Awino & Company Advocates for the Appellants.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant