



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 123 OF 2016

BETWEEN

JOSEPH MILIMOAPPELLANT

AND

REPUBLIC RESPONDENT

**(Being an appeal from conviction and sentence of Hon E. Malesi SRM delivered on 07.12.2016 in
Kakamega CMCCR Case No. 411 of 2016)**

J U D G M E N T

Introduction

1. The appellant herein was arraigned before the chief Magistrate's Court at Kakamega on one count of selling Chang'aa without licence contrary to Section 71(1)(b) as read with Section 62 of the Alcoholic Drinks Control Act, No. 4 of 2010. It was alleged that he committed the offence on the 05.11.2016 at Mutaho sub-location, Shesele location in Kakamega South Sub-County when he was found selling 40 litres of chang'aa in contravention of the said Act.

2. The appellant pleaded guilty to the charge on the 07.11.2016 when he appeared for plea. He was convicted on his own plea of guilty and sentenced to pay a fine of kshs.80,000/= in default to serve 12 months imprisonment.

The Appeal

3. Being aggrieved by both conviction and sentence, the appellant brought this appeal. He also filed an application for bail pending appeal but the said application dated 14.12.2016 was compromised so that the appeal could proceed without delay. The appeal is premised on grounds:-

- 1.) That the learned Magistrate erred in law and fact in reading the charges to the appellant in a language that the appellant did not understand properly.
- 2.) That the learned Magistrate erred in law and fact by awarding an excessive sentence to the appellant in respect of the charges that he was facing.
- 3.) That the learned magistrate erred in law and fact in convicting the appellant over an equivocal plea.

4. The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside.

Submissions

5. At the hearing of this appeal, Mr. Manyoni who appeared for the appellant informed the court that he was abandoning ground 2 of the appeal and would urge grounds 1 and 2 only. Regarding ground 1 counsel submitted that the language used by the court when the charges were read out to the appellant was not properly understood by the appellant, since the record does not show that any enquiry was made as to the language which the appellant understood.

6. On ground 3, counsel submitted that because of the court's failure to make an enquiry as to the language understood by the appellant the plea of guilty entered against the appellant was unequivocal. Counsel urged court to find and hold that for the reasons stated hereinabove, the appellant should be set free.

7. Counsel for the prosecution conceded the appeal in part, on the ground that neither the court nor the prosecution advised the appellant of his rights under Article 50(2)(g) to choose and be represented by an advocate as a result of which the appellant failed to appreciate the dire consequences of pleading guilty to such a charge. In conclusion counsel for prosecution urged the court to send the case back to the trial Magistrate for retrial.

Analysis and Determination

8. From the submission on record, the only issue that arises for determination is whether the plea in this case was unequivocal. In the case of **Baya – vs – Republic [1984] KLR 657** in which the court cited the case of **Adan – vs – Republic [1973]EA 445**, it was stated that an unequivocal plea must go through the following stages:-

- a) The charge and all its ingredients must be explained to the accused in vernacular or some other language that he understands;
- b) The accused's own words, in reply should be correctly translated into English and carefully recorded.
- c) The facts are then read out to the accused and if he admits the same, then a plea of guilty shall be entered.
- d) If the accused does not admit the facts or subtracts some of the facts then a plea of not guilty shall be entered.

9. In **Murage – vs – Republic [2006]2EA 218** the Court held inter alia that “ compliance with Section 207(1) of the Criminal Procedure Code entailed explanation of the charge and all its ingredients to the accused in his vernacular or language he understood and the recording of the accused's own words correctly translated into English. If the words were an admission, a plea of guilty was to be recorded and if the accused did not admit the court was to proceed to hear the case.” In **Boit – vs- Republic [2002] 1KLR 814**, the court held, among other things, that the accused. “Should understand the consequences of his plea of guilty,” and where the appellate court finds that this was not the case during the plea, an order for retrial would be in order.

10. In the instant case, the language during plea was shown to be English/Kiswahili interpretation. In reading the plea, the trial court stated, “ “The substance of the charge/s read over and explained to accused in Kiswahili, **the language he understands**, and he replies;- Accused – “Ni kweli”- It is true. [Emphasis is mine]. Though there is no detailed record of the enquiry about the language, there is that indication that the court confirmed from the appellant that the appellant understood Kiswahili and he then proceeded to read the charge in Kiswahili. For this reason, I do not think, as submitted by appellant's counsel that the appellant did not understand the language in which the charge was read to him.

11. I now move on to examine the record with a view to determining whether the rest of the plea was properly taken. From the record, the prosecution gave the facts to the effect that “The accused was on 5.11.2016 at Mutaho sub-location within Kakamega County found selling 40 litres without a license issued under ADCA. The chang’aa is produced in evidence as exhibit” to which the appellant responded. “Accused;- facts are correct – the chang’aa is mine.”

12. It is my considered view that the appellant’s response to the facts as given by the prosecution clearly shows that he understood these facts and admitted them, including the fact that the 40 litres of chang’aa which he was found selling belonged to him. In this regard, this court does not agree with counsel for the appellant that the plea of guilty in this case was equivocal.

13. The other issue raised by respondent’s counsel in conceding the appeal is that the appellant was not informed of his right under Article 50(2) (g) of the Constitution of Kenya 2010 that he was entitled to be represented by an advocate. That submission is correct, but taking the totality of this case into consideration, the omission on the part of the court to inform the appellant of this right did not prejudice the appellant. I have come to this conclusion on the basis that the appellant fully understood the charge, and when the facts were read out to him he admitted the same adding that the chang’aa he was found selling belonged to him. For the above reason, I do not think that it would serve any useful purpose to send this case back to the trial court for retrial.

Conclusion

14. Consequently, the appeal is found to be without merit and is dismissed. The findings of the trial court be and are hereby confirmed. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega this 21st day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Miss Shirika for Manyoni (present).....for Appellant

.....Miss Tarus (present).....for Respondent

.....Mr. Polycap.....Court Assistant.