REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION NO. 1 OF 2016

HENRY MUTIA…….....…….…….....APPLICANT

VERSUS

REPUBLIC.....…….....…….RESPONDENT

CRIMINAL REVISION

1. By a letter dated the **8th** day of **January, 2016 M. M. Kimuli and Co. Advocates** acting on behalf of the Applicant have called upon this court to exercise its supervisory and revisionary jurisdiction pursuant to **Section 364** of the **Criminal Procedure Code** and **Article 165(6)** and **(7)** of the **Constitution of Kenya, 2010** for purposes of ensuring ends of justice are met.
2. The Applicant was charged with the offence of **being in possession of alcoholic drinks that does not conform to the requirements of the Alcoholic Drinks** contrary to **Section 27(1)(b)(4)** of the **Alcoholic Drinks Control Act No. 4 of 2010.** Particulars of the offence being that on the **24th** day of **December, 2015** at around **2.00 p.m.** at **Kwa Kinyai Market, Nzambani District** in **Kitui County,** was found in possession of **17 bottles of Tana Brandy 250 mls** each, in contravention of the said act.
3. The Applicant pleaded guilty to the charge. A plea of guilty was entered and he was sentenced to serve **six (6) months imprisonment.**
4. The revision is sought on grounds that:

- The Applicant was not properly identified as he was charged under the wrong name.
- The Applicant was charged with an offence that does not conform to the requirement of **Section 27(1)(b)(4)** of the **Alcoholic Drinks Control Act (Act No. 4 of 2010)** as the particulars of conformity were not provided hence no offence was disclosed in the charge sheet.
- The submitted exhibits of the alleged "brandy" were not accompanied by a report from the Government Chemist to confirm if indeed what was tendered in court was alcohol.
- After the Applicant pleaded guilty, the Prosecution did not read out facts of the alleged offence which made the plea not unequivocal.
- Non-custodial sentence provided by the law was not considered which made the sentence harsh.

5. Pursuant to the requirement of the law I have examined the record of the Lower Court in order to satisfy myself of the need to invoke powers conferred upon this court by **Section 362** as read with **Section 364** of the **Criminal Procedure Code.**
6. It is stated that plea taking was not unequivocal. The legal principles to be followed in plea taking were enunciated in the case of **Adan vs. Republic (1973) EA 445** where it was held that:

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in the language or in a language he understands.

(ii) The accuseds own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(ii) The Prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain facts or to add any relevant facts.

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

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded." (Also see Section 207 of the Criminal Procedure Code; John Muendo Musau –v- Republic (2013) eKLR).

7. With this guidance in mind I must consider grounds raised by the Applicant.
8. It is asserted that the Applicant was not properly identified. Rules regarding framing of charges which include how a person should be described when accused are provided for by the **Criminal Procedure Code. Section 137(d)** of the **Criminal Procedure Act** provides thus:

"(d) Description of persons.—the description or designation in a chargeor information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown";" (emphasis mine).

9. The Applicant herein was described as **"Henry Mutia".** A copy of an Identity Card has been annexed which indicates that he is known by two (2) names **"Eric Mutia".** When he was arraigned in court he was identified as **Henry Mutia.** He responded to the charge. His identification as an accused person was not questioned therefore failure to state his correct name was not fatal. Even if he had been described as an **"unknown person"** he would have been accepted as a person accused. Therefore there was no miscarriage of justice.
10. The plea is stated to have not been unequivocal. This is a case where the Applicant admitted the charge. The criteria for interfering with a plea of guilty was stated in the case of **Laurent Mpinga vs. R. (1983) TLR 166,** thus:

"(1) That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty.

(2) That the Appellant pleaded guilty as a result of mistake or misapprehension.

(3) That the charge laid at the appellant's door disclosed no offence known to law; and

(4) That upon the admitted facts the appellant could not in law have been convicted of the offence charged.

11. The Applicant was stated to have contravened **Section 27(1)(b)(4)** of the **Alcoholic Drinks Control Act No. 4 of 2010** that provides thus:

"(1) No person shall—

(b) possess,

an alcoholic drink that does not conform to the requirements of this Act.

(4) A person who contravenes the provisions of this section commits an offence and shall be

liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both."

The Prosecutor was indicated to have states thus:

"Facts as stated in charge sheet. I produce the exhibits 17 bottles of Tana each 250 ml."

These were the facts that were admitted by the Applicant.

12. The alleged facts did not disclose the ingredients of the offence. There is absolutely nothing to indicate how the possession of **"Tana brandy 250 mls"** contravened the statute. There is nothing presented to suggest that **"Tana Brandy"** was an alcoholic drink. Although the Applicant admitted facts as presented, having not disclosed an offence as envisaged by the law, he should not have been convicted. The liquid produced in court should have been subjected to analysis and a report thereof produced in court.
13. From the foregoing it is apparent that the plea was not unequivocal. The subsequent conviction is hence a nullity which I quash. Consequently, I do set aside the sentence meted out.
14. I have taken note that following the order of the court the exhibits were to be destroyed. The Applicant has been in custody for **35 days.** It will be unnecessary to order a retrial. In the premises, the Applicant shall be released forthwith unless otherwise lawfully held.
15. It is so ordered.

Dated and **Signed** at **Kitui** this **1st** day of **February,** 20**16.**

L. N. MUTENDE

JUDGE