REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 16 OF 2014

(An appeal from the judgment of the Principal Magistrate Runyenjes

in SPMCR. Case No. 480 of 2013 dated 20/03/2014)

JOY KAMBA MWENDA.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of selling alcoholic drinks without a licence contrary to Section 7(1) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010. There was an alternative charge of failing to display a licence contrary to Section 20(1) of the Alcoholic Drinks Control Act No. 4 of 2010.

2. The case went to full hearing before the Runyenjes Ag. Principal Magistrate and the appellant was convicted of the offence of failing to display a licence and was fined Kshs.5,000/= in default 2 months imprisonment. Being dissatisfied with the judgment, the appellant lodged this appeal.

3. The appellant relied on eleven (11) grounds fo appeal drawn and filed by his counsel Gitau Mwara & Co. Advocates filed on 8/04/2014 which will be summarily stated. He stated that the magistrate erred in convicting the appellant on a lesser offence of failing to display alcoholics drinks licence after finding there was no case to answer and declined to allow the defence application to visit the scene.

4. The other grounds of appeal are that the magistrate failed to find that the Alcoholic Drinks Licence was clearly displayed,relied on the evidence of a single witness ,disregarded the defence which included photographic evidence and demonstrated bias against the defence through out the trial. The appeal was disposed by way of written submissions.

5. The appellant in his submissions stated that the magistrate rejected an application to visit the scene to prove that there were nails on the wall to hang the licence and stated that the same could be proved by other ways. Photographs of the displayed licence were availed as exhibits but the magistrate rejected them. The evidence by the prosecution witnesses was weak. The prosecution did not prove the case beyond reasonable doubt as was held in the case of ***EVANS MATHENGE WACHIRA VS REPUBLIC, Nakuru Criminal Appeal No. 32 of 2005.***

6. The state counsel submitted that the appellant was charged with failing to display a licence contrary to

Section 20(1) of the Alcoholic Drinks Act. DW2 testified that he was present during the arrest and that he took photographs which were rejected by court on grounds that they were not admissible under Section 78 of the Evidence Act. The magistrate took the defence into consideration. The appellant did not prove that PW1 and PW2 were compromised by some bar owners. The prosecution proved the case beyond reasonable doubt

7. The duty of the 1st appellate court was explained in the case of ***OKENO VRS. REPUBLIC 1972 EA 32*** where it was held that;

> ***"****An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA.(336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."*

8. The law applicable in this appeal is Section 20(1) of the Alcoholics Drinks Control Act provides that;

> *Every licence shall be prominently and conspicuously displayed on the premises to which it relates, and any licensee who fails or neglects so to display his licence commits an offence.*

9. The prosecution's witnesses relevant to this appeal were PW1, PW2 and PW3. PW1 an administration police officer stated that on 10/9/2010 as they were on patrol within Nthegaiya area they entered Mutungi bar and found that the licence had not been displayed. They arrested the lady attendant and recovered 8 litres of beer.

10. PW2 a police officer testified that on 10/9/13 at 8.00pm he was on patrol and upon entering Mutungi bar they found that the licence was not displayed and arrested the lady attendant.

11. PW3 was the investigating officer who testified that the case was referred to him for investigations by the OCS. The appellant had been arrested for selling liquor without a licence. He said the appellant did not show him any licence in the course of the investigations but said it was in the box at the time of arrest.

12. The appellant DW1 testified that she worked as a cashier in Mutungi bar. At the time of arrest,the licence was hung on the premises using a nail and it was valid. The policeman who arrested her informed her that the licence did not cover Ndume liquor.

13. DW2 testified that at the material time he was a bar attendant at Mutungi bar. He was present when the appellant was arrested by PW1 and PW2. The licence was displayed on the wall at the time of the arrest. After the arrest, DW2 took photographs of the licensee produced the said exhibits in court.

14. The magistrate who had the opportunity to observe PW1 and PW2 noted on in her judgment that both PW1 and PW2 were firm in their evidence that they did not see the licence on the premises at the time they arrested the accused. The magistrate noted that the demeanor of the two witnesses did not indicate that PW1 and PW2 were not telling the truth. The evidence of the photographs came much later after the appellant was arrested and was faced with issues of procedure.

15. The appellant argued that the magistrate disregarded the photographic evidence despite the fact that the photographs were taken immediately after the arrest.

16. The relevant law in this regard is Section 78 of the Evidence Act provides:-

> *i. In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the*

hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

ii. The court may presume that the signature to any such certificate is genuine.

iii. When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.

17. The photographs in question showing the display of the licence were allegedly taken by DW2. As much as I agree with the appellant that the defence can shoot and present their own photographs, there must be an accompanying certificate to show how the photographs were taken, processed and developed.

18. I am in agreement with the trial magistrate that PW2 did not satisfy the provisions of the law in tendering the photographs in evidence.

19. It was stated that the trial magistrate erred when he rejected the appellant's applicant to visit th scene to see where the licence was displayed. The magistrate delivered a very sound ruling on why he rejected the application which is self-explanatory. He said that the nails on the wall the appellant was calling the court to see could have been fixed after the appellant was arrested. This was highly probable and for this reason, the visit to the scene would not have added any value to the trial or helped the court to reach a just and fair decision. The decision of the magistrate to decline the application was correct and justifiable in the circumstances.

20. The appellant claimed that the trial magistrate erred in relying on the evidence of a single witness in convicting the appellant. Even if he did, there is nothing wrong as long as the case was proved beyond reasonable doubt. In the case of ***DAVID MUTUNE NZONGO VS REPUBLIC [2014] eKLR*** it was held that ;

We agree with Mrs. Murungi that under Section 143, Evidence Act, Cap 80, Laws of Kenya no minimum number of witnesses is required to prove a case. Therefore the testimony and evidence of arrest and recovery of items by IP Muli cannot be discredited for the reason that he is a single witness.

21. The appellant claimed that PW3 the investigating officer did not conduct any investigations but was directed by the OCS to charge him. PW3 testified that the case was referred to him for investigations by the OCS and that the appellant had been arrested by PW1 and PW2 for selling alcoholic drinks without a licence. The officer did not tell the court what investigations he carried out and this can be construed to mean that no investigations were conducted.

22. The officer said he did not visit the premises but was told by the appellant that the licence was kept in the box at the time she was arrested.

23. As the investigator, the officer was duty bound to interrogate the appellant and other witnesses, PW3 did not make any attempt to investigate the offence. In cross-examination, PW3 said he believed the arresting officers that the appellant was trading without a licence.

24. He also admitted that the he was the investigating officer in Runyenjes Criminal Case No. 273 of 2013 involving Mutungi Bar And that the accused was acquitted because no investigations were conducted. Despite his failure to conduct any investigations, PW3 went ahead to charge the appellant. Its therefore correct as alleged by the appellant that no investigations were conducted in this case.

25. The issue of the malicious prosecution was raised by the appellant. It was argued that the evidence of PW1 and PW2 was untruthful and that the two officers were determined to harass the proprietor of the

business and lead to closure.

26. PW1 said he was on patrol with his colleague PW2 when they went to Mutungi Bar and found the appellant selling alcoholic drinks without a licence. He arrested her and took her to Runyenjes police station and handed her over to the officers.

27. He seized some exhibits including some stuff known as “Ndume” which he referred to as illicit liquor. The appellant was not charged with selling or being in possession of illicit liquor which raises questions on the motive of PW1 and PW2.

28. As the hearing of the case was going on, it was brought to the attention of the court that the administration police officers kept going to the bar to harass the owner and the attendants by threatening to charge them and taking away items.

29. These included TV remotes, empty jericans and buckets which led to the appellant's counsel to complain in court. It was admitted by PW3 that there was an earlier case facing an employee of the same bar which ended in an acquittal.

30. These incidents were quite frequent and may be interpreted as harassment though there is no indication that they were actuated by malice.

31. The applicant was convicted of the alternative charge after the trial magistrate ruled that there was no case to answer in the main charge. The issue arises as to whether this was procedural to single out the main charge from the alternative charge and ruled that there was no case to answer.

32. It is unprocedural to single out the alternative charge and put the accused on his defence and acquit him of the main charge. The magistrate ought to have found that there was a case to answer in the case on its entirety and make the separation of the two charges during judgment.

33. For the foregoing reasons, I find this appeal successful. The conviction is hereby quashed and sentence set aside.

34. The fine paid by the appellant shall be refunded. The appeal is accordingly allowed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Onjoro for respondent

Ms. Njeru Rose for Mr. Mwara for appellant