



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 44 OF 2016**

**(CORAM: J. A. MAKAU – J.)**

**ROSE ADHIAMBO ALUOCH..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the conviction and the sentence in Criminal Case No. 421 of 2016 in Siaya Law Court before Hon. C. A. Okore – S.R.M.)*

**JUDGMENT**

1. The Appellant **ROSE ADHIAMBO ALUOCH** herein was charged with four counts being as follows:-

**1) Count 1: Manufacturing Alcoholic Drinks namely chang'aa contrary to section 7(1) (a) as read with Section 62 of Alcoholic drinks control Act No. 4 of 2010.** The particulars of the offence are that on the 25.4.2016 at Acheyo village in South East Alego location in Siaya Sub-County within Siaya County she was found manufacturing chang'aa to wit 40 litres of Kangara without licence in contravention of the said Act.

**2) Count 2: Being in possession of Alcoholic Drinks Chang'aa contrary to Section 27 (1) (b) as read with section 27 (1) of Alcoholic Drinks Control Act No. 4 of 2010.** The particulars of the offence are that on the 25.4.2016 at Acheyo village in East Alego location in Siaya Sub-County within Siaya County she was found in possession of Alcoholic Drinks to wit 1 litre of Chang'aa, having not been prepared in accordance with the **Alcoholic Drinks Control Act No. 4 of 2010.**

**3) Count 3: Being in possession of uncustomed Goods contrary to section 200 (d) (iii) as read with Section 210 (c) and Section 213 of The East African Community Customs Management Act 2004.** The particulars of the offence are that on the 25.4.2016 at Acheyo village, South East Alego Location in Siaya County was found in possession of 9 packets of Supermatch Kings Cigarettes valued at Ksh.900/= in contravention of the **East African Community Customs Management Act 2004.**

**4) Count 4: Conspiring to contravene provisions of The East African Community Customs Management Act 2004 contrary to Section 193 of the East African Community Customs Management Act 2004.** The particulars of the offence are that on the 25.4.2016 at Acheyo village, South East Alego Location in Siaya County conspired to contravene provisions of the **East African Community Customs Management Act 2004 contrary to Section 193 of the East African Community Customs Management Act 2004**, by unlawfully selling Supermatch Kings Export Cigarettes.

2. The Appellant was convicted on her own plea of guilty on the four (4) counts and fined Ksh.20,000/= in default five (5) months imprisonment on each of the 4 counts (total Ksh.80,000/=) and the sentence to run consecutively.

3. Aggrieved by the conviction and sentence the appellant preferred an appeal setting out several grounds which can be summarized as follows:-

a) *That all the four charges were defective and did not disclose any offence.*

b) *That no plea of guilty could be entered on a defective charge and the purported plea of guilty could not be said to be unequivocal*

c) *That the plea-taking was against the procedure in regard to plea-taking as facts were not read in respect of each charge in a language that the appellant understands and by failure to give appellant an opportunity to respond to the truthfulness of the facts.*

d) *That the fine imposed was hefty, harsh and punitive and incomplete disregard to the appellant's past record, this being a first offender.*

e) *That the sentence passed is illegal and especially on 3rd and 4th count.*

4. That at the hearing of the Appellant who appeared in person relied on her written submissions whereas Mr. E. Ombati Learned State Counsel appeared for the State. Mr. E. Ombati conceded the appeal on count 1 urging that it is not clear what was being contravened as "**Kangara**" is not an alcoholic drink and as such urged the offence as stated did not meet the threshold of alcoholic drinks as defined under the relevant Act. On count II, III and IV he urged the offence is properly provided for as stated. On plea-taking he conceded that the plea was not properly taken and on facts he submitted it is not clear which facts if any were given. He further urged the appellant was not given an opportunity to plead to the facts as read and wondered further what exhibits were produced if any. He therefore conceded on the other counts, thus count II, III and IV. He did not support the sentence as the plea was not properly taken.

5. The court record show that the appellant indicated the language that she understands and wished the proceedings to be conducted in was Dholuo, however the court record reveal that the substance of the charge and every element thereof was stated by the court to the accused (appellant) in language that she understands (**English/Kiswahili**) but she replied in Dholuo language. This was contrary to **Article 50 (1) 2 (m) of the Constitution** which provides:-

**"Article 50 (1) (2) (b) (m) of the Constitution of Kenya 2010** provides

***"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

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

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

***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have***

***(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;"***

5. I have perused the plea-taking at the trial Court, and the issue for consideration is whether the plea was unequivocal? The Lower Court record show that the appellant after the charge was read over stated "**it is true.**" That once charge is read and explained to the accused in the language he

understands and wishes to speak and answers to the charge, the facts are supposed to be given and explained to the accused in the language he/she understands and wishes to speak. The accused is required to plead and admit all the ingredients constituting the offence he or she is charged with before a plea of guilty is entered against him/her. In the case of **Paul Irungu Maina V. Republic HCRC No. 1209 of 2007 (Nakuru)** the Court held that the word **“It is true”** standing on their own did not constitute an unequivocal plea of guilty. (See the case of **Kato V. Republic (1971) E.A. 542, Wanjiru V. Republic [1975] E.A.5**, and in the case of **Adan V. Republic (1973) E.A. 445 Court of Appeal** held:

**“(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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

**(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**

**(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded”**

6. In the instant case the charge was read to the appellant in **English/Kiswahili** language but she replied in Dholuo language **“True”** on count I, II, III and IV and plea of guilty entered in respect of each count. The prosecution on facts stated:-

**“Facts on all counts exhibit are before court”**

The Accused (**Appellant**) is quoted to have stated:

**“Facts are correct. Exhibits were the ones I was found with.”**

The court then proceeded to convict the accused (Appellant) on her own plea of guilty and fined her Ksh.20,000/= in default 5 months imprisonment on each of the 4 counts (**Total Ksh.80,000/=**) and ordered sentence to run consecutively.

7. The conviction of the appellant is not proper as the plea-taking was defective and contrary to the constitution in that the same was not in compliance with the principles set on in plea-taking as in the case of **Adan V. Republic (Supra)**. The Appellant's reply was that **“True”** without any other words being added and without facts having been given in this case as required and stating that it is **“True”** did not constitute an unequivocal plea of guilty. It is desirable that the court taking a plea should ensure that the substance and every element constituting the offence charged is stated and explained in the language the accused understands, thus the language of his/her choice of conducting of the proceedings after which the accused should be required to make admission or denial of the facts constituted of the charge. In this case the language the appellant understands and language of her choice was not the language used in explaining every element constituting the charge but a language different from Dholuo. She was required to reply in Dholuo. The plea-taking went against the appellant's **Bill of Rights** and the proceedings were unconstitutional and fatally defective. In view of the foregoing the plea was not unequivocal.

8. On count I, the appellant was charged with an offence of **Manufacturing Alcoholic Drinks namely changaa contrary to section 7(1) (a) as read with Section 62 of Alcoholic drinks control Act No. 4 of 2010**. The particulars of the offence are that on the 25.4.2016 at Acheyo village in South East Alego location in Siaya Sub-County within Siaya County she was found manufacturing changaa to wit 40 litres

of **Kangara** without licence in contravention of the said Act.

9. The particulars of the charge state that the appellant was found manufacturing **chang'aa** to wit 40 litres of **Kangara** which were in contraventions of **Alcoholic Drinks Control Act No. 4 of 2010, Section 2 of the said Act** on definition of "**alcoholic drink.**" do not have "**Kangara**" amongst the list of included alcoholic drinks. The learned State Counsel submitted that "**Kangara**" is a substance used in distilling of changaa. The State Counsel confirmed **Kangara** is not an alcoholic drink but a substance used in making a changaa drink. The appellant should have been charged with a different offence other than being in possession of an alcoholic drink as "**kangara**" is not an alcoholic drink as pointed out but a substance used for the purpose of making changaa which itself is an alcoholic drink. I have noted from the aforesaid Act, that possession of such substance as "**kangara**" has not been criminalized and as such the appellant could not be charged with non-existent offence. Similarly a plea could not be taken on a defective charge as was the case in the instant case. I have seen the judgment of my sister **Honourable Lady Justice H. I. Ong'udi** who was faced with similar case, on appeal in the case of **Gladys Cherotich V. Republic in HCCRA No. 3 of 2015 at Bomet** where she held:-

***"This confirms that Kangara is not an alcoholic drink but a substance used in distilling changaa which is an alcoholic drink."***

I agree entirely with my learned sister's judgment and have nothing useful to add to it.

10. In count 1 the appellant was charged with a non-existing offence as the particulars did not support the charge at all. The particulars in support of charge in count I cannot stand as they do not support the charge, the charge is defective and no plea can be taken in respect of a defective charge. The appellant was charged under a proper section but facts did not support the charge as "**Kangara**" is not an alcoholic drink nor has it been criminalized.

**Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010** defines "**alcoholic drinks**" as follows:-

***"alcoholic drinks" includes alcohol, spirit, wine, beer traditional alcoholic drink, and any one or more of such varieties containing one-half of one per cent or more of alcohol by volume, including mixed alcoholic drinks, and every liquid or solid, patented or not, containing alcohol, spirits, wine, or beer and capable of being consumed by a human being."***

**Kangara** do not fall under alcoholic drinks and is therefore not a criminal offence to be found in possession of **Kangara.**"

11. In view of the flawed procedure in plea-taking and failure to give facts of the case in support of the charge makes the whole process undertaken by the trial court defective though counts II, III and IV were not defective. I agree with the Learned State Counsel. He is right in conceding the appeal and in not supporting the sentence on all counts.

**12. The upshot is that the appeal is allowed, conviction quashed and sentence set aside. The appellant is set at liberty unless otherwise lawfully held.**

**I further direct the Deputy Registrar of this Court to give a copy of this judgment to the trial Court and Office of D.P.P. Siaya for their own record and information.**

**DATED AT SIAYA THIS 2ND DAY OF JUNE, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 2ND DAY OF JUNE, 2016.**

**In the presence of:**

**Appellant in person.**

**Mr. E. Ombati for State**

**Court Clerk – Kevin Odhiambo**

**Court Clerk – Mohammed Akideh**

**J. A. MAKAU**

**JUDGE**