REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NOS. 68, 69 AND 70 OF 2013

ANDERSON KIRIRU NYAGA…..……...…1ST APPELLANT

DAVID KIBUCHI MWANGI…….……..2ND APPELLANT

JAMES MURIITHI MWANGI……..…….3RD APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

JUDGMENT

1. ANDERSON KIRIRU NYAGA, DAVID KIBUCHI MWANGI and **JAMES MURIITHI MWANGI** are the appellants in this consolidated, appeal and were charged vide Baricho Senior Resident Magistrate's Court Criminal Case No. 768 of 2011 together with two others (who did not prefer an appeal) with two counts namely:-

> i. Distributing alcoholic drink without a licence contrary to **Section 37 (1)** of the **Alcoholic Drinks Control Act No. 4 of 2010.**

The particulars were that on 23rd day of November, 2011 at Kaharo village, Kirinyaga West within Kirinyaga County they were found distributing alcoholic drinks namely Kibuga without a licence from Kirinyaga District Licensing Board.

> ii. Contravening **Section 32 (1) (a) (c) (2)** as read with **Section 8** of the **Alcoholic Drinks Control Act No. 4 of 2010**.

The particulars were that on 23rd November, 2011 at Kaharu village Kirinyaga West within Kirinyaga County they were jointly found repacking an opague beer namely Kibuga into 20 litres jerricans which did not bear a statement as to its contents and also health warning messages prescribed in English or Kiswahili.

2. The prosecution case rested on the evidence of five witnesses and exhibits produced to prove the charges facing the appellants. Briefly the evidence adduced shows that **John Migwi Nguru** (P.W.1) an assistant chief of Gitaku sub-location where the offence took place, got tip off from a member of the public that the appellants were distributing beer at Kaharo villages. He got hold of an administration Police officer and informed the area chief **David Mwangi Kurigu** (P.W.2) who promptly came with more police officers and together they headed to the scene where they found the appellants and two other persons offloading and refilling alcohol into different containers. They arrested them with the motor vehicle Registration Number KBL 623V and recovered 4 plastic jerricans of 20 litres and crates of beer.

According to P.W.1 the 1st and 2nd accused persons were buyers while the appellants herein were suppliers with the lorry. He told the court that the five were arrested and later charged in court.

3. P.W.2 largely gave evidence which corroborated the above with the latter giving more details of what was recovered at the scene of crime which he described as beer crates in motor vehicle Registration Number KBL 623V, two jerrican of 20 litres each, 1 jerrican of 25 litres and others in 5 litres. He also told the trial court that they recovered 8 empty crates of beer. **Antony Moseti** (P.W.5) the Police Officer who investigated the case, told the trial court that he sent the exhibit (liquid) for analysis and later got the report back from Government chemist. He produced both the analyst report and exhibit memo as Prosecution Exhibit 4a and 4b respectively showing that the liquid found contained 44% alcohol (Ethanol) by volume. He also produced four jerricans and crates recovered at the scene as exhibits in the case. The photographs of the canter lorry with crates of beer were also produced as Prosecution exhibit 1 a-d. The witness told the trial court that the persons charged had no licence at the time of their arrests and that is why he charged them with the two counts before the trial court.

4. In their defence, the appellants defended themselves that they had licences and were in their lawful employment (Roskin Agencies) at the time. They produced two licences Defence Exhibit 1 showing that they were authorized to distribute beer for sale and Defence exhibit 2 showing that they were authorized to manufacture opague/Kibuga wine.

5. The trial court found that the prosecution had proved their case to the required standard as the appellants did not deny that they were at the scene at the material time. The trial court found that the appellants had not offered sufficient explanation on what they were doing with jerricans that were unmarked contrary to the law. He also found that the licence produced did not authorize them to distribute the alcohol in Kirinyaga West. The court as such found them guilty and sentenced them to 15 months probation. The appellants felt aggrieved and preferred this appeal citing 5 grounds in their petition namely:

> ***i. That the learned magistrate erred in law and fact by making judgment against the weight of evidence.***
>
> ***ii. That the learned magistrate erred in law and fact in disregarding the inconsistencies and contradictions in the prosecution case.***
>
> ***iii. That the learned magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt.***
>
> ***iv. That the learned magistrate erred in law and fact in misinterpreting the provisions of Section 37 (1) of the Alcoholic Drinks Control Act No. 4 of 2010.***
>
> ***v. That the defence was unfairly disregarded.***

6. The appellants in their written submissions through their counsel submitted in support of ground 4 of their petition that the particulars contained in the charge sheet did not disclose the offence under **Section 37 (1)** of **Alcoholic Drinks Control Act**. In their contention the particulars suggested that they did not have a licence to distribute the alcohol and yet the provision presupposes a situation where one has a licence but selling alcohol in some premises that the licence did not cover or that they were selling drinks to customers who were caught consuming them in those premises lacking the licences. It was therefore submitted that count 1 irrespective of the evidence tendered, could not have sustained a conviction because it was defective.

7. The appellants further submitted that the prosecution case at the trial did not prove the particulars of the offence beyond reasonable doubt. It was pointed out that while the particulars in Count 1 stated that the appellants were distributing "kibuga" without a licence of Kirinyaga District Licence Court, the evidence adduced showed different reasons why the appellants were arrested as the prosecution witnesses particularly P.W.1 and P.W.2, P.W. 4 and P.W. 3 were not sure if the appellants had a licence or not. The

appellants have contended that no evidence was tendered to prove that the appellants were distributing alcohol without a licence.

8. In regard to count II the appellants contended that the charge was defective as it was too general with several offences crystalised into one. It was further submitted the appellants were charged under an irrelevant section stating that **Section 8** of the Act relates to the licencing authority/body. It also was pointed out that the particulars contained in count II were vague and that the amendments made were done after the principal witnesses had given evidence and that it was erroneous for the learned trial magistrate to base conviction on the evidence of a single witness who was investigating officer.

9. The appellants contended that they could not have been expected to put labels on the jerricans as the same were in their view connected with the 1st and 2nd accused at the trial. They have accused the prosecution for building up their case as the trial went on holding that no reasons were advanced why the witnesses could not make their statements and yet they were all close to the police station where the appellants were detained before being arraigned in court.

10. The appellants have further faulted the prosecution case at the trial contending that the evidence adduced did not add up pointing out that no bottle tops were produced as exhibits to show that the beer in the bottles was being transferred to jerricans and that the eight crates could not fit the four jerricans produced.

11. On contradictions on the prosecution case, the appellants have pointed out that P.W. 1 and P.W. 2 gave contradicting evidence on the amount of alcohol recovered at the scene with the former stating that 65 litres was recovered while the former stating that 70 litres was recovered.

12. The appellant faulted the learned trial magistrate for not giving enough weight to their defence which in their view was straight forward and credible. They submitted that the absence of bottles at the scene showed that the empty creates were collected from customers and that it was not an offence in any event to carry empty beer crates. They have faulted the learned trial magistrate for shifting the burden to them arguing that they were not expected to prove their innocence. They further contended that the licence they produced in defence authorized them to distribute alcoholic drinks without restrictions.

13. The respondent opposed this appeal through written submissions by E. P. O. Omooria principal prosecuting learned counsel for the respondent. He submitted that the prosecution proved its case at the trial court to the required standard and supported the finding of the learned trial magistrate. It was submitted that the 2nd appellant testified that he was the driver of motor vehicle registration number KBL 623V that was used to transport the kibuga beer without licence to distribute the beer where he was arrested (Kaharu area). The state contended that the licence produced by the appellant in defence did not cover Kaharu area which proved that they were guilty as charged.

14. I have gone through the evidence adduced at the trial court and re-evaluated the same in order to consider whether the finding of the learned trial magistrate was correct as submitted by the respondent or erroneous as submitted by the appellants.

15. To begin with the grounds cited in the petitions of the appeal *vis a viz* the written submissions, this Court has noted that the appellant without leave of this Court under **Section 350 (2),** raised new ground that the charge particularly in regard to Count I was defective and that the particulars contained therein did not disclose an offence. This in my view was a new ground and cannot be connected in any way with ground 4 in the petition. The 4th ground in the petition is about the application of **Section 37(1)** of the **Alcoholic Drinks Control Act No. 4 of 2010**. The appellants faulted the magistrate in the application of that provision in his judgment but I have considered the judgment of the trial court and I have not seen where the learned trial magistrate misdirected himself in regard to that provision. He found that the appellants were distributing unmarked alcoholic drinks in an area not covered by the licences that the appellants tendered in their defence. The ground is therefore distinct and different from the new ground touching on the competence or defect of the charge. This Court therefore finds that that ground raised in the submissions is incompetently raised as the appellant had not initially raised it and required leave of

this Court to raise it as provided by the law.

16. The appellants were charged with selling or distributing alcoholic drinks without a licence which is outlawed under **Section 37 (1)** of the **Alcoholic Drinks Control Act**. I have evaluated the evidence adduced by the prosecution in regard with what the appellants were found with. I have noted the discrepancy pointed out by the appellants with regard to the amount of alcohol seized at the scene of crime. While P.W. 1 (Assistant Chief) gave the total amount of alcohol seized as 65 litres, P.W. 2 (Area chief – David Mwangi Kurigu) gave the total number of litres as 70. This discrepancy in my view was minor and an insignificant and did not affect in any way the probative value of the evidence tendered by the prosecution.

17. The appellants' contention that the charge facing them was too general and non-existent in view of provisions of **Section 8** of the **Alcoholic Drinks Control Act** cited in the charge sheet is not competent as a ground in this appeal because it was also later raised at submissions stage without leave of this Court and even if it had been properly raised, I would still have found the defect not fatal as contended because the defect is curable under **Section 382** of the **Criminal Procedure Code**. What was important to the trial court was to satisfy itself that the offence under which the appellant had been charged with had been proved beyond reasonable doubt. This brings my attention to the first and fifth grounds of appeal herein which touché on the weight of the prosecution case *visa viz* the defence put forward by the appellants at the trial.

18. The learned trial magistrate in his judgment found that the 2nd appellants, David Kibuchi Mwangi, upon whose evidence the defence case rested, was found at Kaharo area, Kirinyaga West with a consignment of alcoholic drinks. That finding has not been seriously challenged by this appeal. I also find that in their defence the appellants had told the trial court that:

"Roskin Agency have a licence to manufacture and distribute alcohol"

and produced the licences at Exhibit 1 and Defence Exhibit 2. He however, conceded under cross-examination that he did not have a licence to distribute alcohol in Kirinyaga West where he was arrested. I find that what he told the trial court under cross-examination was material. " I do not have licence to distribute beer at Kirinyaga West. I was arrested at Kaharu at Kirinyaga West." In my considered view the learned trial magistrate in the face of this admission coupled with the evidence adduced by prosecution witnesses was correct in concluding that the prosecution case had been proved beyond reasonable doubt.

19. The appellants have pointed out that some past evidence adduced by the prosecution could not add up and cited point where the investigating officer was had pressed to explain how 8 crates of beer could fit into 4 jerricans produced in court. While I agree with the proposition that it was not feasible for eight crates of beer or any liquid for that matter to fit into 20 litre or 30 litre jerricans, I do not think that it was viable or rational for anyone to pour beer from beer bottles to a jerrican. It is possible that what was contained in the jerricans was some other staff and not kibuga beer that were bottled in the beer bottles. It is in fact telling that the investigating officer told the trial court that he could not establish the contents of the liquid found in the jerricans and that is why he could not charge them with selling adulterated alcohol or any other illicit drinks.

20. The appellants have raised an important point which I must address and this is the question of burden of proof. They contend that the trial court kind of shifted the burden from the prosecution to them. It is true that an accused person in Kenya has a constitutional right, embedded under **Article 50 (2)** of the **Constitution**, to be presumed innocent until the contrary is proved. That right cannot be taken away and must be enforced at all times. However it is also true that to deal with some specified controlled products or by-products a person for good reason would require a licence or permits to deal with such products and so the law enforcement agencies will from time to time require those persons to display or show that they are permitted by law or licenced to deal with the said products. In this case when the appellants were confronted while distributing the alcoholic drinks, which by law are controlled and regulated, again as a matter of public policy which is desirable, they could not show that they were licenced. I have looked at

Defence exhibits 1, which is a brewer's licence (No. 0700) issued to Roskin Agencies to distribute alcoholic drinks. The terms of the distributor's licence were given as follows:

a. Brew and store brewed alcoholic drink in its depot.

b. Seal the product by wholesale to a holder of a wholesale licence or by delivery from a depot throughout Kenya.

c. Bottle the alcoholic drink.

The definition of "depot" used in the Statute under Alcoholic Drinks Act, 2010 is given as premises of whatever description which is occupied by a brewer for his trade. The defence exhibit 2 gave authority or licence to the appellants employers to manufacture alcoholic drinks (kibuga wine) at its premises situate at Kagumo Town along Kerugoya-Karatina road. The appellants could not therefore justify distributing alcoholic drinks at Kirinyaga West District because they were not permitted or licensed to do so in that location. The trial court cannot be faulted that he misdirected himself on the burden of proof. The plastic jerricans they were caught with had no mark from Ministry of Heal warning the public of the contents therein. The trial court was therefore right to conclude that the appellants had contravened the law as per the 2nd count on the charge facing them. Of course I have noted that there was spelling/grammatical mistakes on the particulars of the charge in the 2nd count where instead of using the word "contents" the Police used the word "constituents". That error is however, curable under **Section 382** of the **Criminal Procedure Code** as no prejudice was suffered by the appellants as a result of the cited mistake.

21. The trial court did not shift the burden of proof. Once the prosecution established that the appellants had committed an offence, it was incumbent upon them to defend themselves which they did but as I have pointed out, the licences they produced in their defence could not assist them. It is not correct to say that the trial court did not consider their defence because it did.

In the end, I find no merit in this appeal. I agree with the respondent that the sentence was lenient perhaps due to mitigating circumstances but all the same the State did not ask for enhancement of the sentence. The appeal is dismissed and the conviction and sentence are upheld.

Dated and delivered at Kerugoya this 18th day of July, 2016.

R. K. LIMO

JUDGE

18.7.2016

Before Hon. Justice R. Limo

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant 1

Appellant 2 absent

Appellant 3

Interpretation:

Magee for the appellant absent.

Sitati for State present.

SITATI: The appellants were to attend court but they are absent and Magee is absent.

Later: Abubakar holding brief for Magee present.

Sitati for State present

COURT: Judgment signed, dated and delivered in the presence of Sitati for State and Abubakar holding brief for Magee for the appellants.

R. K. LIMO

JUDGE

18.7.2016