



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.16 OF 2016

(An appeal from original conviction and sentence of Kisii CM'S Criminal Case No. 1548 of 2016 by Hon. B. OCHIENG – CM dated 12TH May, 2016))

RAEL KEMUNTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein, **RAEL KEMUNTO**, was charged with the offence of dealing with alcoholic drinks without a licence contrary to **Section 7 (1) (b)** as read with **Section 34 (a)** of the **Alcoholic Drinks Control Act of Kenya Gazette Supplement No. 4 of 2010**.
2. The appellant faced a second similar count of dealing with alcoholic drinks without a licence. The particulars of the charges were that on 12th May 2016 at IKURUMA location in MARANI District within Kisii County, was found dealing with alcoholic drinks namely 20 litres of KANGARA and 5 litres of Changaa without liquor licence in respect to the 1st and 2nd count respectively.
3. The appellant pleaded guilty to both counts and was subsequently convicted of her own plea of guilty and sentenced to serve 6 months and 3 months Community Service Order for the 1st and 2nd counts respectively.
4. Later on, when the matter was mentioned before the court for Community Service Placement, the Probation Officer informed the court of the accused's previous criminal record whereupon the court revoked the earlier sentence of Community Service Order and imposed a 6 months imprisonment on the appellant.
5. The appellant has now appealed to this court against both conviction and sentence and has put forth several grounds of appeal, 5 of which are not relevant to this appeal since no evidence was taken in this matter as the appellant pleaded guilty to the charges. The only relevant ground of appeal is the last ground in which the appellant states that the sentence handed down on her was excessive.
6. When the matter came up before me for the hearing of the appeal, Mr. Otieno counsel for the state informed the court that he was conceding to the appeal owing to the irregular manner in which the plea was taken which, he submitted, made the plea of guilty not unequivocal and further, that the trial magistrate irregularly purported to revoke his own earlier non-custodial sentence and substituted the

sentence with a prison term on the basis of a Probation Officer's report indicating that the appellant had a previous criminal conviction.

7. Mr. Bigogo, Counsel for the appellant, supported the sentiments of the state counsel and added that there were several glaring irregularities in the lower court record that rendered both the conviction and sentence a nullity.

Determination

8. I have perused the petition of appeal filed herein, and the lower court's proceedings. I have also considered the submissions of the Counsel for the state and the appellant.

9. This court as the first appellate court has a duty to reconsider the evidence tendered before the lower court in order to arrive at its own independent findings. (See **Okeno Vs Republic (1972) E.A. 32**).

10. The appellant herein however pleaded guilty to the charges leveled against her before the lower court and therefore no evidence was tendered to prove the charge. Be that as it may, in this appeal, the court is still under a duty to re-look at the proceedings before the lower court with a view to establishing if the plea was unequivocal and was taken in accordance with the principles laid down, by the courts, for the recording of a guilty plea.

11. In the celebrated case of **Adan Vs Republic (1973) E.A 445- 447** the procedure for recording a plea of guilty was laid out as follows.

- 1. That the charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
- 2. The accused's own words should be recorded and if they are an admission a plea of guilty should be recorded.**
- 3. 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.**
- 4. If the accused does not agree the facts and raises any question of his guilt his reply must be recorded and change of plea entered.**
- 5. If there is no change of plea conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.**

12. In the instant case, the prosecution cannot be said to have stated the facts of the case as when asked to state the same, the prosecutor in both counts simply stated as follows:

"Facts as per charge sheet".

13. Going by the guidelines provided for in **Adan Vs Republic (supra)** it was incumbent upon the prosecution to state the facts of the case so as to accord the appellant an opportunity to admit or challenge the same. See **Moraa Onduso Vs Republic [2007] eKLR**.

14. The prosecution did not provide the facts of the case and this was a fatal error that rendered the guilty plea not unequivocal.

15. On this ground alone this appeal succeeds. However, I still feel obliged to address the issue of sentence. From the record, I note that the trial court had initially pronounced a probation sentence on the appellant before revoking the same as follows:

"CSO order is revoked and accused sent to 6 months imprisonment."

16. The change of mind, on the part of the court was actuated by a statement made by the Probation Officer to the effect that the appellant had a previous conviction when the case was mentioned for Community Service Order Placement.

17. I concur with the submissions by Mr. Otieno that the trial court, upon making an order on sentence, was rendered *functus officio* and could not purport to revise its own orders as revision orders is the preserve of the High Court by dint of the Provisions of Section 362 and 364 of the Criminal Procedure Code.

18. Furthermore, the trial court had not called for the Probation Officer's pre-sentencing report so as to warrant the decision by the Probation Officer to inform the court of the appellant's alleged past criminal record. It was the duty of the prosecution to inform the court of the appellant's past record and in the instant case, the prosecution had already informed the court that the appellant was a first offender with no previous criminal record.

19. In any event, even where a court calls for the Probation Officer's presentencing report, such a report is never meant to provide the court with justification for a much harsher sentence than the court would otherwise had meted out were there no such report.

20. In the case of **James Kimani & Another vs Republic [2016] eKLR**, Waweru J. had the following to say on probation reports:

“The purpose of obtaining a probation report on a convicted accused person is to enable the court to consider a period of probation as an appropriate sentence instead of a term of imprisonment or fine, or other punishment.”

21. I therefore find that the Probation Officer not only overstepped his mandate and ventured into the prosecution's territory by purporting to furnish the court with the appellant's past criminal record, but also veered off course by attempting to guide/provoke the court to give a much stiffer sentence than it had already pronounced.

22. In view of my above findings and in view of the glaring irregularities in the lower court record, I allow the appellant's appeal on both the conviction and sentence.

23. Consequently, I quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless she is otherwise lawfully held.

24. It is so ordered.

Dated, signed and delivered in open court this 14th day of July, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Bigogo for the Appellant

Omwoyo court clerk