



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 6B OF 2015

ESTHER NG'ETICHAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Honourable J. Nyagol, Resident Magistrate at Kericho in Criminal Case No. 458 of 2015 on 26.2.2015)

J U D G M E N T

1. **Esther Ng'etich**, the appellant was arrested on 25th February, 2015 and arraigned before the Chief Magistrate's Court Kericho on 26th February, 2015 charged with the offence of selling Alcoholic drinks without licence contrary to **Section 27(1)(b)** as read with **Section 24(2)** of the **Alcoholic Drinks Control Act No. 4 of 2010 Laws of Kenya**.

The particulars being that the appellant on the 25th day of February, 2015 at about 10.00a.m at Pagao village in Kericho District within Kericho County, was found selling alcoholic drinks namely Busaa to wit 200 litres and Chang'aa to wit 50 litres without a licence as required by law.

2. She pleaded guilty to the charge and facts were read to her in Kipsigis language. She admitted the facts and was convicted and fined Shs. 150,000/= in default six(6) months imprisonment.
3. She was dissatisfied and has filed an appeal against both the conviction and sentence raising the following grounds;
 - *The trial magistrate erred in both law and fact by convicting the appellant on defective charge sheet.*
 - *The sentence awarded was harsh and excessive in all circumstances as the appellant was first offender.*
 - *The trial magistrate did not warn the appellant of the consequences of pleading guilty.*
 - *The appellant herein prays this court to allow the appeal set aside the sentence or in the alternative the appellant be placed on probation and/or community service order.*
4. When the appeal came for hearing the appellant was only asking the court to release her to go home. She did not argue the grounds.

5. The State through **M/S Mwangi** the learned state counsel conceded the appeal on the first ground, that the charge sheet was defective.
6. She submitted that the appellant was charged under the wrong provisions of the Law. That she should have been charged under **Section 7(b)** of the **Alcoholic Drinks Control Act** and not **Section 27(1) (b)** of the said Act.
7. The Penal Clause ought to have been **Section 62** and not **Section 24** of the Act.
8. The particulars of the charge indicate that the appellant was found selling alcoholic drinks. **Section 27(1)** of the **Alcoholic Drinks Control Act** only deals with;
 - *Manufacturing*
 - *Importing*
 - *Distributing*
 - *Possessing of alcoholic drinks.*

There is no mention of selling under Section 27(1).

9. **Section 7(1) (c)** of the Act provides:

“No person shall sell, dispose of, or deal with any alcoholic drink except under and in accordance with a licence issued under this Act.”

This is the section under which the appellant ought to have been charged.

10. The punishment for selling alcoholic drinks without a licence is found in **Section 62** of the Act as no specific penalty is provided for in relation to **Section 7(1)** of the Act.

The Section quoted in the charge sheet being **Section 24(2)** of the Act is so irrelevant to the offence.

11. It is noted that the charge was laid under wrong provisions of the law as explained above.

It must be remembered that the appellant was unrepresented at the trial and could not therefore have raised any objection to the charge.

12. It was the duty of the prosecution in the first place, to see to it that the charge was correctly framed and laid under the appropriate provisions of the law.

13. It was also the special duty of the learned trial magistrate to be certain, having regard to the fact that the appellant was unrepresented by counsel that the charge was laid under the correct provisions of the law before convicting her on her own plea of guilty.

14. For me, to hold otherwise would be to encourage incompetence and laxity which would result in the prosecution not taking care to ensure that proper charge sheets were presented to the courts.

15. My finding is that the charge sheet was manifestly defective and occasioned injustice to the appellant who has been in prison for six(6) weeks. This defect in the charge sheet cannot be cured under **Section 382** of the **Criminal Procedure Code**. The State has rightly conceded the appeal.

16. The result is that the appeal is allowed.

The conviction is quashed and sentence set aside.

The appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Dated, signed and delivered this 9th day of April, 2015

H.I. ONG'UDI

JUDGE

In the presence of ;

M/S Mwangi for State

Appellant

Lagat – Court Assistant