



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO.37 OF 2014**

(An appeal against original conviction and sentence of Sotik PM Criminal Case No.464 of 2014 – Hon. N. Barasa –RM dated 13<sup>th</sup> May 2014)

**WESLEY KIRUI - APPELLANT**

**VERSUS**

**REPUBLIC - RESPONDENT**

**JUDGMENT**

Wesley Kirui, the Appellant herein, was convicted on his own plea of guilty to a charge of four counts which were expressed on the charge sheet as follows:

Count 1: Selling alcoholic drinks without licence contrary to Section 27(1) of the Alcoholic Drinks Control Act No.4 of 2010.

Particulars: On the 12<sup>th</sup> day of May 2014 at Kibwastuiyo village in Bureti District within Kericho County was found selling Alcoholic Drinks namely Kangara to wit 190 litres without licence.

Count 2: Selling Alcoholic Drinks without proper packaging contrary to Section 32(9) (b) as read with Section 32 (1) (c) of the Alcoholic Drinks Control Act No.4 of 2010.

Particulars: On the 12<sup>th</sup> May 2014 at Kibwastuiyo village in Bureti District within Kericho County was found selling Alcoholic Drinks namely Kangara to wit 190 litres having not properly packaged.

Count 3: Selling Alcoholic Drinks without licence contrary to Section 27(1) of the Alcoholic Drinks control Act No.4 of 2010.

Particulars: On the 12<sup>th</sup> day of May 2014 at Kibwastuiyo village in Bureti District within Kericho County was found selling alcoholic Drinks namely Changaa to wit 10 litres without licence.

Count 4: Selling Alcoholic Drinks without proper packaging contrary to Section 32 (a) (b) as read with Sections 32 (1) (c) of the Alcoholic Drinks Control Act No.4 of 2010.

Particulars: On the 12<sup>th</sup> day of May 2014 at Kibwastuiyo village in Bureti District within Kericho County was found selling Alcoholic drinks namely Chang'aa to wit 10 litres having not properly packaged.

The Appellant was thereafter sentenced in each count as follows:

Count 1: To pay a fine of Ksh.30,000/= in default to serve 6 months imprisonment.

Count 2: To pay a fine of Ksh.20,000/= in default to serve 6 months imprisonment.

Count 3: To pay a fine of Ksh.30,000/= in default to serve 6 months imprisonment.

Count 4: To pay a fine of Ksh.20,000/= in default to serve 6 months imprisonment.

The learned Resident Magistrate stated that the default custodial sentences to run consecutively. The Appellant being aggrieved preferred this appeal. He put forward the following grounds of appeal:

1. THAT the learned Resident Magistrate erred in law and in fact in not considering that all the four (4) counts as framed are totally defective.
2. THAT the learned Resident Magistrate erred in law and in fact in taking the plea of the Appellant without adhering to the law. The plea taking was fatally defective.
3. THAT the charge was not read out in any language the Appellant understood.
4. THAT the facts constituting the charge were not stated by the prosecutor.
5. THAT the proceedings are fatally defective in not indicating the rank of the Prosecutor.

When the appeal came up for hearing, Miss. Kivali, learned prosecution conceded, the appeal on the basis that the plea was equivocal. She pointed out that the facts in supported of the charge were not outlined. Mr. Onganyi, learned advocate for the Appellant urged this court to allow the appeal on the same ground. He complained that the facts were not outlined. He also argued that the Appellant did not understand the language of the court.

I have taken into account the submissions of learned counsels. The main question which must be determined on appeal is whether or not the plea was equivocal. The Principles to be considered before recording a plea of guilty were restated by the Court of Appeal in the case of Michael Mbaria Kariuki –vs- R. [1984] KLR 810 as follows:

“The manner in which a plea of guilty should be recorded is:

- a. The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;
- b. He should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;
- c. The prosecution may 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;
- d. If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused’s reply - Adan v Republic [1973] EA 445.

A critical examination of the recorded proceedings of the trial court will reveal that the court did not state whether the accused person understood Kiswahili language which was used in reading and explaining the charge and its particulars. It is also quite apparent that the facts in support of the charge were never

outlined as required under Section 207 of the Criminal Procedure Code. With respect, I agree with the submissions of both learned counsels that the plea of guilty was equivocal hence the appeal must be allowed. I had contemplated to order for the appellant a fresh taking of plea but upon examining the record, it is clear that the alcohol, the subject matter of this appeal was ordered to be destroyed. It will therefore be prejudicial to the appellant to be made to undergo a fresh trial. The appeal is allowed. The order on conviction is quashed and the sentence is set aside. If any fines have been paid, they should be refunded forthwith. The Appellant, if serving the default sentences, he should be set free from custody forthwith unless lawfully held.

Dated, signed and delivered in open court this 11<sup>th</sup> day of July 2014.

J. K. SERGON

JUDGE

In the presence of:

- Mr. Ong'anyi for Appellant
- Miss. Kivali for Director of Public Prosecutions