



REPUBLIC OF KENYA



**Khayo v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 4423 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E001 OF 2024
WM MUSYOKA, J
APRIL 26, 2024**

BETWEEN

PRISCILA AKELO KHAYO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the sentence by Hon. AN Karimi, Senior Resident Magistrate, SRM, in Port Victoria SRMCCRC No. E16 of 2024, of 15th January 2024)

JUDGMENT

1. The appellant was convicted of the offence of possession of alcoholic drinks, which do not conform with the requirements and instructions of law, contrary to Section 27 (1) 5, as read with Section 27 (4), of the *Alcoholic Drinks Control Act*, Cap 121, Laws of Kenya. She was sentenced to pay a fine of Kshs. 200,000.00, or, in default, serve 12 months in jail. She was convicted on her own plea of guilt.
2. She was aggrieved, hence this appeal. The appeal is largely on sentence. It is averred that the trial court did not enquire as to the ability of the appellant to pay the fine of Kshs. 200,000.00, a pre-sentence report was not called for, and her statement in mitigation was not considered. It is also submitted that the plea was not equivocal.
3. In her written submissions, the appellant argues that a sentence should be proportionate to the circumstances and the gravity of the offence. It is also submitted that before imposing the fine, the court should have enquired into whether the appellant could pay the fine. It is also submitted that it is now the norm to call for a pre-sentence report before imposing sentence. It is also submitted that the mitigation was not considered. She submits more substantially on the process of taking plea, and even cited authority to support her contentious. She raises issue with the facts not being read, to her, and the respondent relying exclusively on the facts set out on the charge sheet, which made the plea equivocal. Section 207 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, is cited on how a plea



of guilty should be recorded, and so is *Adan v Republic* [1973] EA 446, where guidelines and principles on plea-taking were set.

4. The respondent relies on section 207 of the Criminal Procedure Code, with respect to plea taking, and cites *Ombena v. Republic* [1981] eKLR, which was founded on *Adan v. Republic* [1973] EA 446. It is submitted that there was compliance with the law on plea-taking. On legality of the sentence, section 27 of the *Alcoholic Drinks Control Act* is cited, and it is submitted that the sentence was lawful and lenient, and it was neither harsh nor excessive. It is also submitted that the trial court exercised discretion properly, and *Wanjema v Republic* [1971] EA 493 is cited.
5. I do not think much turns on the grounds against the sentence. Section 27(4) of the *Alcoholic Drinks Control Act* provides for a maximum fine of Kshs. 2,000,000.00. The trial court imposed a fine of Kshs. 200,000.00. For imprisonment, the prescribed maximum is 5 years. The default term was imprisonment for 1 year or 12 months. Section 27(4) of the *Act* also allows imposition of both fine and imprisonment. The appellant was alleged to be in possession of large quantities of the alcoholic drink, 201 litres, not 1 litre or 2 litres. In the circumstances, the sentence imposed, cannot be said to be harsh or excessive.
6. The appellant argues that her statement in mitigation was not considered. She said she sold alcohol to feed her family. Such a mitigation cannot form basis for excusing contravention of legislation. If the law criminalises possession of something, a person found in possession cannot possibly justify that possession unless in circumstances allowed by the law. If possession required licensing or authorization of some sort, again possession cannot be explained away, except in circumstances where the law would allow such possession without the licence or the authorization. The appellant did not attempt to demonstrate that her possession was legally justified to enable the court exercise discretion in her favour. The legislation was passed to enable control of handling of alcoholic drinks, and any person handling such drinks must strive to comply with that law, whether they handle the alcoholic drink to raise money to support their family or not. There is some objective behind every law, which should not be disregarded willy-nilly.
7. On whether the plea taking process was proper, I am persuaded that there are some issues.
8. Firstly, I doubt whether the charge under section 27(1)(b) of the *Alcoholic Drinks Control Act* was properly framed. Section 27(1)(b) criminalises possession of alcoholic drink that does not conform with the requirements of the *Act*. What are these requirements? These are stated in section 27(2) of the *Act*. One is authorization of the possession, and the other is possession of the alcoholic drink in premises licensed under the *Act*. The offence under section 27(1)(b) is committed where the possession is unauthorized under section 27(2)(a) of the *Act*, or where it is authorized but the possession is in premises that are unlicensed.
9. Section 27 of the *Act* state as follows:

“27. Conformity with requirements

(1) No person shall—

- (a) manufacture, import or distribute; or
- (b) possess, an alcoholic drink that does not conform to the requirements of this Act.

2 Subsection (1) shall not apply to a person who—



- (a) is authorized under this Act to be in possession of the alcoholic drink; or
 - (b) has possession of the alcoholic drink in a premises licensed under this Act.
 - (3) The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or the requirements of this Act.
 - (4) A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.”
10. The charge against the appellant was for possession of an alcoholic drink that does not conform to the requirements and standards contrary to section 27(1)(b) of the Act. The particulars alleged that she was found in possession of mulingilo without a license. Firstly, section 27(1) does not create an offence for not conforming with standards, but with the requirements of the Act. To that extent, the charge was partially defective, for including an element which is not provided for in the law. Secondly, under section 27(2), possession has 2 elements, possession which is unauthorized, and possession in premises that are unlicensed. Possession which is unauthorized is one, and possession in premises that are unlicensed is another. Authorized possession is defined in section 7 of the Act, one can only deal with liquor or alcoholic drinks under a license issued under the Act, except where the Act authorises otherwise. The handling of alcohol in medicinal form; or in the form of a perfume; or at an auction; or by trustee in bankruptcy; or for sale at Parliament Buildings with the permission of the Speaker; or sale to members of any canteen, club, institute, mess or similar institution in the disciplined forces is authorised, for handling without the necessity of taking out a licence. Anything outside of that is subject to licensing under section 9 of the Act, that is to say the handling of alcohol for manufacturing purposes or for sale, except in the circumstances detailed under section 7. Section 12 requires licensing of premises for sale of alcoholic drinks for consumption.
11. The relevant portions of sections 7, 9 and 12 state as follows:
- “7. Control of alcoholic drinks
- (1) No person shall—
 - (a) manufacture or otherwise produce;
 - (b) sell, dispose of, or deal with;
 - (c) import or cause to be imported; or
 - (d) export or cause to be exported, any alcoholic drink except under and in accordance with a licence issued under this Act.
 - (2) For the purposes of subsection (1), an alcoholic drink shall be deemed to have been exported when it is placed on a ship, aircraft, train or any other vehicle within Kenya for the purposes of export.
 - (3) Subsection (1) shall not apply to—



- (a) the bona fide administration or sale for purely medical purposes, and in accordance with any written law for the time being in force governing the administration and sale of medicine, by a medical practitioner, a veterinary surgeon registered under the *Veterinary Surgeons and Veterinary Paraprofessionals Act* (Cap. 366) or a pharmacist registered under the *Pharmacy and Poisons Act* (Cap. 244), of a medicine containing alcoholic drink;
- (b) the sale of spirituous or distilled perfume, or perfumery;
- (c) the sale of industrial alcohol;
- (d) the sale by auction by an auctioneer, licensed under the *Auctioneers Act* (Cap. 526), of an alcoholic drink in quantities not less than those authorized to be sold under a wholesale alcoholic drink licence belonging to a wholesale dealer, on the licensed premises of the dealer;
- (e) the sale by a deceased person's legal personal representative of an alcoholic drink forming part of the estate of the deceased person;
- (f) the sale by a trustee in bankruptcy of an alcoholic drink forming part of the bankrupt's estate;
- (g) the sale by the liquidator of a company of an alcoholic drink forming part of the company's assets;
- (h) the sale of alcoholic drink at Parliament Buildings, if sold with the permission of the Speaker of the National Assembly;
- (i) the sale of alcoholic drink to the members only of any canteen, club, institute, mess or similar institution of the disciplined forces:

Provided that this paragraph shall not apply to any such canteen, club, institute, mess or similar institution operated by any person for personal profit.”

“9. Application for licence

- (1) A person intending to manufacture or otherwise produce any alcoholic drink in Kenya or to operate an establishment for the sale of an alcoholic drink shall make an application in a prescribed form to the District Committee in the district where the premises is to be situated and shall pay a prescribed fee.
- (2) ...”

12. So, the question would be whether the appellant fell among the categories of persons or entities authorised to handle alcohol under section 7, without authority, and if not, whether she had the requisite license to handle the alcohol. If she had no authority, then she needed a license under the Act, and that license could only be issued under sections 9 and 12 of the Act, for the purpose of sale for consumption. Under sections 9 and 12 of the Act, that license should be tied to some premises where the alcohol is to be sold. The licensing, therefore, is of the premises where the alcohol is to be sold. It is not a license to handle alcoholic drinks generally, but at defined premises, for the purpose of its sale.

13. From the facts therein, the appellant was not a person authorized under section 7 to handle alcoholic drinks. She required a license, therefore, to handle them, for the purposes of sale. In her mitigation,



she clearly indicated that she possessed the mulingilo for purposes of sale. As indicated above, under sections 9, 10, 11 and 12 of the Act, the licensing to sell alcohol for consumption is tied to premises, and, in fact, it should be licensing of the premises. It should not be a license to a person to handle alcoholic drinks, but of premises where such drinks are to be sold. So, the charge, as framed against the appellant, under section 27(1)(b), should be read together with section 27(2)(b), that she was in possession of alcoholic drinks, in premises that should have been licensed. The charge, as framed, makes no reference to the requirement in section 27(2)(b), about the possession of the alcoholic drinks being in premises that are not licensed. Section 27 should further be read with sections 9, 10, 11 and 12, so that the possession is tied with the alcohol being intend for sale, and the requirement that the sale should be in licensed premises. To the extent that the charge, or its particulars, did not allege that the possession was in premises that were not licensed, made it incomplete, and, therefore, defective. The appellant pleaded to an incomplete and defective charge. That situation was compounded by the fact that the facts of the case were not read out to her, for it was alleged, at the trial, during plea-taking, that the facts were as per the charge sheet, yet the charge itself was incomplete, meaning that the said facts were, therefore, incomplete, and could not form basis for a proper charge, and subsequently a proper conviction.

14. On the plea not being unequivocal, one has to look at section 207 of the *Criminal Procedure Code*, which sets out the requirements and standards of what ought to be proper process. Section 207(2) of the Code requires any admission of a charge, by a plea of guilty, to be recorded as nearly as possible in the words used by the accused. *Adan v Republic* [1973] EA 446, expounded on that by stating that the charge should be read in a language that the accused understands, with all its elements being explained to him in that language; the accused persons own words should be recorded; the statement of the facts should be read to him, and he should be given a chance to respond to the facts, by way of either disputing them, or explaining them, or adding to them; and if he does not dispute the facts, he should be convicted.
15. So, what happened here? The charge was read out to the appellant, in Kiswahili, the language that she was alleged to understand. She answered in Kiswahili. It was then stated that the facts were as per the charge sheet, and she said the facts in the charge sheet were true, and she was convicted. When invited to make a statement in mitigation, she said she sold alcohol to feed her family.
16. I am persuaded, save for the bit of or the aspect on the facts being as per the charge sheet, section 207 of the Code, and the requirements in *Adan v Republic* [1973] EA 446, were complied with. The appellant understood the charge to be that of being in possession of mulingilo. Her statement in mitigation is a pointer to that fact. She explained why she handled the alcohol contrary to the requirements of the Act, that is to feed her family. I do not think that the trial court mishandled the plea-taking process. The problem was not how the plea-taking was handled, but about the charge being incomplete, or defective, or improperly framed. Possession of alcohol or alcoholic drinks per se is not an offence, the offence is being in possession of it for sale, without having premises licensed for that purpose. It is about possession of the alcohol at a place or premises that are not licensed for the purpose of handling that alcohol. The offence is committed when a person is found selling alcoholic drinks at a place or premises that has or have not been licenced for that purpose. The charge should have alleged that she had possession of mulingilo for sale at or without premises licensed for that purpose.
17. I believe I have said enough to demonstrate that the appeal herein has merit, for the reasons given. The appellant should not have pleaded to the charge as framed. I, accordingly, quash the conviction and set aside the sentence. The appellant shall be set free, unless is otherwise lawfully held. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 26TH DAY OF APRIL 2024



W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Shihemi, instructed by Maloba & Associates, Advocates for the appellant.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

