



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 99 OF 2015**

**LINNET ATIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPOUDENT**

**[Appeal from Original Conviction and Sentence from WINAM SRM'S**

**Court B. KASAVULI -SRM**

**in Criminal Case No.339 of 2015.]**

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**J U D G M E N T**

1. The appellant Linnet Atieno was charged with the offence of selling alcoholic drinks without a license contrary to Section 37(1) of the Alcoholic Drinks Control Act No. 4 of 2010. She was convicted of the offence on her own guilty plea and was condemned to pay a fine of Kshs. 50,000/- and in default a jail term of one year. The appellant has now appealed against the conviction and sentence.

2. In her petition of appeal, the petitioner raised several grounds of appeal but on arguing the appeal, Counsel for the appellant only argued on three grounds namely:

**1. That the charge was defective and could therefore not form a basis for mounting a competent trial.**

**2. That charge and the particulars of the offense were not read out to the appellant in a language that she understood and hence the answer by the appellant "ni kweli" was not sufficient.**

**3. That the plea was equivocal and hence a conviction was not safe.**

3. Counsel for the appellant made oral submissions. He told the Court that Section 37(1) of the Alcoholic Drinks Control Act which is the section that the appellant was charged under only defined the offence and it was therefore not safe to sentence and convict the appellant based on that section alone. Counsel argued that under Section 37(1) there is a requirement that a person is found drinking an alcoholic drink

with the privity of licensee but that the particulars of the charge in this case did not indicate that any person was found drinking the alcohol that the appellant was accused of selling without a license. It was argued that the reply by the appellant to the charge and the particulars "ni kweli" was not sufficient. Counsel urged the Court to allow the appeal and quash the sentence and the conviction.

4. For the respondent, learned State Counsel, readily conceded that the charge was defective.

5. Whereas the respondent reserves the right to oppose or concede to a criminal appeal, that in itself does not bind the Court. The decision of the Court is based on the court's analysis of the evidence adduced at trial. The respondent's opposition of an appeal does not lead to a dismissal of the appeal; conversely respondent's concession of an appeal cannot lead to its automatic success. See. **Norman Ambich Mero & Anor vs.- Republic NYERI CR APP NO. 279 OF 2005.** This court therefore has a duty to determine this appeal on its merits.

6. This being a first appeal, the court has a duty to reconsider and re-evaluate the evidence afresh with a view to reaching its independent conclusion. see. **Okeno vs.- Republic [1972] E.A 32.** In the present appeal however the appellant was convicted on an own plea of guilty and thus full trial was not conducted. What the Court should therefore ascertain is whether the plea was unequivocal before determining the other grounds of appeal.

7. **Section 281** of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea bargain. The principles to be applied in plea taking were well laid out in the locus classicus of **Adan vs.- Republic [1973] EA 445 at 446** where the Court held thus:

**“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”**

8. In the case of **Njuki vs.- Republic [1990] KLR 334** the Court emphasised the need to caution in recording a guilty plea. It held that the Court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

9. In the present case the charge and the particulars were read out in swahili and the appellant's answer was "ni kweli" following which a guilty plea was entered. Up to that point I am convinced that the right procedure was followed. What seems to be in issue are the particulars of the charge. The section 37(1) under which the appellant was charged provides as follows:

**37(1)If any person purchases any alcoholic drink from a licensee whose licence does not cover the sale of that alcoholic drink for consumption on the premises, and drinks the alcoholic drink on the premises where it is sold, or in any premises adjoining or near to those premises, if**

**belonging to the seller of the alcoholic drink or under his control or used by his permission, or on any highway adjoining or near any such premises, and it is proved to the court that the drinking of the alcoholic drink was with the privity or consent of the licensee who sold the alcoholic drink, the licensee commits an offence.**

10. It is clear from the section that selling of alcoholic drinks is not the offence. The offence is allowing a person to take the alcoholic drink on the premises if the seller's license does not cover the sale and consumption in that premises or an adjoining premises . The section is aimed at licensees whose licenses only allow them to sell but not to serve such drinks to their customers. From the charge sheet, the appellant was charged with selling alcoholic drinks without a license. That is not the offence created under section 37(1). The particulars of the offence do not also depict that there were people taking alcohol in the appellant's premises or at a place nearby with her permission.

11. From the forgoing it is clear that the charge was fatally defective. It was unsafe for the trial court to convict the appellant on such a defective charge and on that alone this appeal is allowed.

12. The appellant be set free unless lawfully held.

**Dated, signed and delivered this 8th March, 2016.**

**H. K. CHEMITEI**

**J U D G E**

**In the presence of:**

**.....for state**

**.....for appellant**



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