



REPUBLIC OF KENYA



KENYA LAW
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**Karihu v Republic (Criminal Revision E022 of 2024)
[2024] KEHC 10432 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E022 OF 2024
FN MUCHEMI, J
AUGUST 21, 2024**

BETWEEN

ESTHER NJERI KARIHU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination dated 24th January 2024 seeks for orders that the sentence in Thika CM Criminal Case No. E3866 of 2023 be reviewed.
2. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. E3866 of 2023 with the offence of selling alcoholic drinks with a liquor licence contrary to Section 7(1)(b) of the *Alcoholic Drinks Control Act* No. 4 of 2010 and was fined Kshs. 100,000/- in default, two years imprisonment.
3. The applicant states that she is a first-time offender, a single mother with two children aged 7 years and 4 years respectively and the breadwinner of her family. The applicant further states that she is responsible for the care of her mother who suffers from diabetes and high blood pressure.
4. The applicant states that she has spent 5 months in custody from the date of her conviction and she is remorseful for her actions and is ready to adhere to the law. The applicant further adds that she is 24 years old and would wish to utilize her young age to be a productive member of the society.
5. The applicant further states that while in custody she has received vocational training in the industry section which has equipped her with the skills that will help her if she is released from prison. She further avers that she pleaded guilty to the offence and agreed to take responsibility and did not wish to waste the honourable court's time.



6. The respondent states that the applicant was charged with the offence of selling alcoholic drinks without a liquor licence and she pleaded guilty and was sentenced to pay a fine of Kshs. 100,000/- in default two years imprisonment.
7. The respondent argues that the applicant has not stated that the sentence is manifestly harsh and excessive, that the sentence was illegal or improper and/or that the trial court acted on a wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing. The respondent further states that the applicant has given generalized reasons which do not suffice interference with the discretion of the trial court in sentencing warranting upsetting the sentence imposed by the trial court.
8. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial and high court.
9. The respondent states that the trial proceedings show that on 11th September 2023, the prosecution indicated that there were no prior records. The applicant in mitigation had nothing to say which means that she was not remorseful for her actions. The respondent urges the court to take judicial notice that the said offence is prevalent in this jurisdiction and a deterrent sentence ought to be meted so as to be a lesson to other potential offenders.
10. The respondent argues that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances.

The Applicant's Submissions

11. The applicant relies on the cases of *Eliud Njire Gatura v Republic* Petition No. 67 of 2019 and Nairobi High Court *Miscellaneous Criminal Application No 430 of 2015* and submits that the trial court's discretion in sentencing at the time of his conviction, was limited by the mandatory nature of the sentence imposed under Section 296(2) of the *Penal Code*. He relies on the cases of *George Munyinyi Kibuyu v Republic* (no citation given) and *John Sila Mutua v Republic* Petition No. 18 of 2020 and urges the court to exercise its discretion and review his sentence in line with the current jurisprudence on sentencing
12. The applicant submits that he was arrested at the age of 30 years and due to his experience in custody and suffering he has undergone he has learnt his lesson. The applicant further submits that he has undergone some courses as a form of rehabilitation and further that during his time in custody, he has lived peacefully with his fellow inmates.
13. The applicant states that he is a first offender and he was constitutionally guaranteed the benefit of the least sentence. He further submits that the mandatory sentence of death and later commuted to indefinite life sentence has ruined his hopes for future release and amounts to psychological torture contrary to Section 28 and 29 of the *Constitution*. The applicant submits that he is remorseful for the offence that he committed and urges the court to grant him a lenient sentence in conformity to the case of *Joseph Mutuma v Republic* [2019] eKLR.

The Respondent's Submissions

14. The respondent reiterates what she deponed in her affidavit and submits that the applicant on mitigation had nothing to say which means that she was not remorseful for her actions. Further that, the applicant has not argued or even suggested that the sentence passed was illegal or improper, or that the trial court acted on wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceedings was irregular or in violation of her rights or fundamental



freedom. Hers were generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court. The respondent argues that there is absence of any material to impeach the sentence or exercise of discretion by the trial court and urges the court to uphold the sentence of the trial court.

The Law

15. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

16. The applicant has come to this Honourable court by way of review provided for under Article 50 of the Constitution. It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

17. In the case of Samuel Kamau Macharia v KCB & 2 Others, Civil Application No. 2 of 2011, it was stated:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

18. The applicant herein was convicted for the offence of selling alcoholic drinks without liquor licence contrary to Section 7(1)(b) of the Alcoholic Drinks Control Act No. 4 of 2010. The applicant pleaded guilty to the offence and was sentenced to a fine of Kshs. 100,000/- in default two years imprisonment.

19. The penalty for the offence of selling alcoholic drinks without liquor licence is a fine not exceeding Kshs. 500,000/- or imprisonment for a term not exceeding three years or both. Thus it is evident that the trial magistrate imposed a sentence within the law and further the learned magistrate imposed the least severe sentence in line with Article 50(2)(1) of the Constitution:-

Every accused person has the right to a fair trial, which includes the right-

To the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

20. Considering the maximum sentence provided by the law, the magistrate treated the applicant with leniency. The court had the discretion to impose the maximum sentence in the event that the circumstances of the case called for it but she gave a less severe sentence. The applicant has not said that the sentence is manifestly harsh and excessive, or that the sentence was illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom.

21. The applicant was convicted and sentenced on 11th September 2023 thus she has served about 11 months in prison since conviction and sentencing. The only mitigating factor on record is that the applicant was remorseful and has reformed. These grounds are not sufficient to warrant interference



of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court. The sentence given by the lower court was within the law, fair and lenient in the circumstances and ought not to be interfered with.

22. I find no merit in this application and it is hereby dismissed.

23. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

