



REPUBLIC OF KENYA



KENYA LAW
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**Odiyo v Republic (Criminal Appeal E034 of 2022)
[2023] KEHC 2331 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E034 OF 2022**

KW KIARIE, J

MARCH 27, 2023

BETWEEN

MOSES ODHIAMBO ODIYO APPELLANT

AND

REPUBLIC RESPONDENT

((From the original conviction and sentence in Criminal case NO.587 of 2022 of the Senior Principal Magistrate's Court at Oyugis by Hon. Celesa A. Okore–Principal Magistrate))

JUDGMENT

1. Moses Odhiambo Odiyo, the appellant herein, was convicted after pleading guilty to the offence of being in possession of alcoholic drink that does not conform to section 27 (1) (b) as read with section 27 (4) of the *Alcoholic Drink Control Act* No 4 of 2010.
2. The particulars of the offence are that on October 11, 2022 at Koderia north location, in Rachuonyo South sub county within Homa Bay county, was found with 2 litres of chang'aa that does not conform with the standards of alcohol requirement.
3. The appellant was sentenced to twelve months' imprisonment. He was aggrieved and filed this appeal against sentence. He raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and fact by sentencing the appellant to serve 12 months imprisonment before affording him an opportunity to mitigate. A miscarriage of justice was thereby occasioned.
 - b. The learned trial magistrate erred in law and fact by sentencing the appellant to serve 12 months imprisonment without the option of a fine. A miscarriage of justice was thereby occasioned.



- c. The learned trial magistrate erred in law and fact by failing to call for a probation officer's report with a view to considering the appropriate alternative sentence in line with the sentencing policy to decongest the prisons.
 - d. The 12 months imprisonment sentence meted out against the appellant is manifestly harsh and excessive.
4. The appeal was opposed by the state through Mr Ochengo. Learned counsel. His grounds were as follows:
 - a. That the sentence did not exceed the maximum penalty;
 - b. That the appellant was a repeat offender; and
 - c. That the sentence was appropriate in the circumstances of the case.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. Section 348 of the *Criminal Procedure Code* provides as follows:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
7. Section 27 of the *Alcoholic Drink Control Act* No 4 of 2010 provides:

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.
8. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. *Nelson v Republic* [1970] EA 599 as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewcity* (1912) CCA 28 TLR 364.
9. Though the appellant contended that he was not given an opportunity to mitigate, this is not borne out by the evidence on record; he mitigated.
10. The appellant admitted that in criminal 515 of 2021 he was convicted for a similar offence and was fined Kshs 30, 000/=. The trial magistrate was therefore justified not to consider fine as an option.
11. Considering the prescribed sentence and the fact that the sentence cannot be claimed to be harsh. I find that the appeal lacks merit. The same is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 27TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

