



**Nyaboke v Republic (Criminal Appeal E018 of 2021)
[2022] KEHC 664 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E018 OF 2021**

F GIKONYO, J

APRIL 28, 2022

BETWEEN

MILKA NYABOKE APPELLANT

AND

REPUBLIC RESPONDENT

*(From the sentence of Hon. G.N. Wakabiu (C.M) in
Narok CMCR No. E1104 of 2021 on 20th August 2021)*

JUDGMENT

- [1] The appellant was charged with the offence of being in possession of alcoholic drinks that does not conform to the law contrary to Section 27(1)(b) as read with Section 27 (4) of the *Alcoholic Drinks Control Act*. It was alleged that on 19th August 2021 at Majengo area in Narok Sub County within Narok County the appellant was found in possession of alcoholic drinks (chang'aa) to wit ten litres packed in five jerrycan containers which does not conform to the said act.
- [2] The appellant was convicted on her own plea of guilty and sentenced to serve 2 years' imprisonment.
- [3] Being dissatisfied with the said sentence she preferred an appeal as set out in her grounds of appeal in her mitigation of appeal:
- a. That the sentence awarded is highly excessive and punitive.
 - b. That she is remorseful of the offence committed and have since been rehabilitated by the harsh conditions in prison environment.
 - c. That she suffers from erotic duodenum peptic ulcers a condition that is seriously complicated and aggravated by the harsh conditions within the prison environment. She used traditional medicinal herbs a facility that is not available in prison.



- d. That she is requesting bond pending appeal before hearing and determination of this appeal.
 - e. That she is aged 66 years, diabetic with her confinement in prison, that she is likely to suffer or end her life prematurely.
 - f. That she earnestly prays that the sentence awarded therein be reviewed and a lesser sentence be considered or a fine.
 - g. That in consideration of her ailment, she be awarded a suspended sentence.
- [4] Ultimately, she prayed that this appeal be allowed; conviction and sentence be set aside and quashed, or the court evaluates the evidence and make its own finding in conviction and sentence or the total success of the appeal on its entirety as the sentence set is excessive in all circumstances.
- [5] On 07/12/2021 the appellant asked the court to forgive her. She stated that she has children. She urged the court to give her a non-custodial sentence.
- [6] Mr. Karanja, the prosecution counsel, submitted for the state that the appellant’s mitigation was considered. She is not a first offender hence a non-custodial sentence was not in order. There is no reason to interfere with discretion in sentencing. He urged the court to dismiss the appeal.

Analysis and Determination.

- [7] Section 348 of the [Criminal Procedure Code](#) bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. The said section provides:

“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 and legality of the sentence.”

- [8] In *Olel v Republic* [1989] KLR 444, the court held:

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”

- [9] Accordingly, reading from the authority afore cited, an appeal on conviction lies where the plea was not unequivocal. I should also add one more, albeit obvious, element; that appeal on plea of guilt lies where the charge did not disclose an offence or it related to an act or omission; that at the time it was committed was not an offence in Kenya or under international law (art. 50(2)(n)) or for which the accused person has previously been either acquitted or convicted (art. 50(2)(o)).

- [10] Was the plea recorded by the lower court unequivocal?

Court’s duty

- [11] I will reexamine the record and the evidence (facts and exhibits) presented before the trial court (see *Okeno vs Republic* [1972] EA 32).
- [12] The law requires a plea of guilty to be taken and recorded in the manner set out in Section 207 of the Criminal Procedure Code, and adumbrated in the case of *Adan vs. Republic* as follows:



- i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands
- ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- iii. The prosecution should 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;
- iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

[13] The appellant was arraigned before the chief Magistrate's Court at Narok on 28th August 2021. The record shows that the substance of the charge(s) and every element thereof was stated by the court to the appellant in the language that she understood. On being asked whether she admits or denies the truth of the charge(s) she replied in Kiswahili 'Ni Kweli'.

[14] Subsequently, the prosecutor stated the facts thus:

“Facts are as per the charge sheet. The two jerrycans of alcohol is here, five litres each. They are before court they do not have any label or warnings, the accused was arrested together with the exhibit and charged.”

[15] The appellant is then recorded as having stated “facts are correct. I ask the court to forgive me. I will never repeat it again.” after which the court convicted her on her own plea of guilty.

[16] Having examined the record of proceedings before the trial court and guided by the legal principles on how a plea of guilty and conviction of an accused person should be recorded by the trial court as set out in the case of *Adan vs. Republic* (1973) EA 445, I am satisfied that the plea of guilty was recorded in accordance with the law. There is no merit in the complaint that the plea was not unequivocal. The ground fails.

Of Sentence

[17] Was the sentence harsh or excessive?

[18] The sentence imposed was two years' imprisonment.

[19] The relevant penalty clause for the offence for which she was convicted is Section 27 (4) of the [alcoholic Drinks Control Act](#) No. 4 of 2010 which prescribes penalty as follows:

- (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. [Underlining mine]

[20] Appropriate sentence is not a result of mathematical precision; it depends on the facts and circumstances of each case which the court considers and makes best and fair judgment therefrom (State of *M.P. vs Bablu Natt* {2009}2S.C.C 272 Para 13, and *Alister Anthony Pereira vs State of Maharashtra*, [2012] 2 S.C.C 648 Para 69).



[21] The appellant was sentenced to serve 2 years' imprisonment. The appellant was a repeat offender on similar offence. In E488 OF 2021 she was convicted for similar offence and fined Kshs. 8,000/= in default to serve 5 months imprisonment. She was also charged again in E193 of 2021; and was convicted and sentenced to pay a fine of Kshs. 5,000/= in default to serve five months' imprisonment. She had pleaded guilty to the charge. In her mitigation she said that she was remorseful. She has children left by her daughter. She admitted that she had been convicted twice. The prosecution urged the trial court to grant the accused a custodial sentence without an option of fine.

[22] I have considered the nature of the offence, the principles of sentencing and the amount of sentence imposed. The sentence was legal and appropriate to the offence. The circumstances of the case demanded a deterrent sentence which the trial court correctly determined to be custodial sentence without an option of fine. She was convicted twice for similar offence. This was lawful justification not to give an option of fine. The trial magistrate exercised discretion judicially. I find no reason to interfere with the sentence imposed by the learned Magistrate. Appeal on sentence fails.

Conclusion and orders.

[23] In the upshot, I find the entire appeal to lack merit and is hereby dismissed. I uphold the conviction and sentence of the trial court.

[24] It is so ordered

[25] Right of appeal explained.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 28TH DAY OF APRIL, 2022

F. GIKONYO M.

JUDGE

