REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL REVISION NO. E006 OF 2020

MARY KARIMI...APPLICANT

-VERSUS-

REPUBLIC..PROTESTOR/RESPONDENT

(From original sentence in Marimanti MCCR Case No. E152 of 2020)

RULING

Introduction

1. By a letter dated 26/11/2020, the Applicant herein requested that this court reviews the sentence passed against her on 16/11/2020 in Marimanti S.P. MCCR Case No. E152 of 2020. The Applicant was arraigned before Honourable M. Nyaga (S.R.M.) with the offence of dealing with an alcoholic drink without a licence contrary to section 7(1)(b) as read with Section 62 of Alcoholic Drinks Control Act No. 4 of 2010. The Applicant pleaded guilty and was consequently convicted on her own plea of guilty and sentenced to pay a fine of Kshs. 120,000/= or a term of one year imprisonment in default of paying the fine.

2. The particulars of the offence were that on 15/11/2020 at Ntaara, Kirangare sub location in Tharaka south sub county within Tharaka County, the Applicant was found dealing in alcoholic drink namely NZOMO 120 litres without a licence in contravention of the Alcoholic Drink Control Act No. 4 of 2010.

3. This application is brought under Section 364 of the Criminal Procedure Code and invites this court to reduce the sentence meted against the Applicant on the following grounds:

a. The applicant was a first-time offender with no previous record of conviction on a similar offence or any other offence;

b. The applicant’s mitigation was not considered when the trial court was sentencing the Applicant as no reference of it is made in the proceedings.

c. There was no certificate provided to show that the 120 litres of substance was indeed alcoholic substance.

4. When the application came up for hearing on 22/02/2021, the Applicant through her advocate on record, Mr. Murango from Messrs Murango Mwenda & Co. Advocates, urged the court to tamper justice with mercy and consider the period served in prison as sufficient.

5. The application was not opposed by the Respondent. Mr. Momanyi, the Prosecution Counsel opined that the sentence meted was legal but harsh.

Issue

6. In my view, the issue for determination is whether the application meets the threshold for revision of the sentence.

Analysis

7. The present application is properly expressed to be brought under section section 364 of the ***Criminal Procedure Code*** which provision set out the powers of the High Court on revision. Section 364 of the Criminal Procedure Code provides as hereunder:

> "***(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -***
>
> ***(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;***
>
> ***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***
>
> ***(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***
>
> ***Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***
>
> ***(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.***
>
> ***(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction***
>
> **………………;**"

8. From the foregoing, it is clear that this court can exercise jurisdiction on revision on orders of conviction and sentence.

9. On the merits, one of the grounds that form the basis of this application is that no certificate was provided to show that the 120 litres of substance was indeed alcoholic substance. In my view, this ought to have been a ground for appeal and not revision. By seeking the imposition of a more lenient sentence, the applicant should not in the same breath question the merits of the decision of the court below. The right approach to question the legality, correctness or propriety of the decision of the lower court is to appeal against the same. I agree with Odunga, J. who opined as follows in **Joseph Nduvi Mbuvi v Republic [2019] eKLR**

> **"In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision."**

10. The Applicant pleaded guilty to the charge unequivocally and she cannot therefore dispute that the substance was an alcoholic drink or substance.

11. The Applicant also stated that the subordinate court did not take her mitigation into account when sentencing her as no reference of her mitigation is made in the proceedings. From a perusal of the proceedings, it is clear the Applicant in mitigation stated that she has a sick child and she is a single mother. The Applicant's advocate submitted that the Applicant has served 3 months in prison and has a four months' old baby who is exposed to the vagaries of prison.

12. In sentencing the Applicant, the trial court pronounced itself as follows:

> **"Offence rampant. Fine Kshs. 120,000 (One hundred and Twenty thousand Shillings Only) in default to serve One (1) year imprisonment."**

13. Mitigation refers to evidence relative to proper sentence or order and has a statutory underpinning of Section 216 as read together with **Section 215 and Section 329** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**. The importance of mitigation in sentencing was addressed by the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic*** [2017] eKLR ***(Muruatetu case)*** where it stated as follows at paragraphs 42-43:

> **"[42]** ***Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:***
>
> ***The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.***
>
> ***Section 329 of the Criminal Procedure Code provides:***
>
> ***The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to***

be passed.

[43] **Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."**

14. *It is not disputed that the lower court afforded the Applicant an opportunity be heard in mitigation and that the trial court recorded the Applicant's mitigating statement as follows:*

"I have a sick child. I am a single mother."

15. The Supreme Court in the ***Muruatetu case*** *also expressed its view that mitigation is an important congruent element of fair trial by stating that:*

"[46] …The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive."

16. The trial magistrate complied with the law as he allowed the applicant to mitigate before passing the sentence.

17. The prescribed penalty for the offence committed by the Applicant is provided under Section 62 of Alcoholic Drinks Control Act No. 4 of 2010 is a fine not exceeding Kshs. 500,000/=, or to imprisonment for a term not exceeding three years, or to both. The Applicant was given the penalty of one year imprisonment in default of paying Kshs. 120,000. In my view, the sentence imposed by the lower court was lawful and having considered the offence was rampant, the sentence cannot be said to be manifestly harsh.

18. However, the record does not indicate that the lower court took into consideration the mitigation of the Applicant in arriving at the sentence imposed. The Applicant pointed out that the sick child referred to was aged 1 month at the time of sentencing and was present with the Applicant during trial, strapped on her back. The child is said to be four months now.

19. The trial court cited the prevalence of the vice as a reason for meting out the punitive and deterrent sentence to the Applicant. While this is a well-grounded reason, the applicant is a first-time offender and a single mother who had a child who was barely one month old. This called on the trial court to treat her with leniency. It was necessary for the trial magistrate to call for a pre-sentence report from the probation office to provide information which would have assisted the court in determining a just quantum of a fine or what would have been a suitable sentence in the circumstances.

20. The Judiciary Sentencing Policy guidelines at page 42, Policy Directions 20:39 to 20:42 states that where the court is satisfied that an offender is pregnant or lactating, it should consider imposing a non-custodial sentence unless the seriousness of the offence and other factors demand a custodial sentence for justice to be served. It follows that where fine is imposed, it should not be excessive as to be beyond the reach of the accused thus making the accused liable to imprisonment.

21. An inquiry before sentence would guide the court on the suitable non-custodial sentence to be imposed. The guidelines further state caretaking responsibilities and family ties of female offenders should be taken into account during sentencing. The court should then consider non-custodial sentence.

22. The United Nation Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders and the United Nations Standard Minimum Rules for Non-Custodial Measures (also known as the Tokyo Rules) state that courts should consider imposing non-custodial sentence for pregnant and lactating mothers. It also states that their care giving responsibilities, family ties and their background must be considered when passing sentence. In this case, the trial magistrate does not seem to have considered the mitigation nor did he make an inquiry on the background of the accused. More often than not when these matters are not considered in some situations, innocent children are left to suffer even to the extent of becoming destitute if their mothers are sent to prison. It leads to a vicious circle whereas if a social inquiry is conducted, where the mothers have to go to prison, protection and care orders can be made in the best interest of the child.

23. In conclusion, having confirmed from the record that the trial magistrate did not consider that the accused was a first offender and the mitigation, the applicant has made a case for this court to review the sentence. She has served three months already.

24. I order that a probation officer's report be filed and if favourable, the remainder of the default be served on probation. The report be filed within seven days.

Dated, signed and delivered at Chuka this 25th day of February 2021.

L.W. GITARI

JUDGE

25/2/2021

The ruling has been read out in open court.

L.W .GITARI

JUDGE

25/2/2021