



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. CRIMINAL APPLICATION NO. E117 OF 2021

CORAM: R.E. ABURILL, J

COLLETA ADHIAMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Application for sentence revision arising from

conviction and sentence of the Principal Magistrate's court

at Ukwala in Criminal Case No. 641 of 2021 on 20/8/2021 by Hon C.I. Agutu, SRM)

RULING

1. The applicant herein **Colletta Adhiambo** was convicted and sentenced to serve various prison terms and fines for the offences of being in possession of alcoholic drinks for sale without a license and manufacturing alcoholic drinks, and contrary to the provisions of **Section 7(1)(b) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010 and Section 8** of the same act respectively. The quantity of alcohol namely Chang'aa in Count 1 was 3 litres whereas in Count 2, the quantity was 80 litres of Kangara.
2. She was sentenced to a fine of Shs. 5,000/= in count one in default to serve one month imprisonment. In count 2, she was fined Kshs. 80,000/= in default to serve one year imprisonment. Sentences to run consecutively.
3. This conviction and sentence on a Plea of guilty was entered on 15/9/2021 before Hon. C.I. Agutu, SRM, Ukwala.
4. However, the court record of proceedings before the said court shows that the matter was before Hon. C.I. Agutu for Plea on 20/8/2021 not 15/9/2021. Plea was therefore taken on 20/8/2021 and fines imposed with default clauses for imprisonment but on 15/9/2021, without any quorum, the sentence imposed on 20/8/2021 was recorded to be consecutive (one after the other).
5. Furthermore, despite the language of the court being indicated to be Dholuo, the convict is said to have responded in Kiswahili and English:

Court 1: "Ni ukweli"

Court 2: "It is true"
6. After facts were read out to the accused, it is stated that she stated: "Facts are right" upon which the court recorded "unequivocal plea of guilty is entered". Accused convicted on her own Plea of guilty.
7. The court never entered a Plea of guilty after the charges were read out to the accused and before the facts were read.
8. The trial court combined the guilty Plea with the conviction and never inquired into whether the accused was a first offender or not before taking down her mitigation where she stated that she has a sick child and the bills are high.
9. I called for a Social Inquiry report on the convict/applicant herein after she filed a Notice of Motion seeking for revision of sentence imposed on her claiming that she is a first offender, very remorseful, aged 35 years and sole breadwinner of her family; hypertensive, sickly with stomach ulcers among other lamentations.

10. The Social Inquiry Report filed this morning by Milton Kasera Probation Officer shows that the convict is 35 years old, she is married with 3 children who are said to be in Class One, nursery and a three year old. She is a first offender and is the second wife. Her husband is living with a disability after sustaining serious injuries in an accident when he worked as a casual labourer in Nairobi. She also takes care of her co-wife's children. She is remorseful. Her home environment is conducive for rehabilitation. She is recommended for Probation.

11. I have considered the application for sentence revision and the offence committed. I have also considered the Plea as taken which was equivocal, and the fact that the trial court should have considered calling for a Presentence Report before sentencing the convict to prison terms as imposed on a first offender. The quantity of alcohol in possession of the convict in my view did warrant such harsh, though lawful sentence.

12. For the above reasons, taking into account the manner in which the Plea was taken, I quash the conviction of the applicant and set aside the sentence imposed on her. Therefore, unless otherwise held, the applicant/convict **Colletta Adhiambo** is hereby set at liberty forthwith.

13. File closed.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF NOVEMBER, 2021

R.E. ABURILI

JUDGE