



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL REVISION NO. 06 OF 2019**

**RAEL SEREM.....PETITIONER**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[Revision from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 2228 of 2019 delivered on the 11<sup>th</sup> day of November, 2019 by Hon. J. Nthuku, SRM]**

**RULING**

1. The applicant who was convicted and sentence to imprisonment for twelve months without an option if a fine for the offence of Manufacturing an Alcoholic drink that does not conform to the requirements of the Alcoholic Drinks Control Act contrary to section 27 (1) (a) of the Act, seeks revision of the sentence which she considers harsh in view of her status as a first offender. The applicant did not challenge the conviction and only sought reduction of sentence. The particulars of the offence indicated that the applicant was in possession of 80 litres of the illicit alcohol as follows:

**“CHARGE SHEET**

**CHARGE: MANUFACTURING AN ALCOHOLIC DRINKS THAT DOES NOT CONFORM TO THE REQUIREMENT OF THE ACT CONTRARY TO SECTION 27 (1) (a) AS READ WITH SECTION 27 (4) OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010.**

**PARTICULARS OF OFFENCE: RAEL SEREM: On the 3<sup>rd</sup> day of November 2019 at around 1239hrs at Kamasaba Village in KOIBATEK Sub County within Baringo County, was found manufacturing an alcoholic drink namely Changaa that does not conform to the requirement of the Act using 80 litres KANGARA packed in Four separate 20 litre plastic jerricans in contravening Alcoholic Drinks Control Act No. 4 of 2010.”**

2. The DPP did not oppose the revision and indeed conceded that the sentence of 12 months' imprisonment without an option of a fine was excessive for a first offender in submissions as follows:

**“I concede that the sentence is excessive as she was a first offender. It appears that the court was moved by the quantity of the alcohol recovered. The sentence was within law under section 27(4) of the Alcoholic Drinks Control Act No. of 2010. The court did not consider the option of a fine as she was a first offender. ”**

3. In considering whether to interfere with sentencing discretion of the trial court, this appellate Court considers that the trial court was plainly wrong in failing to give credit to the accused for (1) her plea of guilty, whereby she saved the court of judicial time and resources and (2), first offender status, as it should have in accordance with the counsel of the Court of Appeal in **Wanjema v. R.** (1971) EA 493, 494 that –

**“An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court's interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449. (This admits no doubt because the magistrate awarded the maximum sentence to this offender; which of itself is unusual.)”**

4. The offence under section 27 (4) of the alcoholic Drinks Control Act No. 4 of 2010 provides for a sentence for the offence as follows:

**“27. (1) No person shall—**

(a) manufacture, import or distribute; or

(b) possess, an alcoholic drink that does not conform to the requirements of this Act.

(2) Subsection (1) shall not apply to a person who—

(a) is authorized under this Act to be in possession of the alcoholic drink; or

(b) has possession of the alcoholic drink in a premises licensed under this Act.

(3) The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or the requirements of this Act.

**(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.**

5. However, the principle of sentencing in case of fines is set out in of the Kenya Judiciary Sentencing Policy at paragraph 11.5, p.28 that –

**“11.5 where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence. . If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so as it proceeds to impose the available option.”**

As conceded by the DPP that an option of fine was appropriate for the first offender, the court revises the sentence and, pursuant to section 364 (1) (b) of the Criminal Procedure Code now alters the nature of the sentence from an imprisonment term to a fine.

#### **ORDERS**

6. Accordingly for the reasons set out above, the court sentence of imprisonment for 12 months is revised.

7. Taking into account the period of close to three (3) months that the applicant has been in prison serving sentence in 11<sup>th</sup> November 2019, the Court now imposes a sentence of a fine of **Ksh.50,000/-**.

8. In default of payment of the fine, the applicant shall serve imprisonment for a period of six months in accordance with the scale in section 28 (2) of the Criminal Procedure Code.

*Order accordingly.*

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF JANUARY 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Ombati & Ombati & Co. Advocates for the Petitioner.

Ms. Muriu, Prosecution Counsel for DPP.