



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NUMBER 5 OF 2020**

***(From Original Conviction and Sentence in Criminal Case Number 2206 of 2019 of The Chief Magistrate's Court At Nyahururu)***

**APPLICANT.....DIRECTOR OF PUBLIC PROSECUTION**

**VERSUS**

**RESPONDENT.....CHIEF MAGISTRATE**

**RULING**

1. The ODPP moves court via a letter dated 20/2/20 under section 364 of the CPC seeking the court to set aside sentence meted out on the accused in Criminal case number 2206/19 on 11/12/19 where the Accused **David Kimtai Kemei** was charged with the offence of contravening Alcoholic requirements contrary to section 31(2) as read with section 31(3) of the Alcoholic Drinks Act No. 4 of 2010.
2. The background of the matter is that the accused person in the matter in reference took plea on 6/12/019 where he pleaded guilty to the charges stated above.
3. The court directed that the facts be read on 11/12/19 and samples of the exhibits be taken to the government chemist for analysis.
4. On 11/12/19 the matter was mentioned in court where prosecution requested the file to be placed aside as the police file had not been availed.
5. The investigating officer had communicated that the file was on the way. Later the file was called out but the police file had not been brought.
6. The trial court went ahead and sentenced the person relying on the facts in the charge sheet and sentenced the accused to serve one-day community service in the premises the prosecution was aggrieved by the sentence meted out to the accused person having been found with 50 liters of suspected chang'aa.
7. This is because the provisions of section 31(3) of the Alcoholic Drinks Act 4 of 2010 states:

***A person who contravenes this section commits an offence and shall be liable to a fine not exceeding Ksh. 50,000 to imprisonment for a term not exceeding 6 months, or both:***

8. Thus the instant reference.
9. The court has perused the proceedings, the instant reference and the law.
10. Article 165 (6) and (7) of the Constitution of Kenya 2010 entrenches the supervisory jurisdiction of the Court in the following terms:  
***“165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***  
***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”***
11. Clearly, the court has jurisdiction under the Constitution and statute to revise the order before the court. The only question is whether the court will, in discretion, exercise that jurisdiction. That discretion is to be exercised judicially in the light of the settled principles of the court

with regard to the nature of order sought to be revised, and whether the decision is “a finding, sentence or order which is manifestly incorrect” or it has resulted in a miscarriage of justice, or, in the words of the applicants, it has caused an injustice to the accused.

12. The power of this court is set out in section 364 CPC cap 75 LOK.

13. Section 364. Powers of High Court on revision is to the effect that ;

***(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.***

14. The record shows that the trial magistrate was even impatient to wait not only the previous records of the accused but also for prosecution to bring report in court or even the government chemist to analyze the substance alleged to be chang’aa.

15. This proceeded to award the accused just a pat on the back in form of punishment.

16. I find that the prosecution was justified in making the instant complainant.

17. For the interest of justice, I make the following order:

**(i) The order of 11/12/20 is set aside and matter is to be placed before another magistrate for the purposes of the sentencing the accused.**

**(ii) orders accordingly.**

**Dated, Signed and Delivered at NYAHURURU this 17<sup>th</sup> day of December, 2020.**

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**CHARLES KARIUKI**

**JUDGE**

**PRESENT:**

SC Rugut for state

Henry court assistant