



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO. 15 OF 2019

(From Original Conviction and sentence in Criminal Case No. 655 of 2019 of the Senior Principal Magistrate's Court at Baricho –A.K. Mwicigi -SPM)

MONICAH WAMBUI WANJIRU..... APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant Monica Wambui Wanjiru was convicted of the offence of dealing with Traditional Liquor without a Licence Contrary to **Section 8(1)(b) as read with Section 64 of the Kirinyaga County Alcoholic Drinks Control Act 204** and sentenced to serve Two years imprisonment.

2. She has moved to this court under **Section 362 and 364 of the Criminal Procedure Code Cap 75 Laws of Kenya** seeking orders of revision based on the ground that she pleaded guilty and is remorseful. That she is a mother of Four children and is the sole breadwinner. She prays for an order that she gets a none custodial sentence.

3. The State did not oppose the application. He submits that the sentence was excessive. I have considered the application.

Section 8(1)(b) as read with Section 64 of the Kirinyaga County Alcoholic Drinks Control Act of 2014 provides:-

“No person shall sell, distribute or dispose of, or deal with, any alcoholic drink except under and in accordance with a licence issued under this Act”. Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding Five Hundred Thousand shillings or to imprisonment for a term not exceeding Three years or to both.”

4. The section provides for a fine and custodial sentence. In **R –v- De Agostino Ezio Cr. Rev. 18/199** it was held that Revision can only be made if the principles upon which the sentence or order was made was improper.

5. This court must always be careful while treading on the thin line between a trial Magistrate's right to exercise discretion while sentencing and the provisions of the law as well as gravity of the offence.

6. The judiciary sentencing policy and guidelines gives guidelines on how to pass a sentence where the Act provides for an option of a fine. At page 28 Para 115. The guideline states that where the option of a fine is provided, the court must consider it before proceeding to impose a custodial sentence. That if in the circumstances fine is not a suitable sentence, then the court should expressly indicate so as it proceeds to impose the available option. In the case of **Fatuma Hassan Salo –v- Republic (2006) eKLR** the court stated that, where an option of a fine is given, the court has to give reasons as to why a fine is in appropriate. The trial Magistrate noted that the accused was a repeat offender and proceeded to pass a sentence of two years.

7. The offence for which the applicant was charged attracts a hefty fine. The trial Magistrate did not indicate why he did not find a fine in appropriate.

8. My view is that where the Section of the Law under which an accused person is charged provides for an option of a fine, the starting point when passing the sentence is to impose a fine. This ensures that the accused enjoys the benefit of the lighter sentence. Where the trial court considers that a fine is not an appropriate sentence, then he must state the reasons for that finding.

9. I have noted that from the record of the trial Magistrate, the prosecutor had indicated that the accused be treated as a 1st offender. It is the Probation Officers report which stated that she is a repeat offender.

10. I have perused the Probation Officers Report and I find that the particulars of previous conviction were not stated in the report. The court was duty bound to call for the proof of the previous convictions. This is provided in the Criminal Procedure Code.

11. I find that the trial Magistrate had no reason not to impose a fine. The State through the Prosecuting Counsel has stated that the sentences imposed were harsh.

12. In view of the fact that the trial Magistrate did not indicate the reasons for not imposing the fine which is provided under the Section, I find I have reasons to interfere with the discretion of the Magistrate in sentencing. I will consider the option of a fine.

13. I set aside the sentence of the trial Magistrate. I substitute the sentence with a fine of Kshs 50,000/- or in default Six months imprisonment. The fine be calculated from the date of the sentence.

14. The reasons given in this ruling will apply in Revision No. 13/19. However, the sentence will be passed in the respective files.

Dated at Kerugoya this 29th November 2019.

L. W. GITARI

JUDGE

29/11/19