



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CR. REVISION NO. 20 OF 2018

CLINTON MUGAMBI1ST APPLICANT
FELIX MURITHI2ND APPLICANT
ZACHARY NCHOKA.....3RD APPLICANT
JESKA KIMATHI4TH APPLICANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

MISC. CR. REVISION NO. 19 OF 2018

MAUREEN KATHURE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. By Motions on Notice dated 30th January, 2018, the applicants applied that this court does exercise its powers of revision in respect of the offences preferred against them and the sentence meted out against the applicant in *Misc. Cr. Appln. No. 19 of 2018*. The grounds upon which the applications were grounded were set out in the body of the Motions and the supporting affidavits of Clinton Mugambi and Maureen Kathure.

2. These grounds were that the charges preferred against the applicants were illegal since there are in existence orders in *Constitutional Petition No. 447 of 2016* at Nairobi (“the said Constitutional Petition”) which bar the police from charging anybody from such offences and that the sentence meted out against Maureen Kathure in one of the charges in which she had been convicted was excessive. The applications were ably argued by Mr. Muriuki on behalf of the applicants while Mr. Namiti opposed the same on behalf of the Republic.

3. The applicants in *Misc. Cr. Rev. No. 20 of 2018* averred that they were on 22nd January, 2018 charged with the offences of operating a gaming machine in an unlicensed premises contrary to *section 45 (1)(a) of the Betting and Gaming Act Cap 131, Laws of Kenya*. That the four applicants were employees to

James Kirema, Purity Kanunu and Peter Njuguna Ngarishu who are petitioner nos. 152, 14 and 169 in the said Constitutional Petition. That they had denied the said offences and were released on bond. That they were charged in contravention of the orders issued in the said Constitutional Petition. That, that was sufficient ground to review and quash the said charges.

4. On her part, Maureen Kathure averred that on 19th January, 2018, she was charged with the offences of selling alcohol without a licence as well as operating a gaming machine without a licence. That she was convicted and sentenced to 3 months in prison or payment of KShs.250,000/- fine in the first count and 3 months imprisonment in the second count. That she is an employee of Lucy Wanjiku who is the 29th petitioner in the said Constitutional Petition.

5. This Court called for the respective lower court records and perused the same. According to the charge sheets dated 22nd January, 2018 and 25th January, 2018, in respect of Jeska Kimathi, it was alleged that on various dates and places set out therein, the applicants were found operating various gaming machines in unlicensed building. The said charges have been challenged on the basis that there is an order in ***Nrb. Constitutional Petition No. 447 of 2016*** that bars the Respondent from charging anyone with such offences.

6. The record shows that Purity Kanunu, James Kirema, Peter Njuguna Ngarihu and Lucy Wanjiku are petitioners in the said ***Nrb. Constitutional Petition No. 447 of 2016***. That being the case, the said persons are entitled to the benefit of any orders that may have been issued in the said Constitutional Petition.

7. Mr. Namiti submitted that there was no evidence to show that any of the applicants was an employee of the said petitioners. The applicants swore on oath that they were employees of the named petitioners. There was no replying affidavit denying that fact. In this regard, Mr. Namiti's submission cannot stand for the reason that, an averment made on oath that is not specifically denied is deemed to be an established fact. The burden of proof would shift to the other party to rebut such an averment made on oath. Accordingly, I make a finding that the applicants are employees of petitioner Nos. 29, 152, 14 and 169 in the Constitutional Petition.

8. This court appreciates that there was no replying affidavit in opposition to the application. However, the only assertions of a factual nature that required an answer were that; the applicants were covered by the said order, which I have already addressed, and secondly, that the said order barred the police from arresting or prosecuting anybody with the offences charged.

9. The relevant part is paragraph 5 of the supporting affidavit which stated:-

"5. That in relation to the above, there are orders emanating from Nairobi Constitutional Petition 447/2016 which bars the police from arresting and prosecuting anybody with the said offences and hence the charges were done in contravention of a court order. Annexed and marked "CM 2" are copies of the said orders".

10. The question that arises is, were the respondents in breach of the orders made in the aforesaid Constitutional Petition when they preferred the impugned charges. The applicants exhibited copies of the subject order. The record shows that on 4th November, 2016, the High Court at Nairobi made the following order in the said Constitutional Petition:-

"That a conservatory order of injunction be and is hereby issued to restrain the Respondents by themselves, officials, agents and representatives from conducting a crackdown on the petitioners/Applicants premises and businesses specifically to raid, forcibly enter, confiscate betting and gaming businesses or in any way close or suspend or close the operations of the said businesses pursuant to the directive/order of the First Respondent contained in its letter 19th September, 2016 (sic) until then".

11. That order was re-issued on more or less the same terms on 15th, 23rd November, 2016 and has been

extended severally to date. The said orders are still in force. The question is, are the charges preferred against the applicants in contravention of the above stated order?

12. A keen reading of the subject order shows that, what the court barred the respondents from is ‘... **conducting a crackdown on the premises and businesses of the petitioners, raids on, forcible entry, confiscation of betting and gaming machines, disrupting, suspending or closure of businesses of the petitioners**’ in pursuance of the directive of the Betting Control and Licensing Board dated 19th September, 2016.

13. That order is clear in its terms. It did not suspend the operation of the law or any sections of the law. If it did, that was not demonstrated in the present case. The order as I have already stated only barred the respondents and their officers and servants from carrying out the acts set out therein in pursuance of the directive and/or letter of the Betting Control and Licensing Board dated 19th December, 2016. There is no allegation that the charges preferred against the applicants are in pursuance of the said directive or are in anyway amount to the acts barred by the said court order.

14. To that extent, this court cannot read into that order anything other than what is expressly stated therein.

15. I have looked at the Charge sheets for all the applicants. They are charged with the offences of:-

a) “Operating a gaming machine in an unlicensed premises contrary to section 45(1) (a) of Betting Lotteries and Gaming Act Cap 131, Laws of Kenya;

b) Gambling in a public place contrary to section 55 sub-section 1 of the Betting Lotteries and Gaming Act Cap 131, Laws of Kenya; and

c) Operating a gaming machine without licence contrary to section 53(1) (a) of the Gaming Betting and Lotteries Act, Cap 131, Laws of Kenya.”

16. I have looked at the sections referred to in the said charges and have confirmed that they still exist in our laws. The sections create the subject offences preferred against the applicants. There was no allegation and there is nothing on record to show that, the said charges were being preferred pursuant to the aforesaid directive dated 19th September, 2016. They are charges which, *prima facie* appear to emanate from the Act referred to in the Charge sheets.

17. In my considered view, the drafters of the order failed to include a portion thereof to restrain the respondents in the said Constitutional Petition from charging or preferring charges against the petitioners or their agents and/or servants. To the extent that the said order did not bar the respondents from charging the petitioners in that petition for any breaches of the law, the charges preferred against the applicants cannot be said to be in breach of that order.

18. For the avoidance of doubt, there was no allegation that the respondent had forcibly entered the premises of the applicants, confiscated betting and gaming machines or closed or in any way suspended the businesses operated by the applicants before preferring the impugned charges. If there had been such an allegation, this court would not have hesitated to forthwith interfere and quash the charges in order to maintain the rule of law since court orders must be complied by all. Such an allegation I am afraid I cannot interfere with the due process of the law.

19. As regards Maureen Kathure, the applicant in **HC. Misc. Cr. Rev. No. 19 of 2018**, she was arraigned in court on 19th January, 2018 with two counts:-

a) Selling alcoholic drinks without licence contrary to section 7(1) (b) as read with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010, and

b) Operating a gaming machine without a licence contrary to section 53(1) (a) of the Gaming Betting and Lotteries Act Cap 131, Laws of Kenya.

20. She pleaded guilty and was sentenced to 3 months imprisonment or a fine of Ksh.250,000/- for count 1 and 3 months imprisonment without a fine in respect of count 2. In the words of the trial court, the two offences were prevalent in the area leading to alcoholism and broken families and the sentences were supposed to be deterrent and act as a lesson to others.

21. Mr. Muriuki learned Counsel for the applicant submitted that the sentences were harsh and excessive in the circumstances. Mr. Namiti, learned Counsel for the state submitted otherwise.

22. I have considered the record of the trial court. The applicant admitted the charges. In paragraph 5 of her supporting affidavit, she averred that she was only an employee of one Lucy Wanjiku, the 29th petitioner in the said Constitutional Petition.

23. I have considered the record in its entirety. I note that the applicant was only an employee of Lucy Wanjiku. She admitted selling the alcohol and operating the gaming machine, but only as an employee. While I am aware that the law does not differentiate between an owner and an employee, how would an employee know that his/her employer has or has not procured a licence for the business. In my view, the arrest and prosecution of an employee while leaving the owner of the business is a propagation of the otherwise unfortunate trend in this country of ***‘frying the small fish while the big fish is left to freely swim in the waters’***.

24. In my view, punishing employees with a view to teach them a lesson will not be a lesson to owners of offending businesses. That will not stop the prevalence of the vice. To my mind the spirit of the law is to prohibit the proliferation of such illegal businesses. To achieve that goal, the authorities should target those who have the capacity and ability to put up and maintain such businesses, not the employees. The poor employees are only trying to eke a living.

25. In this regard, I note that the trial court did not effectively consider the mitigation of the applicant that she has children. Further, the trial court was oblivious of the fact that the applicant was only an employee and not the owner of the business. That fact has only been disclosed in the supporting affidavit before this court.

26. If the state was minded to stem the problem as the law presupposes it should rope in the owners of offending businesses, it could do so vide ***section 63 (4) of the Alcoholic Drinks Control Act, No. 4 of 2010***. Accordingly, there is no effective lesson to be learnt by meting out stiff sentences upon a mere employee as it happened in this case. The trial court having failed to indicate that it had considered the applicant’s mitigation and having set out to teach a lesson to the wrong culprit, this is a fit case to intervene and review the sentence notwithstanding that the fine provided for under ***section 62 of the Alcoholic Drinks and Control Act*** is a fine of Kshs.500,000/- or up to 3 years imprisonment or to both.

27. ***Section 362 of the Criminal Procedure Code, Cap 75, Laws of Kenya*** provides:-

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

28. On the other hand, ***section 354 of the Criminal Procedure Code*** confers this court with power in ***subsection 3 (a) and (b)*** to alter a conviction, reduce or increase the sentence. In this regard, I am satisfied that considering the amount of alcohol in the possession of the applicant, the sentence was excessive. I hereby reduce it to the period already served. The applicant should be released on count 1.

29. As regards count 2, the penalty is a fine of up to KShs.5,000/= or imprisonment of up to six months or to both. There was no indication that the applicant had any criminal record. The trial court sentenced

her to half the term set by the law without a fine because of the prevalence of the vice. For reasons already set out above regarding count 1, I will reduce the sentence to the period already served.

30. Accordingly, the application in *Miscellaneous Criminal Revision No. 20 of 2018* is unsuccessful and the same is dismissed. *Miscellaneous Criminal Revision No. 19 of 2018* succeeds. The applicant is to be released forthwith.

It is so ordered.

DATED and **DELIVERED** at Meru this 22nd day of February, 2018.

A. MABEYA

JUDGE