REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

REVISION NO. 2 OF 2018

PRISCILLA KOECH KIPTEK.....PETITIONER/APPLICANT

VERSUS

THE OFFICE OF

THE DIRECTOR OF PUBLIC PROSECUTION.....REPUBLIC/RESPONDENT

RULING ON REVISION

Application

1. By a letter dated 2nd February 2018 entitled ***Petition for Revision under section 362 of the Criminal Procedure Code, E/Ravine Cr. Case No. 171 of 2018, R Vs. Priscilla Koech Kiptek,*** the applicant who was convicted on own plea of guilty for the charge of contravening Alcoholic Drinks Control Act contrary to section 32(1) as read with 32 (8) of the Act and sentenced to a fine of ksh.200,000/-, in default imprisonment for 12 months, moved the court for revision of the conviction and sentence in Eldama Ravine Principal Magistrate's Court Criminal Case No. 171 of 2018, setting out the principal grounds for the revision as follows:

> *"That from the face of the proceedings specifically on the grounds the court gave in sentencing the petitioner, it is very clear that she was sentenced based on the ground that most of the offences/cases pending in the trial court have their root cause as local brew and there was need to deter the vice so that the crime rate can go down. In this case your lordship, the petitioner was fined of Ksh. 200,000/- for being in possession of 100 litres only of the local brew known as busaa. The trial court in its sentencing was punishing the petitioner on behalf of the many brewers within its jurisdiction and that is unfair, unjust and discriminatory.*
>
> *That the sentence in as much as was discretionally considering the penalty provided for in the alcoholic drinks control act No. 4 of 2010, the same was misused, excessive and/or exorbitant in the circumstances.*
>
> *That the petitioner is a first time offender and is currently serving her sentence in Nakuru G.K Prison and has served the same for 13 days. The Petitioner is remorseful and pleads that upon being given a lighter sentence, she will not go back into repeating the same vice."*

2. The charge before the trial court was as follows:

> *"**CHARGE***
>
> *Contravening Alcoholic Drinks Control Act Contrary to section 32(1) as read with section 32(8) of the Alcoholic Drinks Control Act No. 4 of 2010.*
>
> ***PARTICULARS***
>
> *On 21st January, 2018 at around 0500hrs in Cheraik Village in Koibatek Sub-county within Baringo County was found **being in possession of Busaa** to wit 100 litres packed in separate three black 30 litres and one yellow 10 litres plastic Jerricans in contravention of alcoholic drinks Act No. 4 of 2010 **for sale."***

3. Section 32 of the Alcoholic Drinks Control Act No. 4 of 2010 provides as follows:

> *"32. Information required on packages*

(1) Subject to this section, ***no person shall—***

(a) manufacture;

(b) import;

(c) sell or distribute, an alcoholic drink unless the package containing the alcoholic drink conforms to the requirements of subsection (2).

(2) Every package containing an alcoholic drink shall— (a) bear a statement as to its constituents; and (b) have at least two of the health warning messages prescribed in the Second Schedule, in English or Kiswahili. (3) The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the package. (4) All the warning labels specified in the Second Schedule shall be randomly displayed in each twelve-month period on a rotational basis and in as equal a number of times as is possible, on every successive fifty packages of each brand of the alcoholic drink and shall be randomly distributed in all areas within the Republic of Kenya in which the alcoholic drink is marketed. (5) The Minister may, by notice in the Gazette, prescribe that the warning, required under this section, be in the form of pictures or pictograms: Provided that such notice shall come into operation upon expiration of six months from the date of its publication. (6) The importer of an alcoholic drink which does not conform to the requirements of subsection (2) shall, at the point of importation, ensure that the imported alcoholic drink bears such sticker containing the warning messages specified under subsection (2) as may be prescribed. (7) The requirements of this section shall not apply to an alcoholic drink which is manufactured in Kenya for export.

(8) A person who contravenes any of the provisions of this section commits an offence and shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

(9) This section shall come into operation upon expiration of six months from the date of commencement of this Act."

4. At the hearing, Counsel for the applicant submit in addition that the particulars did not support the charge as the charge did not indicate clearly whether charge relating to the 100 litres of Busaa met the provisions of subsections 1 (a), (b) or (c) of section 32 to show whether she manufactured, sold or imported the same, as she was just found in possession.

Determination

5. The DPP's Ms. Macharia opposed the appeal pointing out that the applicant had pleaded guilty to the charge after being found in possession of 100 litres of Busaa and the sentence of fine of Ksh.200,000/- and in default 12 imprisonment was within the law. She urged that the quantity of the Busaa implicated the applicant in the distribution and sale of the alcoholic drink. On question of deterrence, the DPP urged the Judiciary Policy Guidelines on Sentencing in which deterrence is a valid consideration and that the sentence was fair to the applicant and it would also serve the community in deterring excessive consumption of the alcoholic brew.

6. The Court has considered the trial court's proceedings set out in full below:

"*REPUBLIC OF KENYA*

IN THE PRINCIPAL MAGISTRATE'S COURT AT ELDAMA RAVINE

CRIMINAL CASE NO. 171 OF 2018

REPUBLIC

VERSUS

PRISCILLA KOECH KIPTEK……ACCUSED

24/1/2018

Coram Before J Nthuku – SRM

State Counsel – Miss Mburu

Court Clerk Dido

Accused: Present

The charges and elements therein are read over and explained to the accused in a language that she understands (i.e) Kiswahili/English who replies:-

Bowen Duncan – Sworn translates to Tugen:

Accused: Kweli

FACTS BY PROSECUTOR:

The accused was arrested on 23rd January, 2018 by the area chief Johana Kiptalam upon being found with 100 litres of Busaa in her house in Chesait on 21st January, 2018 but she escaped when officer came to her house. The liquor was recorded on that day 21st January, 2018 but since she went into hiding until 23rd January, 2018 she was arrested on 23rd January, 2018 whereby she was charged. I produce 100 litres in 4 black Jerricans as exhibit.

Accused: The facts are correct.

COURT: Plea of guilty entered. Accused convicted on own plea.

Mitigation by Accused:

I have a daughter who was chased by her husband so I feed her children. I also take care of my aged sick parents. I take care of my grand children.

PROSECUTOR: No records

COURT

The accused has no obligation to fend for her grandchildren because the parents are alive and that is their responsibility. The liquor is so much and not depicting someone barely surviving. Most of the offences/cases pending in this court have their root cause as local brew. <u>There is therefore need to deter this vice so that the crime rate can go down. I sentence the accused person to pay a fine of Ksh. 200,000/= in default 12 months imprisonment.</u>

Right of appeal 14 days. Liquor to be poured after 14 days.

HON. J. N NTHUKU

SENIOUR RESIDENT MAGISTRATE

24/1/2018"

7. It is indicated in the proceedings that the charge was read over to the applicant and interpreted/explained in **Tugen** language and there is no question of accused not having understood the particulars of the Offence, which clearly charged possession and sale of the alcoholic drink which are both prohibited under section 32. She in addition confirmed the facts of the case as set out by the prosecution as correct. I find the plea of guilty to have been unequivocal. As the Court held in ***Margaret Wamalwa v R*** KBT HC Criminal Revision No. 5 of 2017, failure in the statement of the charge to use the exact wording of the Statute as '***being in possession'*** and using '***contravening'*** the Act instead, is curable under section 382 of the Criminal Procedure Code.

8. The primary consideration is whether the accused was prejudiced by the defect in the charge. In this case the particulars of the charge and the facts of the case both which the accused accepted laid out in sufficient clarity and detail the offence charged of being in possession for sale of an alcoholic drink namely ***Busaa*** in contravention of the Alcoholic Drinks Control Act.

9. In accordance with section 348 of the Criminal Procedure Code, the applicant having pleaded guilty to the charge, which plea the court has found to have been unequivocal, could only challenge the severity of the sentence imposed therefor.

The Sentence

10. The decisions in ***Jane Maina v. R*** Kericho HC Criminal revision No. 278 of 2013 and ***Josephine Rono v. R*** Kericho HC Criminal Revision No. 282 of 2013 both cases of selling alcoholic drinks without a licence c/s 27(1) (b) and selling alcoholic drinks without proper packaging c/s 32 (1) and 32 (a) and (b) were based on Probation Officer's Reports filed in those cases which justified the court in altering the respective fines of 50,000/- and 20000/- to sentences for Community Service.

11. This Court was not able to take benefit of the decision in ***Joseph Natwat & 10 others*** [2004] eKLR being an old decision, primarily on the impropriety of recording facts of a case as "per charged sheet" with no indication that they are put to the accused before a plea of guilty may be accepted, and which related to the Traditional Liquor Act which set different maximum fine of Ksh.6,000/-.

12. The applicant's objection that in punishing her so as to deter other persons is trial court was acting in a discriminatory manner is not well founded in view of the fact that deterrence is one of the objectives of punishment in criminal law as observed in the ***Sentencing Policy Guidelines of the Judiciary*** at 15 as one of the objectives of sentencing-

"Deterrence – to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences."

13. The trial court was entitled to consider the prevalence of the offence and mete out a deterrent sentence as appropriate to the circumstances of the case.

14. However, as regards imposition of fines, the Sentencing Policy Guidelines provide instructively as follows:

> ***"DETERMINATION OF A FINE.***
>
> *11.10. The fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases and in which case the necessary information is within the court's knowledge, a presentence report should be requested from the probation officer to provide information which would assist the court in reaching a just quantum."*

See also ***Mita v. R*** [1969] EA 598, where **Madan, J**. (as he then was) held that irrespective of an accused person's high earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly precluded this mode of punishment.

15. Under section 32(8) of the Alcoholic Drinks Act, the sentence is a maximum of Ksh.1,000,000/- or imprisonment term of 3 years or both. If the trial court aimed to keep the applicant in prison custody as a form of deterrence, it could have imposed the fine together with an imprisonment term or the imprisonment as the only sentence. To impose a sentence of a fine whose effect is to detain the offender in prison upon failure to pay a fine is, as observed in the Policy Guidelines, wrong and contrary to the principle of fine as a method of punishment. Furthermore, the trial court did not as directed by the Guidelines request for a probation officer's report, and it cannot be assumed that the offender is able to pay the amount of the fine which is by no means small.

16. It is clear from the sentence that the court imposed the sentence as a deterrent measure because of the prevalence of the offence. However, having failed to consider the means of the accused, the trial court may have imposed a fine that the accused is unable to pay and therefore ends up being practically an imprisonment for default period of 12 months.

17. For this error of principle, the Court feels justified in interfering with the sentencing discretion of the trial court. See ***Wanjema v. R*** [1971] EA 494. Even considering the applicant's earning capacity from the sale of the Busaa, this Court considers that the objective of deterrence would still be met by a lower fine of Ksh. 100,000/-.

Orders

18. Accordingly, pursuant to section 364 (1) (a) and 354(3) (a) (ii) of the Criminal Procedure Code, without altering the finding of guilty, I reduce the sentence to a **fine of Ksh.100,000/-** and in default imprisonment for **six (6) months.**

DATED AND DELIVERED THIS 19T DAY OF FEBRUARY 2018

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Kipruto, Advocate for the Applicant.

Ms. Macharia Ass. Director of Public Prosecution.