REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 7 OF 2018

Arising from conviction and sentence passed by Hon. Lucy Ambasi in MERU CMCCRC NO 182 OF 2018 on 19.1.2018

(CORAM: GIKONYO J)

MAREEN KATHURE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

[1] By a Petition dated 24th January, 2018, the Appellant preferred the following grounds of appeal:-

> ***1. THAT the learned magistrate erred in law in failing to find that the procedure for taking plea was not followed and adhered to.***
>
> ***2. THAT the learned Magistrate erred in law in failing to find that the charge was an illegality in view of Nairobi H.C. Court petition No. 447 of 2016 (Revision(sic) by JUSTICE MATIVO J.)***
>
> ***3. THAT the learned magistrate erred in law and fact in failing to consider the circumstances of the case and the mitigation in sentencing the appellant.***
>
> ***4. THAT the magistrate [erred] in law in sentencing the appellant to jail without fine in the 2nd count.***
>
> ***5. THAT the sentence was excessive in the circumstances.***

[2] Mr. Mutwiri, legal counsel for the Appellant argued that maximum sentence for the offence was a fine of Kshs. 500,000 and the trial magistrate imposed a fine of Kshs. 250,000 for count I. And as for Count II, the trial magistrate sentenced the Appellant to a jail term without an option of fine. Another complaint; that the trial magistrate did not indicate whether the sentences were concurrent or consecutive. On the basis of these matters, counsel beseeched court to allow appeal and quash the sentence.

[3] Mr. Namiti, the state counsel, argued that the sentence meted out was not illegal, was reasonable and appropriate; except he asked the court to treat the Appellant as first offender.

DETERMINATION

[4] The Appellant was convicted on her own plea of guilt which was unequivocal. Counsel, however, fastened a quarrel on the sentence which makes it necessary to discuss the principle of sentencing. In the case of **SHADRACKKIPCHOGE KOGO vs. REPUBLIC**[20] the court of appeal stated:-

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"***

[5] Imposition of punishment is a matter for the discretion of the court. Except, the court must consider the facts and circumstances of each case in order to impose punishment that is:-

> ***"…appropriate, adequate, just and proportionate… commensurate with the nature and gravity of the crime and the manner in which the crime is done… motive for the crime, nature of the of the offence and all other attendant circumstances" see*** **AlisterAnthony Pareiravs State of Maharashtra,[26]**.

Thus, in exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation- in assessing proportionality, take into account mitigating and aggravating factors, the impact of the crime on the victims and the need to make any order for compensation or forfeiture. I need not remind that victims of crime now occupy rightful position in the Constitution.

[6] See also the purpose and the principles of sentencing under the common law[28] which are:-

> ***i. To ensure that the offender is adequately punished;***
>
> ***ii. To prevent crime by deterring the offender and other persons from committing similar offences;***
>
> ***iii. To protect the community from the offender;***
>
> ***iv. To promote the rehabilitation of the offender;***
>
> ***iv. To make the offender accountable for his or her actions;***
>
> ***v. To denounce the conduct of the offender***
>
> ***vi. To recognize the harm done to the victim of the crime and the community prevent***

[7] In this case, Count I was a charge of selling alcoholic drinks without license contrary to section 7(1)as read with section 62 of the Alcoholic Drinks Control Act. Counsel seemed to be saying that the sentence imposed thereto was high. The applicable provision herein is thegeneral penalty in section 62 of the Alcoholic Drinks Control Act which provides that:-

> ***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.***

[8] The trial magistrate sentenced the Appellant to a fine of Kshs. 250,000 or in default 3 months imprisonment. She noted that the offence is prevalent in the area leading to increased alcoholism. The fine may seem high at first sight, but looking at the maximum fine provided, which is Kshs. 500,000, and the reason advanced by the trial magistrate, she took the view that stiffer penalty was needed to prevent crime by deterring the offender and others from committing similar offences. Again, the magistrate was clear that the sentence was aimed at protecting the community from the holocaust of alcoholism. Nonetheless, I will reduce the fine for count I to Kshs. 150,000 in default to serve 3 months imprisonment.

Option of fine not given

[9] I move to the second issue that no option of fine was provided in the sentence on count II despite it being an option in the penalty clause. Under section 28 of the Penal Code, where an offence is punishable with a fine or a term of imprisonment, or both, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court. But, the discretion is exercised upon define principles of law and the circumstances of the case. On this subject, I find help from the case of **MITA vs. R [1969] E.A.**where *Madan, J* (as he then was) stated:

> ***"Before passing sentence the learned Magistrate pointed out that the appellant was a first offender, [who] appeared sorry and repentant. He added that this was, however, a very violent and unattractive act, although the appellant may have been provoked by the attempt to expel her from the premises …***
>
> ***"The learned Magistrate ended up by saying he did not think a fine would serve any purpose as the appellant appeared to be earning a lot of money …***
>
> ***With respect I think the learned Magistrate did not assign enough emphasis to the appellant's contrite condition and the fact that she was a first offender …***
>
> ***"I am also of the opinion that the learned Magistrate misdirected himself when he said the act of biting a man's face is hardly justifiable. At no stage has the appellant tried to justify her act …***
>
> ***"I think irrespective of an accused person's earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly preclude this mode of punishment which is not the case here …***
>
> ***"I think the interests of justice will be met if I set aside the sentence of imprisonment and substitute therefor a fine of Kshs.400/=; in default, two months' imprisonment".***

[10] Accordingly, imposition of prison terms alone especially fines or other less intrusive yet appropriate penalties are provided should be avoided, unless, the circumstance of the case resist that kind of approach. *Mwera, J*(as he then was) in ***AnnisMuhidinNur***, High Court

Criminal Appeal No. 98 of 2001 stated this policy in sheer simplicity as follows:

> ***"… unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing …"***

That is not to say, however, that prison terms cannot be imposed alone where there is an option of fine if it is the most appropriate sentence in the circumstances of the case. In this case, the charge in count II was operating a gaming machine without licence contrary to section 53(1) of the Betting, Lotteries and Gaming Act. The penalty clause thereofprovides that;

> ***…a person convicted of an offence under this section, shall be liable to a fine not exceeding five thousand shillings, or to imprisonment for a term not exceeding six months, or to both.***

The trial magistrate after considering mitigation by accused, stated that the prevalence of the offence and subsequent effect of gambling on many families is noted in the region and the Appellant was sentenced to 3 months imprisonment without the option of a fine as a lesson to others.Such was a contentious decision which took into account the prevailing circumstances. Needless to state that, today, gambling has taken a toll on many people and is being advertised and promoted vigorously. It has become a matter of public notoriety. It is becoming a scourge in our society. Three months is not therefore harsh. Again, the reasons given by the trial magistrate are in accord with the facts of the case as well as the principles in sentencing. I find nothing on which to disturb the sentence although no fine was imposed.

[6] One last query; the trial magistrate did not indicate whether the sentences shall run concurrently or consecutively. Unless there is special reason, I hold that the sentences shall run concurrently.The appeal succeed to the extent I have stated. Otherwise, the other grounds of appeal are dismissed. She shall suffer the original sentences except fine for Count I will be Kshs. 150,000 and the sentences shall run concurrently. It is so ordered.

Dated, signed and delivered in open court at Meru this

15th day of February, 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutwiri advocate for Appellant

Mr. Namiti for the Respondent

F. GIKONYO

JUDGE