REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO.23 OF 2018

GRACE NTAKIRA……...……...……APPLICANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

[11] The Applicant in an Ex-parte Notice of Motion Application dated 8th February 2018 has sought *inter alia* for declarations:-

> *1.That the plea taking process in the same case was un-procedural and not unequivocal; and thereby be set aside and*
>
> *2.That the sentence in Tigania SPMCC No.92 of 2018 is also illegal and be set aside*

[2] The application is appealing to the power of the court in Section 362 of the Criminal Procedure Code and Article 159 of the Constitution of Kenya.

[3] The Applicant was, on 12th January 2018, arraigned in Tigania Law courts on a charge of being in possession of 150 liters of *"marua"* contrary to Section 27 (1) (b) as read with Section 4 of the Alcoholic Drinks Act No.4 of 2010. She pleaded guilty. She argued that, there being no previous record of conviction, she pleaded for leniency. But her plea fell on deaf ears and the court meted out a very harsh sentence on her.

[3] When the matter came up for hearing on 1st March 2018, Ms. Mwathi for the State intimated to court that they were not opposing the application for revision. She did not give any reason for the position she took on the application.

DETERMINATION

[4] I have carefully perused the lower court record. It reveals that the Applicant was charged with being in possession of illegal alcoholic drink and without licence contrary to section 27 (1) (b) as read with Subsection 4 of the Alcoholic Drinks Control Act No. 4 of 2010. The Applicant was subsequently convicted on her own plea of guilty and fined Kshs 70,000 or in default 14 months imprisonment. The Applicant has now *inter alia* contended that she was charged with a nonexistent offence and therefore the sentence meted on her was also illegal. She has also stated that the process of plea taking was un-procedural as plea of guilty entered was not unequivocal.

[4] She was charged with being in possession of an illegal alcoholic drink called Marua and without a

licence contrary to Section 27(1) (b) as read with subsection 4 of the Alcoholic Drinks Control Act No. 4 of 2010. Section 27 provides as follows:

> ***27. Conformity with requirements***
>
> ***(1) No person shall-***
>
> > ***(a) Manufacture, import or distribute; or***
> >
> > ***(b) Possess, an alcoholic drink that does not confirm to the requirements of this act***
>
> ***(2) Subsection (1) shall not apply to a person who—***
>
> > ***(a) is authorized under this Act to be in possession of the alcoholic drink; or***
> >
> > ***(b) has possession of the alcoholic drink in a premises licensed under this Act.***
>
> ***(3) The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or the requirements of this Act***
>
> ***(4) A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.***

[5] The Applicant argued that she was charged with non-existent offence. The argument throws me back to the principles of legality. Accordingly thereto, a criminal offence must be expressly established in law and penalty prescribed thereto. You cannot infer an offence from an obscure provision of law. The language of the provision creating the offence must be clear and simple. Section 27(1) (b) as read with subsection 4 of the Alcoholic Drinks Control Act establishes offence if a person:-

> ***(a) Manufactures, imports or distributes; or***
>
> ***(b) Possesses, an alcoholic drink that does not confirm to the requirements of the act.***

I should believe that *an alcoholic drink that does not confirm to the requirements of the act* is what the charge referred to as an illegal alcoholic drink.

The section also prescribes the penalty for the said offence to be:-

> ***… a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.***

Therefore, it is not correct to state that the offence under those sections is non-existent. Accordingly, I do not agree with the Applicant that she was charged with a non-existent charge.

[6] I note, however, that the particulars of offence contained words ''without license''. This is common in offences under section 27 of the Act. But, I should think that, a more careful prosecutor should use such technical words on a charge under section 7 of the Act, because it is not legally tenable to possess an illegal alcoholic drink under licence. I wish the word ''possess'' is added in section 7 of the Act so that this dilemma confronting the prosecution will fade off. I am aware also that these sections especially section 27 of the Act have caused tremors in judicial interpretation thereof, with some judges arguing that they do not disclose any particular offence. Perhaps, legislative wit is required to cast provisions which establish offences in a more sharp and pointed manner. In that manner, Parliament will give effect to the global object of the Alcoholic Drinks Act which is:-

> *'…**to provide for regulation of the production, sale and consumption of alcoholic drinks,…''***

Nonetheless, Criminal offences have been created under section 7 and 27 of the Alcoholic Drinks Control Act and so, nothing turns on the argument by the Applicant. Having stated that, it is, however, a different thing altogether if the facts or evidence do not support the charge. If that be the case, different remedies are available in law, say, amendment or alteration or rejection of charge or an acquittal as the case may be.

[7] On the other issue raised by the Applicant that plea taking was un-procedural and that the plea of guilty entered was not unequivocal, I say these. The record states that the substance and essential elements of the charge were stated to the Applicant in the language she understood and replied: - True. Similarly, when the facts were read to the applicant, she replied ***"true".*** Of more importance, but this has not been raised by the Applicant, is that neither the language of the court is nor the language used to read the charges to the Applicant is indicated. I will therefore give her the benefit of doubt and in exercise of the power conferred by section 362 of the Criminal Procedure Code and article 167 of the Constitution, I hereby quash the conviction and sentence on that account. She will be set free forthwith unless she is otherwise lawfully held in custody.

Dated, signed and delivered in open court at Meru this 21st day of March 2018

F. GIKONYO

JUDGE

In the presence:

Mr. Namiti for State

Applicant in person

F. GIKONYO

JUDGE