



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL REVISION NO. 23 OF 2018

DOUGLAS MONCHONGE OMOGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

20/3/2018

Before W.A. OKWANY J

In Chambers

RULING

1. I have perused the application dated 6th March 19, 2018 in which the applicant seeks revision under Section 362 of the Criminal Procedure Code (CPC). I have also examined the proceedings of Ogembo SRMCR Case No. 1793 of 2017 for the purposes of satisfying myself as to the correctness, legality and propriety of the order on sentence made on 18th December 2017.

2. I note that the accused was convicted and sentence to pay a fine of Kshs. 100,000 in default 6 months imprisonment for the offence of manufacturing alcoholic drinks without a licence contrary to Section 7 (1) (b) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010. The particulars of the offence were that on 17th December 2017 at Botabori Sub-location, Gucha South Sub-County within Kisii County was found manufacturing changaa by using 100 litres of Kangara.

3. Section 7 (1) (b) of the Alcoholic Drinks Control Act stipulates that:

“(1) No person shall

b) Sell, dispose of or deal with any alcoholic drink except under and in accordance with a licence issued under this Act.”

4. In the instant case I note that the **Section 7 (1) (b) of the Act** under which the applicant was charged does not relate to the offence with which the accused was charged as while the particulars of the charge refer to manufacturing alcoholic drinks, the section of the Act deals with selling, disposing or dealing with alcoholic drinks. The correct provision ought to have been section 7 (1) (a) of the Act which deals with the manufacturing of alcoholic drinks. Be that as it may, the citing of the wrong section of the Act is curable under section 382 of the Criminal Procedure Code (CPC).

5. I also find that the facts of the case, as narrated by the prosecutor during the trial are not clear on what actually constituted the manufacturing of the alcoholic drink. The said facts were as follows:

“On 17/12/17 at Botabori accused was arrested manufacturing changaa using 100 litres of kangara without a licence. The 100 litres in skyplast container is produced.”

6. From the above facts, it was not explained how the 100 litres of kangara was being used in the manufacturing of changaa or what constituted ‘manufacturing’ considering that the said changaa, which is the alcoholic drink in question, was not produced in court as an exhibit. The question which then arises is whether kangara is an alcoholic drink. **Justice H. I. Ong’udi** had the following to say when faced with similar question in the case of **Gladys Cherotich V. Republic in Bomet HCCRA No. 3 of 2015:-**

“This confirms that Kangara is not an alcoholic drink but a substance used in distilling changaa which is an alcoholic drink.”

7. Taking a cue from the above decision, I find that the substance that was produced in court, that is kangara, was not an alcoholic drink so as to support the charge that the applicant was manufacturing an alcoholic drink. Be that as it may and considering that the applicant was reported to be a first offender, I find that the trial court ought to have called for the probation officer's report with a view to considering the appropriate alternative sentence in line with the sentencing policy geared towards decongesting prisons. I find that the sentence meted out on the applicant was excessive taking into account the totality of the circumstances of this case.

8. Having regard to the above observations, I find that there is justification in exercising the court's powers of review under section 362 and 364 of the CPC. Consequently, I hereby review the sentence passed on the applicant and in its place, order that the applicant shall serve 3 months' Community Service during which period he will be supervised by the probation officer of his area.

20/3/2018

W.A. OKWANY

JUDGE