



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HC. CR. REV. NO. 139 OF 2018

(CORAM: R. E. ABURILI - J.)

BENEDITA OTIENO OSIMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the

sentence dated 11.04.2018 in Criminal Case No. 82 of 2018

in

Ukwala Law Court before Hon. G. Adhiambo – SRM)

RULING OF THE COURT

The Applicant/Convict **Benedita Otiemo Osimbo** was charged with the offence of manufacturing alcoholic drinks contrary to **Section 32(1)a of the Alcoholic Drinks Control Act No. 4 of 2010**. She is alleged to have possessed 10 litres of *Kangara* used in manufacturing *Chang'aa* on 15th February 2018 at Sikala Village in Ugunja Sub-County within Siaya County.

She pleaded not guilty before Hon. H. Adhiambo SRM, Ukwala. A full trial was conducted and on 11th April 2018, the trial court found her guilty of the offence, convicted her and sentenced her to pay a fine of Kshs. 100,000/= in default to serve 12 months imprisonment on Count 1 and on Count 2 of being in possession of 9 litres of *Chang'aa*, the Applicant was fined Kshs. 9,000/= in default to serve 2 months imprisonment.

The sentence were to run consecutively. The Applicant/Convict has not challenged her conviction and sentence.

She was a first offender, according to the Prosecution.

In her mitigation, she maintained her innocence and stated that the alcohol was not hers and that she had a child who was still breastfeeding and urged the Court to have mercy on her.

The Applicant/Convict is now before this Court seeking for revision of her sentence. The Court notes that she does not challenge conviction or sentence or their propriety and neither does the Court find any impropriety in the conviction and sentence imposed by the trial court.

However, the Court's jurisdiction to review sentence is discretionary, having regard to the circumstances of the case and the need to promote prison decongestion in minor offences or petty offenders.

The Applicant has served more than half her prison sentence after failing to raise the fines imposed on her. The sentence Revision Report dated 20/7/2018 by Ms. Rose K. Gwaro, Probation Officer, Siaya shows that the convict needs economic empowerment and reintegration and intervention include guidance and counselling. She has 5 children aged between 15 and 2 years and the last born is serving prison with his mother. Her husband works in Nairobi doing casual jobs. The children are distressed as they lack a mother figure at home and her family and community seek for leniency on her behalf.

The child in person is sickly and is not receiving motherly care due to the duties allocated to the Convict in prison. She regrets her offence

and promises to reform and desist from such unlawful activities. The Probation Officer recommends her release on probation to help in her rehabilitation and to benefit from guiding and counselling.

The Court appreciates the post sentence mitigating factors but must warn the Convict that crime does not pay. She must learn to do legal business to fend for herself and her children.

I am persuaded that the Convict has learnt her lessons in prison. She has subjected her young son aged only 2 years to harsh prison conditions. If she is disciplined and hardworking as recommended by her Prisons Supervisor, then she is capable in engaging in useful activities outside the Prison walls to fend for her family of minor children.

I shall therefore in the interest of justice and for the sake of her minor children tamper justice with mercy and Order that the sentence now served in prison with her innocent 2 year old son is sufficient punishment. Accordingly, the sentence of 12 months imposed on the Applicant is hereby revised to three months imprisonment and the 2 months imprisonment imposed on her in Count 2 to be served concurrent with the 3 months imprisonment on the 1st Count.

In the end, I order that the Convict, Benedita Otieno Osimbo having served 3 months imprisonment is hereby discharged from Prison forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at SIAYA this 31ST day of July 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okach: Prosecution Counsel for the State

Benedita Otieno Osimbo: Applicant in person (present)

Court Assistant: Akida and Brenda