



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

REVISION CASE NO. 2 OF 2017

ANN MUNYIVA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING OF THE COURT

1. Andrew Makundi & Company Advocates vide a letter dated 2/2/2017 has sought for an order of revision of the Machakos Chief Magistrate's Court Proceedings conviction and sentence in **MACHAKOS CM CR. NO. 1101 OF 2016 – REPUBLIC =VS= ANN MUNYIVA** conducted on the 30th November, 2016 by Hon. Ocharo Principal Magistrate. The grounds in support of the Revision are as follows:-

- (1) That the Learned trial Magistrate failed to clarify to the accused person which charges were brought against her upon the withdrawal of Count 1.***
- (2) That the learned Trial Magistrate proceeded with the trial notwithstanding that the accused had not taken pleas as relates to the alternative charge and a second charge as per the charge sheet.***
- (3) That the trial Magistrate did not disclose to the accused person which charge related to the orders of the court delivered on 30/11/2016.***
- (4) That the trial magistrate failed to have the accused person plead to the remaining charges after count 1 was withdrawn.***
- (5) That the trial court failed to satisfy itself that the accused understood the nature and extent of the charges preferred against her.***

2. Counsel for the Applicant submitted that accused rights to fair hearing under Article 50 of the Constitution was infringed upon. It was further submitted that it appears the Applicant pleaded guilty to a charge that had been withdrawn by the prosecution and hence it is not clear to which of the three (3) Counts she pleaded, two of which were not read to the accused. Counsel further submitted that the Applicant had already obtained The requisite operating Licence as per the Alcoholic Drinks and Control Act 2010. The learned counsel urged this court to invoke its supervisory powers under Articles 50(1) (9), 165 (6) and 7 of the Constitution and Section 364 of the Criminal Procedure Code to quash the orders of the trial court issued on 30/11/2016 and refund the amount to Kshs. 98,300/= paid as fine by the Applicant.

3. Upon receipt of the above request, this court duly called for the record from the lower court pursuant to

the Provisions of Section 362 of the Criminal Procedure Code for perusal. The lower court record reveals that the accused **Ann Munyiva** faced two main Counts and an alternative charge all under the Alcoholic Drinks and Control Act No. 4 of 2010: the respective charges as laid out against the accused were as follows:-

COUNT 1:

Operating a Bar business without Licence contrary to Section 7(1) (b) as read with Section 62 of the Alcoholic Drinks Control Act No.4 of 2010. It is alleged that on the 30th day of November, 2016 at around 0020 hours, at Kyumbi Township in Mathatani location within Machakos County was found operating a bar business namely OASIS BAR without alcohol liquor Licence for the year 2016.

ALTERNATIVE CHARGE: *Failing to Display Alcoholic Liquor Licence contrary to Section 20(1) of the Alcoholic Drinks Control Act No.4 of 2010. It is alleged that on the 30th day of November, 2016 at around 0020 hours, at Oasis Bar in Kyumbi. Mathatani location within Machakos County being the counter attendant, failed to display the Alcoholic Liquor Licence for the year 2016.*

COUNT II: - *Breach condition of Licence contrary to Section 34 (a) of the Alcoholic Drinks and control Act No. 4 of 2010. It is alleged that on the 30th day of November, 2016 at around 0020 hours at Kyumbi Township in Mathatani location within Machakos County, was found selling alcoholic drinks at Oasis Bar outside the time allowed by the Alcoholic Liquor Licence which authorizes selling of alcoholic Drinks between 5.00 p.m. – 11.00 p.m. on week days and 2.00 p.m. – 11.00 p.m. on weekends and public holidays.*

4. The proceedings conducted on the 30/11/2016 show that before the charges could be read to the accused the Prosecution sought to withdraw Count one and before the court could endorse the order of withdrawal the record reveals thus:-

COUNT 1: “kweli”

Subsequently the next record reveals thus:-

“COURT: COUNT 1 is withdrawn”

The Court appears to have gone ahead to tick the relevant part of the standard form – Plea of guilty entered and accused convicted. The accused proceeded to offer her mitigation after which the court imposed a fine of Kshs.100,000/= or in default to serve six (6) months imprisonment.

5. A perusal of the entire record shows that it is not clear as to which of the charges the accused pleaded guilty to and for which she was subsequently convicted and sentenced. If indeed Count one was withdrawn by the prosecution, then the correct procedure would have been to let the accused plead to the remainder of the charges namely the Alternative charge and Count two. Indeed the Provisions of Article 50(2) (b) of the Constitution that relates to a right to fair hearing is quite paramount and an accused must always be accorded that fundamental right. The above provisions provides thus:-

“Every accused person has the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it.”

It was the duty of the court to satisfy that the accused understood the entire proceedings. Hence it is clear that the said proceedings did not pass muster as the effect violated accused’s right to fair hearing. It is noted that the accused did not plead to the alternative charge as well as Count two after the first Count was withdrawn by the prosecution. Hence there was no charge properly pleaded by the accused so as to justify the eventual conviction and sentence.

6. Section 362 of the Criminal Procedure Code gives Revisionary powers to this court to call for and examine the record of the any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Section 364 of the Criminal procedure Code gives the High court powers with which to deal with any issues requiring revisions. In the present revision the proceedings appear not to have been properly conducted due to the failure of the court to ensure that the accused understood which of the counts she was pleading to after one of the counts was withdrawn by the prosecution. It is the finding of this court that plea was not properly taken and which greatly prejudiced the accused. The accused was ordered to pay a fine of Khss.100,000/= or in default to serve six (6) months imprisonment. It has transpired that there was indeed the current liquor Licence for the year 2016 which was issued on 1/12/2015 and expiring on 1/12/2016, and therefore as at 30/11/2016 Oasis Bar's Licence was still in force and had not expired.

7. In the result it is the finding of this court that the conviction of the accused was unsafe. Consequently the conviction herein is quashed and sentence set aside. The accused is ordered set at liberty forthwith unless otherwise lawfully held. The fine of Kshs.98,300/= that had been paid is ordered to be refunded forthwith.

It is so ordered.

Dates, signed and delivered at Machakos this **10th** day of **April 2017**.

D. K. KEMEI

JUDGE

In the presence of:

.Loko for Makundi for Appellant

Machogu for Respondent.....

.C/A: Kituva.....