



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL REVISION NO. 5 OF 2017

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 492 OF 2017 OF THE
PM'S COURT AT ELDAMA RAVINE**

MARGARET WAMALWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 17/8/2017, the applicant sought revision of the sentence imposed on her by the Eldama Ravine PM's Court in Criminal Case No. 492 of 2017 for (2) counts, of respectively, contravening Alcoholic Drinks Control Act Contrary to Section 27(1)(b) as read with 27(4) of the Alcoholic Drinks Act and manufacturing an Alcoholic Drink that does not conform to the requirement of the Act contrary to section 27(1) (a) as read with section 27(4) of the Alcoholic Drinks Control Act No. 4 of 2010.
2. The applicant was sentenced to pay a fine of Ksh. 70,000 and in default to serve imprisonment for 6 months in count I and to a fine of Ksh. 10,000/- and in default to serve imprisonment for 1 month in count II.
3. The applicant pleaded that she was a single mother with 10 children under her care and that she was the sole breadwinner of the family. She urged that the sentences were too harsh and that the Court did not consider her mitigation.
4. When the matter came up for hearing the applicant reiterated her plea for leniency and stated that her children in Form III, II and class 8 had been chased out of school for lack of fees, and prayed to be released to be able to cater for their welfare.
5. For the DPP, Assistant Director of Public Prosecution Ms. Macharia, did not oppose the Revision pointing out that the charge was defective and the proceedings irregular because as regards count I, the applicant was charged with Contravening Alcoholic Drinks Act rather than being in possession of Alcoholic Drinks Contrary to Section 27(1) (b) of the Alcoholic Drinks Control Act and that upon conviction on her plea of guilty, the applicant was not given an opportunity to mitigate.
6. The trial Court record of the proceedings of 6/7/2017 is as follows:-

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATES COURT AT ELDAMA RAVINE

CRIMINAL CASE NO. 492 OF 2017

REPUBLICPROSECUTOR

VERSUS

MARGARET WAM ALWA.....ACCUSED

6.7.2017

Coram Before Hon. J L Tamar, PM

Sc Mr Kelwon

CC: Diana

Accused: Present

The charges and elements therein are read over and explained to the accused in a language that he/she understands (i.e)Kiswahili/English who replies;

Count I

Accused: It's true

Court: Plea of guilty entered

Court Prosecutor: Facts as per charge sheet

HON. J. L. TAMAR, PM

Court: Accused to pay a fine of Ksh. 70,000/- in Count one in default six months and Ksh. 10,000 in count two in default one month. Right of appeal explained.

Exhibit to be destroyed.

HON. J. L. TAMAR, PM

7. Although the charge in Count I did not use the language of the section 27 (1) (b) of the Alcoholic Drinks Control Act, the applicant was in no way prejudiced as she was not uncertain of the charge she was facing or embarrassed in her defence to the same by reason of any ambiguity in the charge because the particulars of the charge were clear that she was facing a "possession" charge as follows:-

"Margaret Wamalwa: on 5th July 2017 at around 12.00 hours in Tripkatoi Village in Koibateck Sub-county within Baringo County , was found being in possession of Busaa to wit 70 litres packed in plastic Jerricans in contravention of Alcoholic Drinks Act No. 4 of 2010".

8. The Court considers that the defect in the statement of the charge in using the words "Contravening Alcoholic Drinks Control Act" rather than " Being in possession of Alcoholic Drinks in contravention of the Alcoholic Drinks Control Act is" a matter that can be cured by section 382 of the Criminal Procedure Code, which provides as follows:

"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other

proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”.

9. As regards the failure of the Court to give the applicant time to mitigate section 207(2) of the Criminal Procedure Code provides, as relevant, as follows:-

“If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the Court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the Court may permit or require the complainant to outline to the Court the facts upon which the charge is founded”.

There is no statutory requirement for the taking of mitigating circumstances before sentence. However, the practice of taking mitigation has worked as a central part of the fair trial procedure of the Courts. In the case of a full trial under section 215 of the CPC, there is provision under section 216 of the CPC, for the taking of evidence to inform proper or appropriate sentence as follows:-

“The Court may, before passing sentence or making an order against an accused person Under Section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made”.

10. There is nothing on record to suggest that the trial Court took mitigation from the applicant and this Court must accept the applicant’s complaint that she was not given time to mitigate before sentence. But want of mitigation does not affect the prior conviction for the offence. It is an irregularity of procedure which the Court as an appellate Court may remedy if it considers the sentence excessive or harsh in the circumstances of the case and the mitigation given at this stage.

11. The pre-sentence report filed by the Probation Officer in this matter on request the appellate Court paints a sad state of affairs with regard to the applicant and her inability to cater for her 10 children , some of whom are out of school for lack of fees, as follows:-

“The social inquiry rendered that despite living in object poverty the family has no Criminal records”. After Paul Wamalwa (the husband) had abandoned the family, the appellant shouldered the responsibility of providing for the family including ensuring their learning. However, upon her incarceration, the children have been staying alone without proper care. Some good Samaritans and neighbours from the area, whenever possible, have been giving cereals, vegetables and other food staffs to the children for at least a meal”.

On account that the applicant’s role as the breadwinner of his family and her responsibility for the children upkeep and schooling, the Probation Officer recommends a Probation

Sentence” so as to gain psychological and counseling support as the economic support is also sought on her behalf.

12. The Court accepts the apparent stance of the trial Court to rid the area of the menace of Alcoholic Drinks which affects the productivity, health and wellbeing of the residents. Dealings in illegal Alcoholic Drinks must be severely punished as a deterrence for the prevalent crime.

13. However, the very sad mitigating circumstances of the applicant call for a non-custodial sentence

which permits the applicant to change her ways and seek to provide for her children by lawful business enterprise and also facilitate her counseling and guidance by Probation Officers. To impose a custodial sentence in the circumstances of this case may aggravate a bad situation in relation to the care and best interest of the appellant's children.

14. Accordingly, for reasons set out above and in exercise of the powers of the Court under section 364 (1)(b) of the CPC, I alter the sentences of fine of 70,000/- in default 6 months imprisonment in count 1 and Ksh. 10,000 in default 1 month imprisonment in count II to a sentence of Probation for (12) months in each count running concurrently

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person

Ms. Macharia for the DPP.