



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL REVISION NO 1 OF 2016

EMILY SANGULI MABISHI..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

THE APPLICANT’S CASE

1. By a letter dated 2nd March 2016 filed on 9th March 2016, the Applicant moved the court for a revision of the sentence that was meted upon her and prayed that she be considered for a non-custodial sentence or the option of paying an affordable fine.
2. She was charged in **Cr Case No 174 of 2016** at the Senior Principal Magistrate’s Court at Voi with the offence of selling traditional liquor without a permit contrary to Section 7(1)(b) of Alcoholic Drinks Control Act 2010 (hereinafter referred to as “the Act”) as read with Section 62 of the Act. She pleaded guilty and was sentenced to eight (8) months’ imprisonment without the option of a fine.
3. It was her view that the sentence was extremely harsh and prayed for forgiveness because she had five (5) young school going children and three (3) grandchildren who were currently being taken care of by her elderly mother.

THE RESPONDENT’S CASE

4. In response to the Applicant’s application, the State filed its Written Submissions dated 17th March 2016 on the same date. It submitted that the Applicant had not demonstrated any of the ingredients in Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides as follows:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to correctness, legality or propriety (emphasis court) of any finding, sentence or order recorded or passed, and as to the regularity (emphasis court) of any proceedings of any such court.”

5. It referred the court to the case of **Charles Gitau vs Republic [2008] eKLR** in which Ojwang J (as he then was) clarified when a revision ought to be filed. It argued that the Applicant ought to have preferred an appeal as opposed to a revision and relied on the provisions of Section 364(1)(5) of the Criminal Procedure Rules that stipulates as follows:-

“When an appeal lies from a finding, sentence or order, and no appeal is brought, no

proceedings by way of revision shall be entertained at the instance of the party who would have appealed.”

6. The court’s acceded to the State’s proposal to have a Probation Report in respect of the Applicant filed in court to assist it in making a determination herein.

THE PROBATION OFFICER’S REPORT

7. On 22nd March 2016, the Probation Officer Voi Sub County filed a Report showing that she interviewed the Applicant, Wundanyi Women Prison authorities, Mr Peter Rangi, the Area Chief, Marungu Sub location and her family.

8. The Probation Report recommended that the Applicant who was asthmatic and who had five (5) young school going children and three (3) grandchildren who were currently being taken care of by her elderly mother, be considered for non-custodial sentence to be undertaken at Marasi Primary School where she went to school, as she was remorseful.

9. The said Report also indicated that the Applicant had been of good behaviour during her incarceration at Wundanyi Women Prison and that her family and the society at large were willing to accept and re-integrate her into the society.

10. On the other hand, the State vehemently opposed the Applicant being given a non-custodial sentence. Its argument was that whilst it was sympathetic to the Applicant’s plight of having five (5) children, she was a repeat offender. It argued that the prison system was rehabilitative as the Applicant would learn new skills to better her life.

11. The court noted that the Applicant admitted of having committed a similar offence in **Cr Case No 161 of 2016 Republic vs Emily Sanguli Mabishi** only on 23rd February 2016 when she was fined a sum of Kshs 20,000/=. She was charged with the present offence the following day on 24th February 2016.

12. She explained that she decided to give out the alcohol after she was convicted because it was a lot and she did not want to waste the same and that is how she came to be re-arrested the next day. It is no wonder then that Hon E. Kadima (RM), the Learned Trial Magistrate herein opted to sentence her to eight (8) months’ imprisonment without the option of a fine.

LEGAL ANALYSIS

13. While the Prosecution rightly submitted that no appeal shall be entertained if a finding, sentence or order could have been appealed therefrom, it is clear from the case of **Charles Gitau vs Republic** (Supra) that the court can act *suo moto* and consider an application for revision as if the same were an appeal. In that case Ojwang J (as he then was) stated thus:-

“...In our judgement, the court can in its discretion, act suo moto even where the matter had been brought to its notice by an aggrieved party who had a right of appeal...”

It is on that basis that this court proceeded to consider the Applicant’s application for Revision in a holistic manner.

14. Section 7(1) (b) of the Act provides as follows:-

No person shall —

(b) sell, dispose of, or deal with;

15. **any alcoholic drink except under and in accordance with a licence issued under this Act.**

16. Section 62 of the Act provides as follows:-

“Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.”

17. Evidently, the Learned Trial Magistrate exercised his discretion judiciously when he sentenced the Applicant to eight (8) months’ imprisonment without the option of a fine. The sentence was legal, correct, proper, and was commensurate to the offence and well within the law. In the circumstances, this court would not have ordinarily interfered with the said sentence had it not been for the new Judiciary Sentencing Policy Guidelines which are now in place to guide courts in giving appropriate sentencing.

18. The Guidelines recommend that imprisonment for petty offenders ought to be discouraged as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. The argument has been that short sentences are disruptive and contribute to re-offending. Generally, the Sentencing Policy Guidelines observed that there was a high rate of Recidivism associated with imprisonment.

19. The said Guidelines do not entirely state that a repeat offender should not serve a non-custodial sentence. It can be ordered where it is most suitable in the circumstances of a case, where an offender is remorseful and receptive to rehabilitative measures and is not a threat to the community he or she lives in.

20. The Applicant herein is asthmatic and not a threat to her society which would make her a good candidate for a non-custodial order. Whether she was remorseful is a different matter altogether as from the said Probation Report, it was indicated that prior to her arrest, she was engaged in selling “**Mnazi**” to earn a living.

21. That could explain why she was re-arrested a day after she had been convicted and paid a fine of Kshs 20,000/=. Her explanation that she decided to give the alcohol to people as it was too much was neither here nor there as she was clearly contravening the very law she had escaped from by paying a fine that was a slap on her wrist.

22. Appreciably, the Learned trial Magistrate acted within the confines of the law as the sentence was correct, legal and proper. However, bearing in mind that the Applicant is asthmatic and Wundanyi Women’s Prison in which she is incarcerated has extremely harsh cold climate which would be detrimental to her health and taking into consideration the Sentencing Policy Guidelines on custodial, non-custodial and fines against the backdrop of the Probation Report, this court was of the opinion that a fine would be the most suitable penalty in the circumstances of the case. Indeed, the option of a fine is also provided in Section 62 of the Act.

23. There was definitely no guarantee that the Applicant would not continue engaging in the trade of selling illicit alcohol. Doing the best that it could, this court was of the opinion that as opposed to giving the Applicant a non-custodial sentence as had been proposed by the Probation Officer, a fine would also be commensurate to the offence that she had committed.

DISPOSITION

24. In the circumstances foregoing, this court hereby sets aside the imprisonment of eight (8) months without the option of a fine that was imposed upon the Applicant by the Trial Court and instead replaces it with an order that the Applicant shall pay a fine in the sum of Kshs 60,000/= and in default, she shall serve eight (8) months imprisonment which period of imprisonment will take into account the time she will have spent in incarceration before her release.

25. It is so ordered.

DATED and DELIVERED at VOI this 31st day of March 2016

J. KAMAU

JUDGE

In the presence of:-

Emily Sanguli Mabishi..... Applicant

Miss Mukangu.....State

Simon Tsehlo– Court Clerk