



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 293 OF 2015

REPUBLIC.....APPLICANT

VERSUS

LEAH WANGUI WAITHERA.....1ST RESPONDENT

BEATRICE NJOKI MUIGAI.....2ND RESPONDENT

RULING

Pursuant to Section 362 of Criminal Procedure Code, the original file in **Gatundu Principal Magistrate's Court Cr. Case No. 1358 of 2015 Republic vs Leah Wangui Waithera and Another** was forwarded to this court with a view to the court satisfying itself as to the correctness, legality or propriety of the ruling of Hon. A. M. Maina, Principal Magistrate delivered on 20th November, 2015. Before the trial magistrate the accused persons namely; Leah Wangui Waithera and Beatrice Njoki Muigai were jointly charged with the offence of exposing alcoholic drinks for sale 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 the 1st day of November, 2015, at Muitirithia Bar, Ituramiro shopping in Gatundu South Sub-County within Kiambu County were jointly found exposing alcoholic drinks for sale without a licence for the year 2015.

The two appeared before the learned magistrate for plea but an objection was raised by learned counsel for the accused urging that the charge was defective because under Articles 185, 186 and 187 of the Constitution read together with the 4th Schedule Part 2 of the Constitution, the liquor licensing was a devolved function of the County Governments and therefore, the charges having been drawn under a National Law did not stand the test of the law. The learned trial magistrate upheld the submission by the defence whilst emphasizing that the charge ought to have been drafted under the Kiambu Alcoholic Drinks Control Act. The magistrate went ahead and rejected the charge under Section 89(5) of the Criminal Procedure Code. The Applicant herein who is the DPP was dissatisfied with that ruling which prompted the instant application.

By a letter dated 18th December, 2015, learned State Counsel Mr. Kerongo Maatwa disagreed with the learned trial magistrate on ground that notwithstanding that liquor licensing was a devolved function, the accused persons had been charged under a known law. In any case, the Kiambu Liquor Licensing Control Act being a County Law was inferior to Alcoholic Drinks Control Act No. 4 of 2010 which was a National Legislation. Furthermore, the learned trial magistrate purported to interpret the Constitution,

specifically on whether Sections 7(1)(b) and 62 of the Alcoholic Drinks Control Act had been repealed or were inoperational by virtue of the existence of the Kiambu Alcoholic Drinks Control Act. According to the learned state counsel, the interpretation of the Constitution was purely the mandate of the High Court and other superior courts. Section 89(5) of the CPC provides that:

“Where the magistrate is of the opinion that a complaint or formal charge made or presented under this Section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reason for the order.”

The above provision clearly limits the powers of the Magistrate to reject a charge if the same does not disclose an offence. In the present case, the Alcoholic Drinks Control Act, 2010 provides for the offence for which the accused persons were charged. Whereas the Kiambu County Alcoholic Drinks Control Act may have been operational and would have been prudent to apply it in charging the accused persons, the fact that the accused persons were charged under a National Law did not confer powers to the learned magistrate to reject the charges.

The entire Section 7 of the Alcoholic Drinks Control Act deals with the control of alcoholic drinks, specifically subsection (1) (b) provides that, No person shall –

“(1)Sell, dispose of or deal with;

(b)Any alcoholic drinks except under and in accordance with a licence issued under this act.”

Section 62 on the other hand provides for general penalty and the same reads thus;

“Any person convicted of an offence under this act for which no other penalty is provided shall be liable to a fine not exceeding Kshs. 500,000/=, or to imprisonment for a term not exceeding 3 years, or both.”

It follows then that the offence with which the accused person were charged is an offence known in a written law. If for any reason the learned trial magistrate was of the opinion that the applicable law was the Kiambu Alcoholic Drinks Control Act, the most prudent thing he would have done was to accept the charge but recommend an amendment and substitution of the charge sheet to reflect the charge drawn under the Kiambu Alcoholic Drinks Control Act. Unfortunately, when he made his ruling, he did not make the recommendation. In the alternative, the accused persons would have been released pending the substitution of the charge sheet. The omission, in my view, was a grave irregularity that calls for the review of the ruling made. In the premises, I give the following orders:

- a. The ruling for the learned trial magistrate in Gatundu Criminal Case No. 1358 of 2015 delivered by A. M. Maina, PM, on 20th November, 2015 be and is hereby set aside.
- b. The accused persons in the said Gatundu Cr. Case No. 1358 of 2015 namely Leah Wangui Waithera and Beatrice Njoki Muigai shall be summoned by the trial court with a view to their appearance in the said Gatundu Law Courts to answer to the charge with which they were charged.
- c. The lower Court file in the said Criminal Case shall be forthwith forwarded to the trial court for mention before the Magistrate In-charge not later than 7th April, 2016 for purposes of execution of the orders given herein.

It is so ordered.

DATED and DELIVERED this 24th day of MARCH, 2016

G.W. NGENYE-MACHARIA

JUDGE