



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 19 OF 2016

PAULINE NDUKU.....APPLICANT

VERSUS

RESPONDENT.....RESPONDENT

RULING ON REVISION

Mutinda Kimeu & Company Advocates acts for the Applicant herein, namely Pauline Nduku, and have requested for revision of the orders made by Hon. C.A. Ocharo in **Machakos Chief Magistrate's Criminal Case No 342 of 2016- R. vs Pauline Nduku** on 6th April 2016. The said request is in a letter addressed to the Court dated 3rd May 2016 wherein the said Applicant requested the Court to revise the findings of the said trial magistrate, and for a fresh probation report of the accused person.

The Applicant was the accused person in the cited criminal case, wherein she was charged with two offences. The first count was that of being in possession of cannabis contrary to section 3(1) as read with section 2(a) of the Narcotics Drugs and Psychotropic Substances Act No 4 of 1994. The particulars were that on 21st March 2016 at Mjini estate within Machakos County, the Applicant was found in possession of seventy nine (79) rolls of cannabis with a street value of Kshs 790/= which was not in medical preparation.

The second count was that of selling alcoholic drinks without a licence contrary to section 7(1)(b) as read with section 62 of the Alcoholic Drinks Control Act of 2010, the particulars of which were that on 21st March 2016 at Mjini estate within Machakos County, she was found selling alcoholic drinks namely one litre of change without a licence, and in contravention of the said Act. The Accused person pleaded guilty to both counts. The trial magistrate then called for a pre-sentence report from the Probation service before she sentenced the Accused to 12 months imprisonment.

The Applicant seeks a revision of the trial magistrate's orders on the following grounds:

- (a) The learned magistrate was correctly informed by the prosecution on 23rd March 2016 that the prosecution had no previous records against accused and the accused be treated as a first offender.
- (b) The learned magistrate correctly ordered for the probation department to avail a pre-sentence report at page 2 of the proceedings.
- (c) The probation officer through his report erred in finding that the accused had been a repeat offender and the learned magistrate adopted the report as a court order despite the report referring to a different person and not the accused.

(d) Having been informed by the prosecution the accused was a first offender the learned magistrate ought to have done a further investigation given that the probation officers report was contradicting the records held by the police as against the accused.

(e) The learned magistrate erred by relying on a probation officer's report that was erroneous as it was referring to a different person but not the accused.

Ms. Rono, the prosecution counsel submitted during the hearing that she would not respond to the application. This Court thereupon called for the record of the trial, and noted that the pre-sentencing report from the Probation Services dated 31st March 2016 is indeed with respect to the Accused who is named therein as Pauline Nduku, and who is reported to have admitted to previous convictions for selling changaa.

However, after perusal of the trial Court record and noting the proceedings as summarised in the foregoing, this Court found irregularities in the proceedings, which I find entitle the Applicant to the revision sought. Firstly, the proceedings when the charges were read to the Accused person on 23rd March 2016 are recorded as follows:

“Coram

C.A. Ocharo -PM

Mrs. Njuguna -prosecutor

Court clerk Jasmine

Interpretation Kiswahili/ Kamba

Accused present

Represented by Nil

The substance of the charge (s) and every element thereof has been stated by the court to the accused person in the language that he /she understands who being asked whether he/she admits or denies the truth of the charge (s) replies:

Count 1- Kweli

Count 2- Kweli

Prosecution- Facts are that on 21-3-2016 at around 1.30 am, the chief and AP officers from Utawala were in town when they received a tip off from members of the public that a lady at Mjini estate was selling changaa and bhang. They proceeded to the estate and found the lady with 79 rolls of bhang PEXB 1 and 1 litre of changaa PEXB

The accused was arrested and arraigned in court today.

Accused- The facts are true.

Prosecution- No records. To be treated as a 1st offender.

Accused in mitigation- I was selling bhang to take care of this child who is my grandchild. The other child is at St Mary's school. I am not married. My home is in Kilungu.

Order- The probation department to avail to court a pre sentence report. Mention on 6-4-2016 in the meantime accused remanded in custody upt 4.00 pm.

Court later at 4.00 pm:

Accused- I do not have the numbers of my children so I could not call them.

Prosecution- Before a free bond can be granted, I pray for a pre bail report. Pray for mention on 24-3-2016 for a pre bail report.

Order- Though the accused gave strong mitigating factors to persuade this court not remand her pending a pre-sentence report, the offences facing the accused are serious in nature, she is not very forthright in assisting court. I shall therefore direct that the accused remanded in custody. The child is called Nduku Ndunge a standard 4 pupil at St. Mary's primary school. I do not know the name of her teacher. They normally leave school at 4.00 pm. I live in Mjini estate alone. I have neighbours.

Summons to Children Officer to follow up on the child and report to court on her welfare. Mention on 24-3-2016 for pre bail report.

Ocharo –PM”

There were no other proceedings recorded regarding the taking of plea or conviction of the Accused person, and there is therefore no indication in the trial record of the plea entered by the Court after the Accused Person's responses to the charges, or whether the Accused person was convicted of the offences she was charged with, and particularly, whether she was convicted of one or both counts and if so which counts.

Section 207(2) of the Criminal Procedure Code in this regard provides for the procedure of taking a plea as follows:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) 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.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

The procedure to be applied on the taking of a guilty plea was further explained in the case of **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an

opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

Lastly, in **Ombena vs Republic** (1981) KLR 45 it was held by the Court of Appeal that where an accused person is charged with more than one count the Court should record a plea on each count separately to ensure that if there is a plea of guilty the same is unequivocal.

In addition, the record of the trial court at the time of sentencing on 6th April 2016 was in this regard as follows:

“Before C.A. Ocharo -PM

Njuguna prosecutor

Court clerk Jasmine

Accused present

Interpretation Englisih/ Swahili

Order- I have noted the probation officer's report which reveals that the accused has been a repeat offender. Has previously been sentence and I find her not suitable for a non-custodial sentence. She needs to be deterred. She is hereby sentence to 12 month imprisonment. The minor herein Nduku Ndunge and Katumbi Yvonne be placed at a children's home to be identified by the children officer. Summons to the children officer to deal with the same. A P & C file be opened for the child Katumbi Yvonne.

Ocharo –PM”

Section 14 of the Criminal Procedure Code provides as follows as regards the passing of sentence where an accused person is convicted of several offences at one trial as follows:

“(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences –

(a) of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so

competent to impose.”

The record of the trial Court consequently did not indicate the offence for which the trial magistrate was sentencing the Accused person to 12 months imprisonment, given that the said Accused person was charged with two offences.

The errors noted in the foregoing make the entire proceedings in the trial Court irregular, and the same are hereby set aside. I have also noted the nature of the charges the Applicant was facing, particularly the quantity and value of the bhang and alcoholic drinks found in her possession, and that the two offences were alleged to have been committed in the same transaction. In addition, taking into account the fact that the Applicant has been in custody since 23rd March 2016, I find that the same is enough punishment, and that it would not be in the interests of justice for the Applicant to undergo a new trial on the same charges. The Applicant is accordingly set at liberty unless otherwise lawfully held.

This ruling and orders herein to be furnished to the Hon. C. A. Ocharo, Principal Magistrate at Machakos Law Courts; the Prosecution; the Applicant/Accused Person herein namely Pauline Nduku; and the Prison authorities where the Applicant is currently held in custody.

DATED AT MACHAKOS THIS 31st DAY OF OCTOBER 2016.

P. NYAMWEYA

JUDGE