

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CRIMINAL APPLICATION NO. 186 OF 2014

CYRUS ONGWEYEAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal case No.2057 of 2014 of the Chief Magistrate's court at Kibera before B. Khaemba Senior Resident Magistrate)

RULING

This is an application for leave to appeal out of time against the sentence imposed by the lower court on 14th May, 2014. There is also a prayer for the applicant to be admitted to bail pending the entering of the appeal.

When I was seized of this matter for purposes of giving directions on 23rd June, 2014 I noticed some discrepancy in the proceedings in that, after the applicant pleaded guilty to the charge the prosecutor stated that the facts are as per charge sheet. Although it is a matter of practice for the prosecutor to state the facts, the procedure is that full facts should be stated so that the court appreciates the weight of the offence, the seriousness to be accorded thereto and be informed of the likely sentence.

The applicant herein was charged with the offence of being in possession of alcoholic drink that does not conform to the Alcoholic Drinks Control Act No. 4 of 2010. It was alleged in the particulars of the charge that he together with another was found in possession of two litres of un bottled chang'aa. He pleaded guilty to the charge and was sentenced to six months imprisonment.

The sentence provided for this offence is a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or to both. Having been denied the benefit of the full facts, the court is not able to determine whether the subject matter was for personal consumption or commercial benefit. Despite the fact that the facts were not stated, I have no doubt that the applicant understood the charge, the particulars, intended to and did actually admit the offence.

Where the penalty provides for a fine and in the alternative imprisonment, the practice is to give an accused person the benefit of the first option. In the present case the applicant was not accorded the said option. Accordingly, under Section 364 of the Criminal Procedure Code I set aside the sentence of six months imprisonment and in place thereof impose a fine of Kshs. 5,000/= in default three months imprisonment.

It is so ordered.

SIGNED DATED and DELIVERED in court this 26th day of June 2014.

A.MBOGHOLI MSAGHA

JUDGE