



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 43 OF 2014**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEALS NOS. 44 AND 45 OF 2014**

**BETWEEN**

THOMAS MAGABE ..... 1<sup>ST</sup> APPELLANT

CHACHA NYAMOHANGA SHADRACK ..... 2<sup>ND</sup> APPELLANT

TITUS MWITA ..... 3<sup>RD</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from the original sentence in Criminal Case No. 517 of 2014 at Senior Resident Magistrate's Court at Kehancha, Hon. R. Aganyo, RM dated on 17<sup>th</sup> July 2014)*

**JUDGMENT**

1. The three appeals were consolidated as they arose from the same charge and conviction. The appellants were charged with the offence of being drunk and disorderly contrary to **section 33(1)** as read with **section 33(2)** of the *Alcoholic Drinks Control Act, No 4 of 2010*. They pleaded guilty and were sentenced to pay a fine of Kshs.500 and in default to serve 3 months in prison. They appeal against the sentence.
2. According to the record, after the conviction and mitigation, the learned magistrate adjourned the proceedings for the Probation Officer to interview the accused on the possibility of making a community service order. The officer returned and noted that, *"the 3 accused persons have been interviewed and they are asking for fines other than Community Service."*
3. In sentencing the accused, the learned magistrate observed as follows, *"Considering the charge the 3 accused persons are facing, I note from their demeanor that they are not remorseful for their actions. In my view, they do not respect the Court's decision to place them on CSO and seem not to acknowledge they are wrong. To teach them a lesson and to deter others, I fine them Kshs.500/- and sentence them to serve 3 months as provided by the law."*
4. I have considered the record and I think the learned magistrate's finding was inconsistent with their mitigation. They were all remorseful and asked for leniency. It was therefore a misdirection on the part of the learned magistrate to allow the accused to consult the Probation Officer as to the nature of the sentence. It is the duty of the Probation Officer to present an objective report on the accused's circumstances and for the Court to consider in light of the mitigation and thereafter impose the appropriate sentence.
5. I therefore, quash the sentence and substitute it with an order of Community Service for each of the accused for two months. The fines paid shall be refunded to them.

**DATED and DELIVERED at MIGORI this 15<sup>th</sup> day of August 2014**

**D. S. MAJANJA**

**JUDGE**

Mr Kisera instructed by Omonde Kisera and Company Advocates for the appellant.

Ms Owenga, Prosecution Counsel, instructed by the Office of the Director of Public Prosecution for the respondent.