



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC. CRIMINAL REVISION NO 121 OF 2014**

**ANNE JEROP.....APPLICANT**

**=VERSUS=**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

**1.** The applicant herein *Ann Jerop* moved this court through an application dated 10<sup>th</sup> September 2014 filed under certificate of urgency by her advocates *M/S Komen Kipchirchir & company Advocates*.

The application seeks revision of the conviction and sentence of eighteen months imprisonment imposed on the applicant on 25<sup>th</sup> August 2014 by *Hon. B Kiptoo* in Kapsabet Principal Magistrate's Court in criminal case No. 2587 of 2014 where the applicant had been charged with the offence of being in unlawful possession of 215 litres of Kangara contrary to **Section 27 (1) (b)** of the *Alcoholic Drinks Control Act of 2010*.

**2.** The record of the lower court shows that the applicant was convicted and sentenced on her own plea of guilty. She now urges this court to exercise its revisionary jurisdiction and review her conviction and sentence. She particularly requested the court to revise the sentence imposed by the trial court and substitute it to a non –custodial sentence.

**3.** The application is premised on grounds that the aforesaid sentence was excessive and extremely punitive in that the applicant is a first offender and sole breadwinner of several dependants; that the conviction and sentence violated the applicant's constitutional rights and that the applicant's health would be threatened if the sentence was not reversed. In the supporting affidavit sworn on 10<sup>th</sup> September 2014, the applicant confirms that she was convicted on her own plea of guilty but avers that if the sentence is not reversed as prayed, she would be greatly prejudiced as she suffers from Asthma and her husband suffers from a terminal illness.

**4.** The application was argued before me on 15<sup>th</sup> October 2014 by *Mr. Kagunza* who held brief for *Mr. Komen* for the applicant and *Ms. Busienei* for the state.

In his submissions, *Mr. Kagunza* besides reiterating the grounds on the face of the application and in the depositions made by the applicant in the supporting affidavit stated that the court under **Section 364** and **Section 365** of the *Criminal Procedure Code* is empowered to review sentences imposed by the lower court in the interest of justice and that the applicants case qualifies to be one such case. He urged the court to allow the application and grant the orders on revision as sought.

5. The state through learned prosecuting counsel **Ms Busienei** opposed the application on grounds that the sentence imposed by the lower court was not excessive and that it was in any event lawful. She invited the court to note that the offence for which the applicant was convicted and sentenced attracts a penalty of a fine not exceeding Kshs 2,000,000 or imprisonment for a term of five (5) years or both. She however left it to the court's discretion to decide if the sentence meted out against the applicant could be substituted to a non-custodial sentence.

6. Having considered the application and the rival submissions made by the parties, I find that though it is true that this court has wide discretionary powers to review a conviction, a sentence or order made in criminal proceedings before the lower court, the courts revisionary jurisdiction is not unlimited. Its scope is limited by **Section 362** of the **Criminal Procedure Code** which states as follows:-

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

In my view, **Section 362** and **364** of the **Criminal Procedure Code** should be read together. **Section 364** of the **Criminal Procedure Code** confers on this court powers it may exercise in its discretion on an application for revision. And it is clear from a reading of these two provisions that for the court to exercise that power, it must be satisfied that there was an illegality, incorrectness, irregularity, mistake or impropriety in the proceedings, judgment, sentence or order of the lower court which is challenged on revision.

7. In this case, I have looked at the proceedings in the lower court and I have not found any irregularity, impropriety, error, illegality or incorrectness of any kind in the proceedings leading to the applicant's conviction or in the sentence meted out against her. It is clear from the proceedings that the applicant's plea of guilty was unequivocal and the sentence of eighteen months imprisonment was lawful as the offence for which the appellant was convicted, as correctly submitted by **Ms Busienei**, attracts a penalty of a fine not exceeding Kshs 2,000, 000 or five years imprisonment or both.

8. In imposing the said sentence, the learned trial magistrate exercised her discretion and for the reasons stated in her pre-sentence notes chose to impose on the applicant a custodial sentence as opposed to the other modes of sentencing available to her which in my view she was entitled to do. It is trite that sentencing is a matter of discretion by the trial court and this court either in its appellate or revisionary Jurisdiction cannot interfere with the sentence imposed by the lower court unless it is evident that the sentence was either illegal or that the trial court in imposing the sentence acted upon some wrong principle or overlooked some material factors – See also **Githinji vs Republic (1992) KLR 318** and **R V Mohamendali Tamal (1951) 18 EACA 147; Republic V Jagani & Another (2001) KLR 590** among others.

9. The grounds relied upon by the applicant in this application would have served her better if she had chosen to exercise her right of appeal instead of filing the instant application as in my view, those grounds may properly support an appeal but cannot form the basis of this court's intervention by way of revision.

As the applicant was clearly aggrieved by the orders of the trial court particularly the sentence, she should have filed an appeal to challenge the conviction and sentence.

It is also important to note that **Section 364(5)** of the **Criminal Procedure Code** precludes this court from entertaining an application for revision at the insistence of a party who could have appealed. The applicant herein falls squarely under the category of parties contemplated by **Section 364 (5)** of the **Criminal Procedure Code**.

10. I believe I have now said enough to demonstrate that the application for revision before me is not merited and ought to be dismissed. The application is accordingly dismissed.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 30<sup>TH</sup> DAY OF OCTOBER, 2014.** In the presence of:-

The applicant

Mr. P.K. Komen Counsel for the applicant

Ms Busienei for the state

Mwende Court Clerk.