



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASES NOs.71, 72, 73 & 74 OF 2011

**JAMES MUTHANJA
DAVID MUGAMBI
BERNARD OLE MWEIKANI
FAITH WAMBUI
MICHAEL NJERU JOHN
PHOLA BARNABAS NYAMAIAPPLICANTS
SUSAN WANGAI MUIGU
GODFREY WACHIRA WANGOI
AUGUSTINE LUAMA MATHAN
LEONARD NJIRU MACHIWA
MARTIN KABULA KATEMBO
SIMON MUNGAI KINYANJUI**

VERSUS

REPUBLIC.....RESPONDENT

RULING

The accused persons were charged with the offence of consuming alcoholic drink or liquor either contrary to section 34(a) and/or before or after the permitted hours. Some were convicted while others pleaded not guilty to the charges. I have called for the files in order to examine and determine whether the applicants were charged properly. I have considered the charges in order to determine whether the validity of the charge was within the purview of the Alcoholic Drinks Control Act No.4 of 2010.

Section 34(a) states as follows;

“Any person who sells an alcoholic drink or offers or exposes it for sale or who bottles an alcoholic drink except under and in accordance with, and on such premises as may be specified in a licence issued in that behalf under this Act commits an offence and is liable-

(a) for a first offence, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding nine months, or to both.”

I have looked at section 34(a) very closely and in doing so I have not discovered the said section as criminalizing consumption of alcohol or alcoholic drinks. There is no offence against persons found consuming alcohol as alleged in the charge sheet whether it is outside the regulated hours or not. The provisions of section 34(a) does not criminalize the consumption of alcohol after or before the permitted hours. The said section deals or addresses only people who sell and not consumers of alcohol.

Section 34 criminalizes sale of an alcoholic drink by persons who are in possession of a licence with a regulated time limit. The sections states any person who sells an alcoholic drink or offers or exposes it for sale or who bottles an alcoholic drink shall be guilty of an offence and is liable to a fine not exceeding 50,000/= or to imprisonment for a term not exceeding 9 months or to both. In my understanding therefore, it is not an offence to drink or consume alcohol within or outside the regulated period. My interpretation of section 34 and the Act as a whole is that the institutions that manufacture and sell alcoholic drinks are required not to sell the same to customers outside the regulated period. There is nowhere in the Act where consumption or drinking of an alcoholic drink is criminalized. The only exclusion is as found under section 27 in so far as the same is in contravention of the standard and the requirement that are contemplated to be put in place by the Minister under section 68.

It is my decision that a charge under section 34(a) alleging drinking or consuming alcohol or alcoholic drink is in contravention of the law. It is clear in my mind the Act does not criminalize consuming or drinking of alcohol whether it is within or outside the regulated period. The alcoholic drinks control regulations made by the Minister of State for Provincial Administration and Internal security sets out the drinking hours. It does not criminalize or state that consumption of alcohol outside or within the permitted hours is an offence. The regulations talk of licensed hours and conditions for sale of alcohol. In essence a person cannot be charged to have consumed alcohol under section 34(a) either outside or within the stipulated time. Section 34(a) and the regulation made under section 68(a) target licensees not to sell alcohol during off hours. I do not know whether the failure to criminalize consumption of alcohol outside the stipulated period was intentional or otherwise. My role as a judge is to interpret provisions of a statute in order to discern or discover whether an act has been criminalized as an offence in a particular section. And in so far as section 34 does not criminalize consumption of alcohol or alcoholic drink, then it is outside my province and boundary to import an issue not found in the express reading of section 34(a). Section 34 does not deal with consumption of alcohol at all. The marginal notes in section 34 states '*breach of licence*' which clearly illustrates that Parliament did not intend to criminalize consumption of alcohol under section 34. It is therefore my findings that the charges against the accused persons were in contravention of the law. The indictment against the accused persons is defective and bad in law. It really prejudices and embarrasses the accused persons.

In conclusion I order that as the charges against the accused persons are in contravention of the law, the convictions and the sentences are hereby set aside. If any of the accused persons had pleaded not guilty and were released on bail, the charges are hereby terminated. Any person who may have paid fine shall be entitled to a refund. Orders accordingly.

Dated, signed and delivered at Nairobi this 1st day of February 2011.

M. WARSAME

JUDGE

