



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL REVISION NO. 20 OF 2010**

**DOUGLAS OMBIRO MOMANYI .....1<sup>st</sup> CONVICTEE**  
**DORIS NYABOKE MOMANYI .....2<sup>nd</sup> CONVICTEE**  
**-VERSUS-**  
**REPUBLIC ..... RESPONDENT**

**RULING ON REVISION**

The convictees, **Douglas Ombicho Momanyi** and **Doris Nyaboکه Momanyi**, were on 1<sup>st</sup> September 2010 arraigned before the Principal Magistrate's court at Nyamira on one count of selling Liquor after hours contrary to section 34 (1) of the Laws of Kenya. The particulars of the charge were that on 31<sup>st</sup> August, 2010 at Omweri Luxury Bar Omogonchero Market in Nyamira District within Nyanza Province at about 11.50hours they jointly were found selling liquor.

The convictees jointly entered a plea of guilty and were accordingly convicted. Upon conviction they were each sentenced to a fine of Kshs. 6,000/= in default 3 months imprisonment.

Through **Messrs P. N Morigori & Co. Advocates**, the convictees have moved to this court seeking revision pursuant to the provisions of section 362 of the **Criminal Procedure Code** and section 165 (6 & 7) of **The Constitution of Kenya** on the grounds that the learned magistrate erred in imposing an illegal sentence.

The convictees were charged under section 34 (1) of the Liquor Licensing Act. That section provides interlia:-

***"...Any licensee who keeps his licensed premises open for the sale of liquor during any time when he is not authorized by his licence to sell, or allows any liquor purchased before the hour of closing to be consumed on such premises after such closing hour, shall be guilty of an offence and liable, for a first offence, to a fine not exceeding five hundred shillings, and for a second or subsequent offence to a fine not exceeding one thousand shillings or to imprisonment for a term not exceeding three months. Provided that it shall not be an offence to allow the consumption on the premises between the hour of closing and fifteen minutes after such hour of liquor supplied for consumption with a meal to be eaten on the premises, if the liquor and the meal were purchased before the hour of closing...."***

From the foregoing it is clear that upon conviction the offence carries an initial maximum sentence of a fine Kshs. 500/= and subsequently Kshs. 1,000/= in default imprisonment for maximum terms of 3 months. Yet in the instant case the learned magistrate imposed a fine of Kshs. 6,000/= in default 3 months imprisonment when the convictees had committed the offence for the very first time. The learned magistrate was clearly in error when he imposed the sentence aforesaid. It is illegal and irregular.

Section 362 of the **Criminal Procedure Code** and indeed section 165 (6 & 7) of the current constitution of Kenya gives this court jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order record or passed, and as to the regularity of any proceedings of any such subordinate court. In this regard, the sentence imposed was illegal and not in conformity with the charge and the Act creating the offence. Accordingly, the revision jurisdiction of this court has been properly invoked. I will therefore interfere with the sentence earlier imposed by the learned magistrate to the extent that each convict will now be sentenced to a fine of Kshs. 500/= in default 14 days imprisonment. In the event that the convictees had paid the fine initially imposed, they

should be refunded the same less Kshs. 500/= each as aforesaid. The revision sought succeeds to that extent therefore.

**Revision dated, signed and delivered** at Kisii this 15<sup>th</sup> day of October, 2010.

**ASIKE-MAKHANDIA**  
**JUDGE**