



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 2 OF 2009

(Appeal against both conviction and sentence of the Resident Magistrate's Court at Butali in Criminal Case No. 513 of 2007 [B. O. OCHIENG. N. NDEGWA ESQ., SRM])

FRANKTON CHESOLI

----- APPELLANT

VERSUS
REPUBLIC

----- RESPONDENT

JUDGEMENT

1. At the hearing of this Appeal, Mr. Kiveu for the Appellant abandoned the appeal on conviction and on the issue of sentence, he argued that under **S.43 (b)** of the Liquor Licencing Act, Cap 121, the maximum sentence to be imposed for the offence of operating a bar without a liquor licence is a fine of Kshs.3,000/= and in default imprisonment to a maximum term of one year. That the sentence of six (6) months imprisonment imposed on the Appellant was therefore harsh and against the Law. That since the Appellant had already served two (2) months imprisonment, then his appeal on sentence should succeed.
 2. Mr. Orinda for the State agrees and I note that **S.43** of the Liquor Licencing Act provides as follows; ***“S.43 – Any person who sells liquor or offers or exposes it for sale or who bottles liquor except under and in accordance with, and on such premises as may be specified in, a licence issued in that behalf under this Act shall be guilty of an offence and liable –***
 - (a) for a first offence, to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding nine months, or to both;***
 - (b) For a second or subsequent offence, to a fine not exceeding four thousand shillings or to imprisonment for a term not exceeding one year or to both; And in addition to any penalty imposed under paragraph (a) or paragraph (b) it shall be lawful for the court to order, custody or control of the person convicted, together with the vessels containing the liquor.”***
 3. The Appellant had admitted the offence and what was open to the court was to exercise discretion on the sentence but within the above section. To impose a custodial sentence when a fine was the primary sentence was clearly a bad exercise of discretion and this court can interfere with that exercise of discretion. It would have been lawful had both the fine and imprisonment been meted out but to mete out imprisonment alone was clearly an illegality.
 4. In the event, the Appeal is merited and the sentence is reduced to the period already served.
 5. As the Appellant is out on bond, he will be at liberty and shall be refunded the cash bail posted before release on bond pending appeal.
 6. Orders accordingly.
- Delivered, dated and signed at Kakamega this 13th day of October, 2010.***

ISAAC LENAOLA
JUDGE