



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 32 OF 2005**

**JAMES MURAGURI MURIUKI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Conviction and Sentence of Resident Magistrate's Court at Gichugu in Criminal Case No. 197 of 2005 dated 11<sup>th</sup> February 2005 by Miss A. Lorot – RM)*

**J U D G M E N T**

James Muraguri Muriuki, the appellant, was on 11<sup>th</sup> February 2005 convicted by the Resident Magistrate's Court at Gichugu (A. Lorot (Mr.) RM) on his own plea of guilty to being in possession of traditional Liquor for sale without licence contrary to section 25(1) of the Traditional Liquor Licencing Act and sentenced to **six (6) months** imprisonment without the option of a fine. He was aggrieved by the conviction and sentence, hence this appeal which he filed through **Messrs Gacheche wa Miano Advocate**.

When the appeal came up for hearing before me, Mr. Wa Miano learned counsel for the appellant opted to abandon the appeal on conviction and rightly so in my view. After all the appellant had been convicted on his own plea of guilty. Instead **Mr. Miano** elected to pursue the appeal on sentence. In support thereof, learned counsel submitted that the sentence imposed was excessive, the appellant was not given a chance to mitigate; that there was no proof that the appellant was a habitual offender. That the maximum sentence for the offence was 6 months imprisonment or a fine not exceeding Kshs.6000/=. That in sentencing the appellant to the maximum jail term, the learned magistrate erred. Finally, counsel submitted that by the time the appellant was released on bail pending appeal, he had already served 2 months jail which was sufficient punishment.

**Ms Ngalyuka**, learned state counsel opposed the appeal on sentence. She submitted that the appellant was subjected to the maximum penalty because he was a serial offender. A fine was not therefore an option. The learned magistrate imposed the term as a deterrent.

It is trite law that sentence is a matter that rests entirely with the discretion of the trial court; and that on appeal, the appellate court will not easily interfere with the exercise of that discretion, unless the sentence imposed is shown to be manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some irrelevant material, or acted on a wrong principle in arriving at the sentence. See generally, **Ogola s/o Owuor v/s Republic (1954) 21 EACA 270, Wanjema v/s Republic (1971) EA 493 and Bernard Gacheru v/s Republic (Nakuru) Criminal Appeal No. 188 of 2000** (unreported).

On the facts of the case as narrated by the prosecution and accepted by the court I think that a deterrent sentence was called for. The appellant was a serial offender. According to the prosecution the appellant had been charged for the selfsame offence on more than seven occasions. He had on all those occasions been fined which fines he had paid with ease. The court on its own was also aware of habitual criminal

traits of the appellant. The court remembered for instance that the appellant had appeared before it no less than four times on similar offence. It was the court's view that the imposition of a fine did not seem to deter the appellant from his illicit trade. It was for this reason that the exercise of the option of a fine though desirable was avoided. I cannot fault the learned magistrate in the exercise of his discretion in sentencing given the facts of the case. He was bound to take into account the appellant's past antecedents. I do not think that any mitigation offered by the appellant would have altered the situation in his favour at all. Much as it is desirable that the court listens to the mitigation by an accused person before passing sentence, I do not think that, that omission in the circumstances of this case occasioned any prejudice or injustice to the appellant.

However, the only quarrel I have with the sentence imposed is its excessiveness. I do not think that the appellant should have been subjected to the maximum sentence provided for under the section that he was charged. To that extent therefore the sentence imposed was manifestly harsh and excessive. Given the circumstances, a sentence of 2 months imprisonment without an option of a fine would have met the ends of justice.

Accordingly I would intervene with the sentence imposed to the extent that the appellant would serve 2 months imprisonment without an option of a fine with effect from the date of conviction and sentence in the subordinate court. I note however that the appellant had already served 2 months imprisonment before he was released on bail pending appeal. He has therefore served the prison term that I have imposed. That being the case, the appellant is set free. The cash bail of Kshs.10,000/= paid pursuant to the order of Justice Khamoni of 11<sup>th</sup> April 2005 should forthwith be refunded to the appellant. To that limited extent, the appeal succeeds.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of October 2007***

**M. S. A. MAKHANDIA**

**JUDGE**