



**Olage v Republic (Criminal Appeal E057 of 2023)  
[2024] KEHC 4345 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E057 OF 2023**

**KW KIARIE, J**

**APRIL 15, 2024**

**BETWEEN**

**GRACE OYUGI OLAGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal case NO.558 of 2022 of the Senior Resident Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)*

**JUDGMENT**

1. Grace Oyugi Olage, the appellant herein, was convicted of the offence of manufacturing alcoholic drinks contrary to section 27 (1) (a) as read with section 27 (4) of the *Alcoholic Drinks Control Act* No. 4 of 2010. She was also convicted of the offence of being in possession of an Alcoholic Drink that does not conform to the requirement of section 27 (1) (b) as read with section 27 (4) of the *Alcoholic Drinks Control Act* No. 4 of 2010.
2. The particulars of the offences are that on the 23<sup>rd</sup> day of September 2022, at Rakwaro location, in Rachuonyo North sub-county within Homa Bay County, she was found in possession of 100 litres of Kangara that did not conform to the standards of the *Alcoholic Drinks Control Act*. On the same day and at the same place, she was found in possession of 100 litres of *chang'aa* that were not labelled according to the standards of the *Alcoholic Drinks Control Act*.
3. The appellant was sentenced to three years' imprisonment. She was aggrieved and filed this appeal against the sentence. She raised grounds of appeal as follows:
  - a. The trial magistrate erred in law and fact by not considering the appellant a first offender and sentencing her to three years without a fine.
  - b. The sentence is manifestly excessive, given that the appellant is a first offender.



- c. The trial magistrate failed to consider the appellant for probation or non-custodial sentence.
4. The state opposed the appeal on the following grounds:
  - a. That the appellant was a repeat offender.
  - b. That she was not the right candidate for a probation order.
5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence before the lower court and drawn my conclusions, keeping in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
6. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson vs Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will exercise its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James vs. Rex*(1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C.CA 28 T.LR 364.

7. Section 27 (4) of the [Alcoholic Drinks Control Act](#) provides as follows:

A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.
8. The appellant was, contrary to what she informed the court, a repeat offender. Evidence was presented to the court that on the 13th day of October 2022, she was convicted for a similar offence and fined. However, this cannot be treated as a previous offence for sentencing. The crimes in this case were committed on the 23<sup>rd</sup> day of September 2022.
9. I am therefore persuaded to interfere with the sentence. I set aside the trial court's sentence and sentenced the appellant to serve two years imprisonment on each count—the sentences to run concurrently. The sentence will run from the time the trial court sentenced her.

**DELIVERED AND SIGNED AT HOMA BAY THIS 15<sup>TH</sup> DAY OF APRIL 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

