



**Mokaya v Republic (Criminal Revision E098 of 2024)
[2024] KEHC 9436 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E098 OF 2024**

WA OKWANY, J

JULY 11, 2024

BETWEEN

AGNES MOKAYA APPLICANT

AND

REPUBLIC RESPONDENT

(From the original Sentence in the Senior Principal Magistrates' Court at Keroka, Criminal Case No. MCCR E176 of 2024 by Hon. C. Ombija, Senior Principal Magistrate on 4th March 2024)

RULING

1. The Applicant herein was charged and convicted on her own plea of guilty for the offence of being in possession of alcoholic drinks contrary to section 27 (1) (b) as read with section 27 (4) of the *Alcoholic Drinks Control Act* No. 4 of 2010. The trial court sentenced her to pay a fine of Kshs. 100,000/= or in default, to serve 24 months imprisonment. The Applicant was unable to pay the fine and has been in custody since 18th October 2023.
2. This ruling is in respect to the Application dated 24th June 2024 wherein the Applicant seeks the following orders: -
 1. Spent
 2. That The honourable court do revise the orders of Hon. Ombija (SRM) issued on 4th March 2024 in Keroka Criminal Case No. MCCR/E176 of 2024 and set aside the sentence.
 3. That the honourable court do grant the Applicant a non-custodial sentence.
3. The Application is supported by the Applicant's affidavit wherein she avers that she is a first offender and has school-going children who are unable to go to school due to lack of school fees. She also states



that one of her children has a disability and requires her actual physical attention for her day to day survival.

4. The rights of an accused person under Article 50 of the Constitution of Kenya are stated as follows: -

(2) Every accused person has the right to a fair trial, which included the right-

(q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.

5. The High Court is vested with powers of Revision under Article 165 of the Constitution and Section 362 of the Criminal procedure Code which provide as follows: -

Article 165

1. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial, or quasi-judicial function, but not over a superior court.

Criminal Procedure Code

362. Power of the High Court to Call for Records

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

6. Section 364 of the Criminal Procedure Code outlines manner in which the Court should exercise its powers of revision as follows: -

364. Powers of the High Court on Revision

1. In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defense:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed that might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



5. When an appeal lies from a finding a sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.
7. This court is required to examine the sentence imposed by the trial court for correctness, appropriateness and legality while bearing in mind the fact that sentencing is the duty of the trial court. (See *Bernard Kimani Gacheru v Republic* [2002] eKLR.)
8. The Court will ordinarily only interfere with the sentence passed by the trial court where the same is not legal or is manifestly excessive. In *Ogalo s/o Owoura v R* (1954) 21 EACA 270, the Court of Appeal for Eastern Africa held that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that it has acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of a similar nature, while not being precedents, do afford material for comparison.
9. I have considered the sentence passed by the trial court and appreciated the gravity of the offence. I note that the Appellant engaged in the business of illicit brew as a means of earning a livelihood to fend for her children. I of the view that punishment that is excessive does not serve the interests of justice or society in any way. (See the decision of the High Court at *Kwazulu Natal in S. v Nchunu & Another* (AR 24/11) [2012] ZAKZPHC6).
10. Considering the fact that the Applicant was a first offender and the sole breadwinner for her family, I find that the punishment imposed on the Applicant was excessive. This Court cannot turn a blind eye to the plight of poor women in society. I therefore I hold the view that the Applicant will benefit more from restorative justice through a non-custodial sentence. In that regard, I direct that the Applicant be empowered through other economic activities within the community to enable her fend for herself and her family.
11. In sum, I find that the instant Application is merited and I therefore allow it. I set aside the sentence of a fine of Kshs. 100,000/= or in default, 24 months' imprisonment and substitute it with a non-custodial sentence. I direct that the Applicant serves a Community Service Order under the supervision of the Probation Officer for a period six (6) months. I further direct that the Probation Office, in conjunction with the County Executive Office of Gender will collaborate to empower the Applicant to enable her secure an alternative income-earning activity before the lapse of the probation period.
12. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

