



REPUBLIC OF KENYA



**Mutuma & another v Republic (Criminal Appeal E051 of 2024)
[2024] KEHC 11076 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E051 OF 2024
JM OMIDO, J
SEPTEMBER 12, 2024**

BETWEEN

JOSEPH MUTUMA 1ST APPELLANT

NICHOLAS MWITI MIRITI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D. Nyambu, Chief Magistrate delivered on 24th May, 2024 in Meru MCCR Case No. E863 of 2024)

JUDGMENT

1. The Appellants Joseph Mutuma and Nicholas Mwiti Miriti were jointly charged before the trial court with the following offences:

Count Selling alcoholic drinks without a licence contrary to Section 7(1)(b) of the [Alcoholic Drinks](#)

1: [Control Act](#) No. 4 of 2010.

Particulars:

On the 23rd day of May, 2024 at Kibirichia Market, Kibirichia Location in Buuri East Subcounty within Meru County, the two Appellants were found jointly selling alcoholic drinks to wit 250 litres of “ndume” without a licence.

Count Selling alcoholic drinks without a licence contrary to Section 7(1)(b) of the [Alcoholic Drinks](#)

2: [Control Act](#) No. 4 of 2010.

Particulars:



On the 23rd day of May, 2024 at Kibirichia Market, Kibirichia Location in Buuri East Subcounty within Meru County, the two Appellants were found jointly selling alcoholic drinks to wit 3 litres of “chang’aa” without a licence.

Count 3: Selling alcoholic drinks without a licence contrary to Section 7(1)(b) of the [Alcoholic Drinks Control Act](#) No. 4 of 2010.

Particulars:

On the 23rd day of May, 2024 at Kibirichia Market, Kibirichia Location in Buuri East Subcounty within Meru County, the two Appellants were found jointly selling alcoholic drinks to wit 250 litres of “muna” without a licence.

2. The Appellants pleaded guilty to all the three counts and were convicted. The trial court then went on to sentence the two Appellants as follows:

Court: All factors considered, the accused persons will pay fines as hereunder:

“In count 1: The accused persons will each pay a fine of Ksh.250,000/- or in default 1 year imprisonment.

In count 2: They will each pay Ksh.3,000/- or in default 3 months imprisonment.

In count 3: The fine is Ksh.250,000/- or 1 year imprisonment each.

Right of appeal 14 days.”

3. In addition to the sentences above, the trial court ordered that the alcoholic drinks be destroyed.

4. The Appellants’ instant appeal is predicated on the sentence of the trial court. The Appellants presented the following grounds of appeal vide their joint undated Petition of Appeal.

a. The learned trial Magistrate erred in matters of law and fact by failing to order the sentences to run concurrently instead of consecutive since the warrant does not reflect how the sentences will be served.

b. The learned trial Magistrate erred in matters of law and fact by failing to note that the sentence is harsh and excessive in the circumstances of this case.

c. The learned trial Magistrate erred in law and fact by failing to consider the mitigations factors (sic) of the Appellants.

5. The Appellants subsequently filed submissions expounding on the above grounds.

6. I have considered the record of the lower court, the Petition of Appeal and the submissions filed. I note that the appeal is preferred on the sole issue of the sentence imposed by the lower court and that the Appellants’ conviction on the three counts is not challenged.

7. The three arguments that the Appellants proffer are; that the court erred by failing to order that the sentences in the three counts run concurrently; that the sentences that were imposed by the trial court were excessive, and; that the mitigation by the Appellants was not considered. Those are in essence the three issues that the appeal presents to this court to determine.



8. As the present appeal is only in respect of the sentence, it is important for me to state that the circumstances under which an appellate court will interfere with the sentence of a trial court are limited.

9. The case that guides me in this regard is *S. vs Malgas* 2001 (1) SACR 469 (SCA in which the court observed as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court....

However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking” “startling” or “disturbingly inappropriate” similarly in *Mokela vs The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

10. On the same issue, in the case of *Ogolla s/o Owuor vs Republic* [1954] EACA 270 the East Africa Court of Appeal stated as follows:

“The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors.”

11. There is also the Court of Appeal case of *Benard Kimani Gacheru v R* [2002] eKLR in which it was held that:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

12. Before considering the issues raised by the Appellants, I will *sua sponte* address the validity of the charge sheet as drawn and presented. I note from the charge sheet that the prosecuting authorities preferred a similar charge against the Appellants in each of the three counts on the basis of the different types of alcohol (ndume, chang’aa and muna). My view is that that is not the correct or proper practice.

13. The prosecution should instead have charged the Appellants with one count of selling the three types of alcohol. Charging them with three counts presented immense prejudice to the Appellants as they



were ultimately subjected to three penalties or sentences, yet the fact of selling the alcohol without a licence was one transaction. On that alone, the charge sheet as presented was bad for multiplicity. Multiplicity in a charge sheet arises from charging of a single criminal act or offence as multiple separate counts.

14. The multiplicity, without doubt, resulted in a violation of the Appellants rights under Article 50(2) (o) of *the Constitution* in respect of every conviction that came after the conviction on the first count. My view is therefore that the convictions on counts 2 and 3 were in violation of the above provision of *the Constitution* and cannot stand as the same were not safe.
15. On the first point taken by the Appellants that the court erred by failing to order that the sentences in the three counts run concurrently, there is no doubt, from the facts that were presented before the trial court by the prosecution, that the Appellants committed the offences in the three counts in one transaction. The offences in the three counts were not so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, and by relation of cause and effect as to constitute one transaction.
16. The Judiciary Sentencing Policy Guidelines provide as follows, in a self-explanatory manner, regarding concurrent/consecutive sentences:

“Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively”.
17. Taking guidance from case law on the issue, the Court of Appeal in *Peter Mbugua Kabui v Republic* [2016] eKLR stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”
18. In the case of *David Jefwa Kalu v Republic* [2007] eKLR, the Court of Appeal observed as follows:

“But the offences on count one and count two were committed in one transaction and there was no legal basis for ordering that the sentences ought to run consecutively. We set aside the order that the sentences are to run consecutively and instead order that the two sentences shall run concurrently.”
19. Considering the above text in the Judiciary Sentencing Policy Guidelines and the jurisprudence presented by the authorities above, it is my persuasion that the trial court erred in not making an order as to how the sentences ought to run.
20. But then, the principle above does not apply to sentences that are imposed in default of fines as such sentences cannot be made to run concurrently (see *Republic v Ofunya* [1970] EA 78 and *Thomas Wakitata v Republic* [1976] eKLR. In the present case, the consecutive sentences in default of fines imposed by the lower court would therefore have been lawful had the second and third counts been valid. It is to be noted that I have above found that the second and third counts were not valid and could not be a basis of a conviction.



21. The second and third issues that the Appellants presented were that the sentences that were imposed by the trial court were excessive and that the trial court did not consider the Appellants' mitigation.
22. The penalty for the offences in the three counts is to be found in Section 62 of the [Alcoholic Drinks Control Act](#) which provides that:

62. Any person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.
23. Before proceeding to sentence the Appellants, the trial court gave the two an opportunity to mitigate. The record bears it that the Appellants offered their mitigation and the court considered the same. The ground that their mitigation was not considered therefore fails.
24. A look at the sentences that the trial court imposed informs this court that the same were not the maximum sentences. I am therefore of the opinion that the sentences imposed were not excessive as they fell far below the maximum sentences provided for under the above provision of the statute.
25. Being of the foregoing findings, I allow the appeal in part and proceed to quash the convictions on count 2 and 3 and set aside the sentences imposed by the trial court on the two counts. The sentence on count 1 shall subsist as per the decision of the lower court. Of course, the sentence on count 1 is to run from the 24th May, 2024 when the Appellants were sentenced by the Magistrate.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 12TH DAY OF SEPTEMBER, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

Prosecution Counsel: Ms. Rotich.

Court Assistant: Mr. Kinoti.

