Kerubo v Republic (Criminal Revision E102 of 2024)
[2024] KEHC 15448 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15448 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E102 OF 2024

WA OKWANY, J

DECEMBER 5, 2024

BETWEEN

MARGARET KERUBO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original Conviction and Sentence in the Chief Magistrates' Court at Nyamira, Criminal Case No. E319 of 2024 by Hon. B.O. Okong'o, Resident Magistrate on 5th April 2024)

RULING

1. The Appellant was convicted on her own plea of guilty for the offences of manufacturing alcoholic drinks without a licence contrary to Section 27 (1) (A) as read with Section 27 of the *Alcoholic Drink Control Act* No. 4 of 2010 and dealing with alcoholic drinks without a license contrary to Section 7 (1) (b) as read with Section 34 (a) of the *Alcoholic Drink Control Act*.

2. The trial court sentenced her to pay a fine of Kshs. 500,000/= or in default, to serve one and a half years' imprisonment.

3. She has now moved this Court through an application for the revision of her sentence on the grounds that she was a first offender and has a young family with six children who solely depend on her. The Application is supported by her sworn affidavit in which she avers that she is remorseful for her actions and has since reformed. She prays for a non-custodial sentence.

4. Mr. Chirchir Learned Prosecution Counsel did not oppose the Application.

5. The *Constitution of Kenya* under Article 50 provides for the rights of an accused person as follows: -

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

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

6. The High Court is vested with powers of revision by dint of Article 165 of the *Constitution* which provides 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.

7. The *Criminal Procedure Code* also outlines the manner in which such revisionary powers are to be exercised at Sections 362 and 364 thereof as follows: -

> 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."
>
> 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.

8. The primary duty of the Court in an application for revision of sentence is to call for the trial court record in order to satisfy itself as to the correctness, appropriateness and legality of those decisions. In this case, this Court is being called upon to determine whether the sentence imposed by the trial court should be revised.

9. I am minded of the adage that sentencing is at the discretion of the trial court which discretion an appellate court should interfere with unless it is shown that the same is illegal or is manifestly excessive or where the trial court overlooked some material factor or imposed a manifestly inadequate sentence. (See *Bernard Kimani Gacheru v. Republic* [2002] eKLR.)

10. In *R. v. Mohamedali Jamal* (1948) 15 EACA, 126, the Eastern Africa Court of Appeal held thus: -

> "It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence, the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."

11. I have considered the Sections of the law under which the Applicant was charged and the attendant punishment. Section 27 of the *Alcoholic Drink Control Act* No. 4 of 2010 stipulates as follows: -

27. Conformity with requirements

(1) No person shall—

(a) manufacture, import or distribute; or

(b) possess,

an alcoholic drink that does not conform to the requirements of this Act.

.....

(4) 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.

12. Section 7 as read with Section 34 of the same *Act* state as follows: -

7. Control of alcoholic drinks

1. No person shall—

a. manufacture or otherwise produce;

(b) sell, dispose of, or deal with;

(c) import or cause to be imported; or

(d) export or cause to be exported,

any alcoholic drink except under and in accordance with a licence issued under this Act.

.....

34. Breach of licence

Any person who sells an alcoholic drink or offers or exposes it for sale or who bottles an alcoholic drink except under and in accordance with, and on such premises as may be specified in a licence issued in that behalf under this Act commits an offence and is liable—

a. for a first offence, to a fine not exceeding fifty 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 one hundred 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 (b), the court may order, the forfeiture of all alcoholic drinks found in the possession, custody or control of the person convicted, together with the vessels containing the alcoholic drink.

13. I note that the trial court imposed a fine of Kshs. 500,000/= which, in my humble view, is excessive. It was not disputed that the Applicant was a first offender and that she pleaded guilty to the offences. I am of the view that these are factors that should have been considered by the trial court, as mitigating factors, during sentencing in line with the Judiciary Sentencing Policy Guidelines (2016).

14. In *S v. Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35, it was held thus: -

> "Plainly, any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. .....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society." (Emphasis added).

15. I have further considered that the Applicant is a mother of four children and their sole breadwinner. It is clear that she is unable to raise the fine imposed by the trial court and I therefore find that subjecting her to a custodial sentence would be against the interests of justice.

16. In the end, I find that the Application is merited and that the punishment meted by the trial court was, in the circumstances of this case, excessive. Consequently, I allow the application and set aside the sentence of a fine of Kshs. 500,000/= or in default the 1 ½ years' imprisonment, and in its place direct that the period that the Applicant has so far spent in prison from 5th April 2024 to the date of this ruling is sufficient punishment for the offences in question. I direct that the Applicant be set at liberty forthwith unless she is otherwise lawfully held.

17. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 5TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE