REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 62 OF 2019

KIMUTAI KIGEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine

Criminal Case no. 2197 of 2019 delivered on the 28th day of October, 2019 by by Hon. J.L. Tamar, PM]

JUDGMENT

The Appeal

1. The trial magistrate's judgment and sentence sought to be reviewed on this appeal is set out in the proceedings of the court set in full as follows:

> "*28.10.2019*
>
> *Coram: Before Hon. J. Tamar – PM*
>
> *State Counsel – Kelwon*
>
> *Court Clerk – Nancy*
>
> *Accused – present*
>
> *The charges and elements therein are read over and explained to the accused in a language that he/she understand (i.e) Kiswahili/English who replies: '**Ni kweli'***
>
> ***COURT**: Plea of guilty entered.*
>
> ***J. TAMAR***
>
> ***PRINCIPAL MAGISTRATE***
>
> ***Court Prosecutor:***
>
> *Facts are that on 26th October, 2019 4:00 p.m., the accused was arrested at his home in Mochongoi village by Police officers led by P.C. Kipchirchir. They found him with 5 litres of Chang'aa. He was arrested and charged. We wish to produce the exhibits. 5 litres*

exhibit 1.

J. TAMAR

PRINCIPAL MAGISTRATE

Accused*: Facts are true.*

J. TAMAR

PRINCIPAL MAGISTRATE

COURT*: Accused convicted.*

J. TAMAR

PRINCIPAL MAGISTRATE

Court Prosecutor*:*

The accused has records he was charged in Criminal Case No. 411 of 2018 with three counts and sentenced. The accused is a notorious offender. Accused has ruined the lives of the youth and members of Mochongoi. We pray for a deterrent sentence. He committed the offence even after he was convicted and sentenced in prison without option of a fine.

J. TAMAR

PRINCIPAL MAGISTRATE

Accused*:*

It is true I had previous conviction. I served the sentence. I was released on 16th October, 2018. I am sorry.

J. TAMAR

PRINCIPAL MAGISTRATE

SENTENCE

Accused is certainly not remorseful. He is a repeat offender. I have taken into account the sentiment by the prosecution that lives have been ruined by the alcohol menace prevalent in this area. A deterent sentence is appropriate.

- *Accused shall therefore serve 2 years imprisonment without the option of a fine.*

Right of Appeal explained.

- *Exhibit to be destroyed upon the expiry of 14 days.*

J. TAMAR

PRINCIPAL MAGISTRATE

28.10.2019*"*

2. The appellant filed his Petition of Appeal dated 10th November 2019 challenging both the conviction and sentence of the trial court as follows:

*"**PETITION OF APPEAL***

An appeal from the judgment, conviction and sentence of Hon. J. Tamar, Principal Magistrate, (PM) Eldama Ravine Law Courts delivered on the 28/10/2019 vide Eldama-Ravine Criminal Case No. 2197 of 2019 and appeals to the High Court of Kenya against the sentence on the following grounds:

1. THAT the learned trial Magistrate erred in both in law and fact by displaying un-meted open biasness against the appellant during the cause of trial hence occasioning him to pass a sentence against the appellant that does not meet the threshold of equity

and fairness.

2. THAT the trial Magistrate erred in both law and fact in sentencing the accused person (sic) person to serve a sentence of 2 years imprisonment without an option of a fine, yet the facts and particulars of the offence could sufficiently support an option of a fine.

3. THAT the trial Magistrate erred in both law and fact in giving an excessive and severe sentence to the set of circumstances that could favour a lesser sentence.

4. THAT the learned trial Magistrate erred in fact and law in failing to consider glaring inconsistencies in the charge sheet.

5. THAT the learned trial Magistrate completely misunderstood the case that was before him, misconceived the issues and as a result came to a wrong sentence.

6. THAT the learned trial Magistrate erred in law and fact in wholly premising his finding and conviction on his own personal views and opinions which were neither supported by the evidence before him nor the applicable law.

7. THAT the learned trial Magistrate erred in both in law and in fact by failing to consider the appellant's mitigation thereby meting out a sentence that was excessive in the circumstance.

8. *THAT in whole, the sentence of the Learned trial Magistrate as contained in his judgment delivered on 29th October 2019, is inconsiderate, erroneous, unlawful biased and untenable in law."*

Submissions

3. At the hearing of the Appeal, which was expedited in view of the short sentence, Counsel for the parties made submissions before this court urging their respective contentions as follows:

*"**16/1/2020***

Coram: Before Hon. Justice Edward Muriithi

C/A: Daisy

State: Ms Muriu

Appellant: present

Mr. kemboi for accused.

Petition of Appeal dated 13/11/19.

We appeal on the conviction and sentence. We urge that the plea of guilty was not unequivocal. There are glaring material inconsistences on the face of record.

*On p. 2 of the coram there is no **mitigation.** The appellant was not accorded a chance to mitigation and if he mitigated to and did not capture the mitigation.*

The language used is not identified whether it was English or Kiswahili.

The previous convictions are set out in the charge sheet. The inclusion of the previous record set out invited biasness.

The sentence is excessive. The sentence of 2 years without an option of fine for 5 litres of alcohol drinks changaa. Had he be given opportunity to explain how he came into possession, he could have explained.

The appellant is serving a sentence of which he was at accorded a fair trial. We urge the Court to quash the conviction and sentence.

DPP

*The Record of the trial Court does not appear to have any headline on **mitigation.***

On the p.2 the accused said I am sorry. The Court may call for the original file. The trial Court factored in the statements of the accused after conviction. The Court considered all factors said by the appellant in mitigation.

Sentence was just and within the law. Court had options of fine and imprisonment or both. Appellant is not a first offender as referred on the record and charge sheet. The sentence of 2 years factored that he was not a first offender as he was present before the Court on similar and related charges.

I urge Court to uphold the sentence. The Court considered previous conviction of the appellant.

Mr. Kemboi

The sentence is not just in view of the quantity of the alcohol. Had he been given opportunity to state how the alcohol came into his possession, he could have explained.

Mitigation should come before the sentence and after the conviction.

The mitigation - the record indicates what the appellant said upon presentation of previous records and it was not mitigation.

We pray that the sentence be set aside, and conviction quashed."

4. The charge sheet set out the offence and particulars thereof and previous convictions without particulars as follows:

"**CHARGE SHEET**

CHARGE: *BEING IN POSSESSIN OF AN ALCOHOLIC DRINK THAT DOES NOT CONFORM TO THE REQUIREMENTS OF THIS ACT CONTRARY TO SECTION 27 (1) (b) AS READ WITH SECTION 27 (4) OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010*

PARTICULARS OF OFFENCE: *KIMUTAI KIGEN: On the 26th day of October 2019 at around 1600hrs at Mochongoi village in KOIBATEK Sub County within BARINGO County, was found being in possession of an alcoholic drink namely CHANGAA to with 5 litres packed in 10 litre Plastic jerrican in contravention of Alcoholic Drinks Act no. 4 of 2010.*

PREVIOUS RECORDS FOR KIMUTAI KIGEN

PCR 241/2018 CF NO.411/2018

OFFENCE: ***COUNT I*** *BEING IN POSSESSION OF CHANGAA 30 LITRES*

SENTENCED 12 MONTHS IMPRISONMENT

OFFENCE: ***COUNT II*** *BEING IN POSSESSION OF BUSAA 40 LITRES*

SENTENCE ONE YEAR IMPRISONMENT

OFFENCE: ***COUNT III*** *MANUFACTURING BUSAA USING 3 KGS FERMENTED FLOUR*

SENTENCED ONE MONTH IMPRISONMENT"

Issues for determination

5. The issues for determination in this appeal are whether the plea of guilty by the appellant was equivocal as to warrant an appeal from the conviction in accordance with the Criminal Procedure Code and whether the sentence was excessive.

DETERMINATION

Whether plea was unequivocal

6. Having pleaded guilty, the appellant is precluded by section 348 of the Criminal Procedure Code from challenging the conviction on appeal. In this case, the counsel for the appellant sought to urge that the plea of guilty was not unequivocal because, the record did not indicate that the accused's mitigation was taken. With respect, although the record does not indicate a subtitle under the heading Mitigation, there is proceeding indicating that the accused's representation upon conviction was taken where he said "***It is true I had previous conviction. I served the sentence. I was released on 16th October, 2018. I am sorry."***

That, with tremendous respect is mitigation.

7. I do not find any merit in the submission that plea was not unequivocal because of want of mitigation, because, in any event, mitigation comes after conviction and default in mitigation could only therefore affect he sentence not the ***prior*** conviction.

Previous convictions in the charge sheet

8. As regards the objection as to the laying out to previous conviction in the charge sheet, Section 137 of the Criminal Procedure Code makes provisions as to the framing of the Charges and precludes challenge on charges drawn in accordance with the provisions of the Code as follows:

> *"137. Rules for the framing of charges and information's*
>
> *The following provisions shall apply to all charges and information's, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—…."*

9. Under section 137 (h) a charge of previous conviction is charged by setting out the conviction without the particulars of an offence as follows:

> *"(h) Mode of charging previous convictions.—where a previous conviction of an offence is charged in a charge or information, it shall be charged at the end of the charge or information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place without stating the particulars of the offence;"*

10. I, therefore, do not find merit in the objection as to laying of the previous convictions in the charge sheet. Moreover, the trial court, very properly, only adverted to the previous convictions after the accused had been convicted of the present charges upon his own plea of guilty. The trial court could not have been, and was not shown to have been influenced by the previous conviction in convicting he accused for the present charge which he accepted by his plea of guilty.

Admission of the facts of the case

11. The accused accepted the charge and later the facts when they were set out in the in line with the procedure for plea taking set out in section 207 of the Criminal Procedure Code and elaborated in ***Adan v. R*** (1973) EA 445, as follows:

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***
>
> ***(iv) If the accused does not agree the facts or raises any questions of his guilt his reply must be recorded and change of plea entered;***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."***

12. The function of a charge as prescribed in section 134 of the criminal Procedure Code is to inform the accused of the offence that he is alleged to have committed as follows:

> *"134. Offence to be specified in charge or information with necessary particulars*
>
> *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

13. I do not find that the charge sheet was prejudicial to appellant in any way as the facts of the case as set out by the Prosecution before he admitted the charge and was convicted were clear that he was charged with possession of 5 litres of changaa as follows:

> "***Court Prosecutor:***
>
> *Facts are that on 26th October, 2019 4:00 p.m., the accused was arrested at his home in Mochongoi village by Police officers led by P.C. Kipchirchir. They found him with 5 litres of Chang'aa. He was arrested and charged. We wish to produce the exhibits. 5 litres* ***exhibit 1.***

14. Section 382 of the Criminal Procedure Code provides that a conviction may not be quashed for an error not going to the root of the case as follows:

> ***"382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings***

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

[Act No. 33 of 1963, First Sch.]"

Excessive sentence

15. The offence for which the accused was charged under Section 27(1) (b) as read with 27(4) of Alcoholic Drinks Control Act provides for a sentence – as follows:

> *"27.(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."***

16. The principles for interfering with the sentencing discretion of the trial court are well set out in the decision of the Court of Appeal for East Africa in ***Wanjema v. R*** (1971) EA 493, 494, as follows:

> *"A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. **No account was taken, as it should have been of the fact that the appellant pleaded guilty:** Skone [1967], 51 Cr. App. R. 165 and Geoffrey (1967, Cr. App. R. 449. (This admits of no doubt because the magistrate awarded the maximum sentence to this first offender; which of itself is unusual.)"*

17. The accused in this case had three (3) previous convictions in PCR 241/2018, which he accepted and for which he had been sentenced to various sentences ranging from imprisonment for one month to one year. The appellant, however, complained that he was sentenced to an imprisonment term without an option of fine.

18. The sentencing policy guideline applicable to fines is set out in ***The Kenya Judiciary Sentencing Policy Guidelines*** at paragraph 11.5 at p. 28, thereof as follows:

> *"11.5 Where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence. If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so, as it proceeds to impose the available option."*

19. In this case, it is apparent from the record that the trial court considered in view of the multiple previous convictions, the sentence of a fine was inappropriate and, therefore, passed as sentence of imprisonment ***without the option of a fine.***

Conclusion

20. Having considered the sentence under section 27 (4) of the Alcoholic Drinks Control Act for which the appellant was liable upon conviction for the offence charged, being *"a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both*" and his previous convictions for offences of similar nature, I would agree with the trial court that the a custodial sentence was warranted. In fact, I considered that the trial court was too lenient in sentencing the appellant to imprisonment for two (2) years only and, had it been this court trying the matter, a stiffer sentence might have been passed. This court may not, however, interfere with the sentence merely because, it would have passed a different sentence had it been trying the case, and there was in any event no application by the prosecution for a review by enhancement of the sentence of the trial court.

Orders

21. Accordingly, for the reasons set out above, the court finds no merit in this appeal and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kemboi S.L & Co. Advocates for the Appellant.

Ms. Muriu, Prosecution Counsel for the Respondent.