



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 8 OF 2018

ALEX FUNDI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant herein was convicted in the Chief Magistrate's court at Embu with the offence of selling Traditional Liquor without a license contrary to section 7(1)(b) as read together with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010 in Embu Chief Magistrate's Criminal Case No. 132 of 2017. He was sentenced to a fine of Kshs. 60,000/= and in default eighteen (18) months imprisonment.

2. The appellant filed this appeal herein vide the petition of appeal changing the sentence on grounds that it was harsh and excessive. It was also argued that the trial court did not take into account the mitigation of the appellant.

3. When the appeal came up for hearing, the appellant in his oral submissions argued that he had appealed against the sentence as the fine of Kshs. 60,000/= was too harsh excessive. He further stated that during the pendency of the appeal, he had served a better part of the default sentence and was only remaining with one month. His prayer was that he be set free at this stage.

4. In opposing the appeal, Ms. Mati for the Respondent submitted to the effect that the appellant was a repeat offender having been convicted in Embu CM Criminal Case Nos. 845 of 2017 and 29 of 2018 and the sentence was meant to be a deterrent for a repeat offender was not excessive but reasonable in the circumstances.

5. The appellant in rebuttal prayed for leniency saying he had children who depended on him and further that he was reformed while in prison.

B. Analysis of the law

6. The duty of this court while exercising its appellate jurisdiction (1st appellate court) was set out by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** and re-stated in **Kiilu and another vs. R (2005) 1 KLR 174** that: -

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya v. R., [1957] E.A. 336**) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Ruwala v. R., [1957] E.A. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters v. Sunday Post, [1958] E.A. 424**.*

7. However, it is clear from the petition of appeal and further from the appellant's submissions that he was only appealing against the sentence and that he was satisfied with the conviction. It is important therefore to set out the circumstances under which an appellate court may interfere with sentence.

8. It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as were set down in the case of **Ogolla s/o Owuor, (1954) EACA 270**, where the East African Court of Appeal held as such: -

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

9. These principles were emphasized by the Court of Appeal in **Benard Kimani Gacheru vs Republic [2002] eKLR** where the court stated 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, any one of the matters already stated is shown to exist."

10. In this case, the appellant was convicted with the offence of selling traditional liquor without a license contrary to section 7(1)(b) as read together with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010. The issue for determination is whether this sentence imposed was manifestly excessive in the circumstances of the case, or the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

11. Section 62 of the Act provides that: -

"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."

12. The objectives of sentencing as laid down in the **Judiciary's Sentencing Policy Guidelines, 2016** which includes: -

a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

e) Community protection: To protect the community by incapacitating the offender.

f) Denunciation: To communicate the community's condemnation of the criminal conduct.

13. It is noted that the maximum sentence under Section 62 of the Act is Kshs. 500,000/= or a term of imprisonment not exceeding three (3) years, or both such fine and imprisonment. The appellant was a repeat offender having been convicted in another case with a similar offence and had another similar case pending in another court. He did not deny these facts. These are factors that the trial court considered as well as his remorsefulness and family interests.

14. It is my considered that considering mitigation of the appellant, his previous record and the principles and objectives of sentencing as well as the facts of this case, it is my opinion that the sentence of fine of Kshs. 60,000/= and in default eighteen (18) months imprisonment was lawful and not excessive. I am not convinced that the trial court overlooked any material factor or took into account some wrong material, or acted on wrong principles.

15. It is my finding that the appellant has not satisfied this court on any of the grounds of appeal to warrant interfering with the sentence imposed by the trial court.

16. I find that this appeal lacks merit and is hereby dismissed.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF JUNE 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Appellant through Video Link