



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL REVISION NO. 02 OF 2020

LEAH WAITHERERO KIBE & 7 OTHERS.....APPLICANTS

- VERSUS -

REPUBLIC.....RESPONDENT

RULING ON REVISION

Introduction

1. The applicants in this case seek revisionary orders as set out in the Notice of Motion dated 19th March 2020 as follows:

“NOTICE OF MOTION

1. THAT this Honourable Court be pleased to certify the present application urgent.
2. THAT this Honourable Court be pleased to review the sentences meted upon the Applicants
3. THAT this Honourable Court be pleased to vary/review the sentences and in the alternative give the Applicants non-custodial sentences.”

2. The grounds of the application are set out in the application as follows:

“Grounds:

1. THAT the Applicants are in custody serving their jail terms.
2. THAT some of the Applicants are sickly and elderly.
3. THAT the sentences meted upon the applicants are excessive in the circumstances.
4. Annexed affidavit of LEAH WAITHERERO KIBE.”

3. In a Supporting Affidavit, the 1st applicant set out the facts relied on as follows”

“SUPPORTING AFFIDAVIT

I, **LEAH WAITHERO KIBE** care of Makutano Koibatek Sub-County in the Republic of Kenya do hereby make oath and states as follows:

1. THAT I am an adult female of sound mind and understanding hence competent to make this affidavit.
2. THAT I have authority of my Co-Applicants to make this affidavit.

3. THAT I currently serving sentence at the Nakuru G.K. Prison whereas my Co-Applicants are equally serving their respective sentences at G.K. Prison Eldama-Ravine. (Attached and marked "LWK1" are copies of Warrants of commitment for a sentence of imprisonment or fine).
4. THAT I and my Co-Applicants were charged vide PRINCIPAL MAGISTRATE'S COURT AT ELDAMA RAVINE – CRIMINAL CASE NO. 269 OF 2020. (Attached hereto and marked "LWK2" is a copy of the Charge Sheet and part proceedings)
5. THAT I and my Co-Applicants pleaded guilty to the 4 counts and were sentences to a fine of Kshs.145,000/= each in default to serve 1¹/₂ years in prison.
6. THAT I and my Co-Applicants are people of meager means and or paupers and unable to raise the fine hence in jail.
7. THAT the fine meted on us is excessive.
8. THAT I and my Co-Applicants have moved this court to review the sentences meted on us and replace the same with a non-custodial sentence.
9. THAT I and my Co-Applicant are elderly and sickly.
10. THAT I and my Co-Applicants make this Affidavit in support of the Motion herein for revision.
11. THAT I and my Co-Applicants urge this Honourable Court to consider our plight and substitute the sentences herein to that of non-custodians.

The case in the trial court

4. The applicants as accused persons before the trial court pleaded guilty to assorted counts of offences under the Alcoholic Drinks Control Act and the Forest Conservation and Management Act as follows:

"CHARGE SHEET

CHARGE: MANUFACTURING AN ALCOHOLIC DRINKS THAT DOES NOT CONFORM TO THE REQUIRMENTS OF THE ACT CONTRARY TO SECTION 27 (1) (a) AS READ WITH SECTION 27 (4) OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010.

PARTICULARS OF OFFENCE: 1. SAMWEL WAWERU 2. STEPHEN WAMBUI 3. DAVID GITHAKWA KMAMU 4. SHEM NDIRANGU: On the 11th day of March 2020 at around 1830hrs at MAKUTANO FOREST in KOIBATEK Sub County within Baringo County, **were jointly found manufacturing an alcoholic drink namely CHANGAA** that does not conform to the requirement of the Act using KANGARA to wit 50 lts packed in a 100ltr plastic drum in contravention of Alcoholic Drinks Control Act No.4 of 2010.

COUNT II

BEING IN POSSESSION 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.

II. SAMWEL WAWERU 2. STEPHEN WAMBUI 3. DAVID GITHAKWA KAMAU 4. SHEM NDIRANGU: On the 11th day of March 2020 at around 1830hrs at MAKUTANO FOREST in KOIBATEK Sub County within BARINGO County, were **jointly found being in possession of an alcoholic drink namely CHANGAA** to wit 80 Litres packed in 4, 20ltr plastic jerricans in contravention of alcoholic drinks Act no.4 of 2010.

COUNT III

CUTTING AND FELLING FORESTS PRODUCE CONTRARY TO SECTION 64(1) (a) AS READ WITH SECTION 64(2) OF THE FOREST CONSERVATION AND MANAGEMENT ACT 2016

1. SAMWEL WAWERU 2. STEPHEN WAMBUI 3. DAVID GITHAKWA KMAMU 4. SHEM NDIRANGU: On the 11th day of March 2020 at around 1830hrs at MAKUTANO FOREST in KOIBATEK Sub County within BARINGO County, **were found cutting and felling one cypress tree log** valued at Ksh.2,000/= without permit form Director of Kenya forest service.

COUNT IV

ENTERING INTO A STATE FOREST WITHOUT A PERMIT CONTRARY TO SECTION 64(1) (g) AS READ WITH SECTION 64(2) OF THE FOREST CONSERVATION AND MANAGEMENT ACT (NO.34 OF 2016)

1. SAMWEL WAWERU 2. STEPHEN WAMBUI 3. DAVID GITHAKWA KMAMU 4. SHEM NDIRANGU: On the 11th day of March 2020 at around 1830hrs at MAKUTANO FOREST in KOIBATEK Sub County within BARINGO County, jointly entered into MAKUTANO Forest without authority from Director of Kenya Forest Service.”

5. The facts of the case which they accepted leading to their conviction on guilty pleas were recorded in the Record of proceedings of the trial court set out in full as follows:

“REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE’S COURT AT ELDAMA RAVINE

CRIMINAL CASE NO.268 OF 2020

REPUBLIC - - - - - DPP

VERSUS

1. SAMWEL WAWERU

2. STEPHEN WAMBUI

3. DAVID GITAKWA KAMAU ACCUSED

4. SHEM NDIRANGU -- -

12.03.2020

CORAM Before: Hon. A. Towett - SRM

CP: Kelwon

CC: Malakwen

Accused 1: Present

Accused 2: Present

Accused 3: Present

Accused 4: Present

The charges and elements therein are read over and explained to the accused in a language that he/she understands (i.e) Kiswahili/English who replies:

In Kiswahili

COUNT I:

Accused 1: It is true. Plea of guilty entered.

Accused 2: It is true. Plea of guilty entered

Accused 3: Present. Plea of guilty entered

Accused 4: Present. Plea of guilty entered

COUNT II:

Accused 1: It is true. Plea of guilty entered.

Accused 2: It is true. Plea of guilty entered

Accused 3: Present. Plea of guilty entered

Accused 4: Present. Plea of guilty entered

COUNT III:

Accused 1: It is true. Plea of guilty entered.

Accused 2: It is true. Plea of guilty entered.

Accused 3: Present. Plea of guilty entered.

Accused 4: Present. Plea of guilty entered.

COUNT IV:

Accused 1: It is true. Plea of guilty entered.

Accused 2: It is true. Plea of guilty entered

Accused 3: Present. Plea of guilty entered

Accused 4: Present. Plea of guilty entered

FACTS:

On 11.03.2020, at 6:30pm Police officers from Makutano heard a tip off from members of Public, who were manufacturing chang'aa in the State forest. The Police went to the scene (Makutano Forest) found the four accused person manufacturing chang'aa. They had lit fire at the scene and were manufacturing chang'aa using kangara 50 litres of chang'aa were recovered.

80 litres of chang'aa also recovered.

A log of Cyprus tree exhibit at Ksh.2000.

Accused persons were arrested. Exhibits were recovered.

COURT:

50 litres of kangara found as Pexhibit 1.

80 litres of changaa found as Pexhibit 2.

A log of cypress were found as Pexhibit 3.

COUNT I:

Accused 1: Facts are true.

Accused 2: Facts are true.

Accused 3: Facts are true.

Accused 4: Facts are true.

COURT:

Plea of guilty entered.

Records: None.

Mitigation:

Accused 1: I pray for leniency.

Accused 2: I pray for leniency.

Accused 3: I pray for leniency.

Accused 4: I pray for leniency. I did commit the offence.

COURT:

Mitigation considered. On Count number one each accused fined Kshs.50,000 or six months in default.

Count No. II each accused fined Kshs.80,000 or six months in default.

Count III each accused fined Kshs.10,000 or two months in default.

Count IV each accused fined Kshs.5,000 or one month in default.

Sentences to run consecutively.

Right of appeal explained.

Hon. A. Towett

Senior Resident Magistrate

6. The application could not earlier be heard owing to Covid-19 scale down of court operations. At the hearing on 24/9/20, Counsel for the applicants and for the DPP made oral submissions on the application for revision as shown below and ruling was reserved for the 12/10/2020:

“Mr. Makori for the Applicants

Sentence

Facts indicate that they were in possession of 80litres of chang’aa, 50 litres Kangara and 1 log of Cypress. Facts do not show clearly how the 80 litres were being manufactured. There were 2 counts. The count should have been being in possession in Count I not manufacturing.

Cutting trees in Count II

They were in possession not cutting tress. The penalty for cutting trees should have been 5,000/- I refer to section 27 (1) (a) (e) of the Forest Management Act.

I urge the court considers the time they have been in custody from 12/2/2020.

Mr. Mongare for the DPP

Revision is opposed.

Nature of the orders sought required an appeal from the sentence and conviction.

Being in possession

It was presumed they were in joint possession. They were not able to substantiate who had what item.

The accused pleaded guilty and they were convicted.

Manufacturing drinks

Being in possession. Manufacturing was not proved.

Cutting trees

One cannot separate being in possession of trees, cutting and felling of trees. Since they were in possession they must of necessity

have cut the trees.

The penalty- if different, the court may review sentence.

The accused were rightly tried and sentenced. The issue before the court is on sentence and the court may in discretion impose the appropriate sentence.

Mr. Makori in reply

I urge the court to reduce the sentence.”

Issue for determination

7. The issues for determination in the revision application are preliminarily whether the court shall entertain at the behest of applicants their revision application herein, and on the merits whether the court will reduce the sentences imposed on the applicants by the trial court for the various offences charged in the four counts.

Limits of Revisionary Jurisdiction

8. The revisionary jurisdiction of the High to revise decisions and orders of the trial court is circumscribed by the provision under section 364 (5) of the Criminal Procedure Code that:

“5. When an appeal lies from a finding, 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.**”

9. There is, however, under section 364(1) of the CPC, the court’s overarching jurisdiction *suo moto* exercisable where it becomes aware, upon a file called up by it or otherwise, of a matter that requires correction by the court in its revisionary function, as follows:

“(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.

c. in proceedings under [section 203](#) or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.”

Right of appeal

10. Section 348 of the Criminal Procedure Code grants an accused who pleads guilty to a charge a right of appeal as against a sentence as follows:

“348. **No appeal on plea of guilty, nor in petty cases**

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, **except as to the extent or legality of the sentence.**

[Act No. 17 of 1967, s. 31.]”

11. The applicants in this case seek revisionary orders as set out in the Notice of Motion dated 19th March 2020, for the reduction of the various sentences imposed by the trial court which they could have sought by exercising their right of appeal under section 348 of the Criminal Procedure Code and they are the court jurisdiction to entertain these proceedings at their behest is curtailed by section 364(5) of the Code.

Supervisory jurisdiction and Powers of the Court on Revision

12. However, the Court being made aware of a matter of conviction for a defective charge may correct the situation as appropriate in the exercise of its general power of revision under section 364(1) of the Criminal Procedure Code and the supervisory jurisdiction of the High Court under Article 365(6) of the Constitution. In exercise of powers under section 364 (1) of the Criminal Procedure Code, the court is entitled to make orders pursuant to several sections thereof including section 354 of the Code which relates to appeals.

13. In cases where there may be glaring errors of law or fact, the court may exercise the powers of revision without the necessity of an appeal against the decision of the trial court and on its own motion after the matter has been brought to its attention under section 364(1) of the Criminal Procedure Code. The question before the court is, therefore, whether the applicants, who being entitled to file an appeal were not entitled to seek revision (section 364 (5) of CPC), have nonetheless raised and brought to the attention of the High Court a matter so grave and glaring error of law or fact that the court's conscience is provoked as to justify seizing the matter of its own motion and acting to avert an illegality and avoid injustice on any party.

The Offences

14. As regards the offences against the applicants under Alcoholic Drinks Control Act, section 27 of the Act provides 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.

2. Sub-section (1) shall not apply to a person who—

a. is authorized under this Act to be in possession of the alcoholic drink; or

b. has possession of the alcoholic drink in a premises licensed under this Act.

3. The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or 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.**”

15. While the section 27 (1) of the Act distinguishes manufacturing and possession of “*an alcoholic drink that does not conform to the requirements of this Act*”, the penalty for both offences is one prescribed under subsection (4) for a “*person who contravenes the provisions of this section*”. The Act does not define the manufacturing but the ordinary meaning under the ***Concise Oxford English Dictionary*** 10th ed. (2002) gives the meaning of the word “*manufacture*” as follows:

“manufacture v. 1. **make (something) on a large scale using machinery** 2. (of living thing) produce (a substance) naturally. 3. make or produce (something abstract) in a merely mechanical way. 4. invent or fabricate (evidence or a story). n. the process of manufacturing.”

The facts of the case

16. The facts as set out by the Prosecution and accepted by the accused upon their plea of guilty were recorded in the Record of Proceedings as follows:

“FACTS:

On 11.03.2020, at 6:30pm Police officers from Makutano heard a tip off from members of Public, who were manufacturing chang'aa in the State forest. **The Police went to the scene (Makutano Forest) found the four accused person manufacturing chang'aa. They had lit fire at the scene and were manufacturing chang'aa using kangara. 50 litres of chang'aa were recovered.**

80 litres of chang'aa also recovered.

A log of Cyprus tree exhibit at Ksh.2000.

Accused persons were arrested. Exhibits were recovered.

COURT:

50 litres of kangara found as Pexhibit 1.

80 litres of changaa found as Pexhibit 2.

A log of cypress were found as Pexhibit 3”

17. The Facts may be broken down as follows:

1. Acting on information from members of the Public, **“Police went to the scene (Makutano Forest) found the four accused persons.”**

2. **The four accused person “had lit fire at the scene and were manufacturing chang’aa using kangara.”**

3. **The following exhibits were recovered –**

“50 litres of kangara found as Pexhibit 1.

80 litres of changaa found as Pexhibit 2.

A log of cypress were found as Pexhibit 3”

18. The particulars of the offence in Count I clearly charge the manufacture of *Changáa* using *Kangara* in a process involving heating by fire in this case from a cypress log. It is Count II that deals with possession which is an offence under paragraph (b) of section 27 (1). There is no ambiguity in the particulars of the offences and the Facts set out by the prosecution as to the nature of the offences charged. Section 134 of the CPC is wholly complied with, and in pleading guilty to the charges the accused were in no way prejudiced by the charge or its particulars or the facts thereof. I accept their plea as having been unequivocal and taken in strict accordance with the procedure for plea taking prescribed under section 207 of the Criminal Procedure Code and the case-law authority of *Adan v. R* (1973) EA 445.

Sentences lenient

19. For an offence punishable by a fine of Ksh. two (2) Million or to imprisonment for a term not exceeding five (5) years, the fines of Ksh.50,000/- in Count I and Ksh.80,000/- in Count II are on the lenient side.

Offences under the Forest Conservation and Management Act

20. Section 64 on offences under the Forest Conservation and Management Act provides as follows:

“64. Prohibited activities in forests

1. Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest—

a. fell, cut, take, burn, injure or remove any forest produce;

b. be or remain therein between the hours of 7 p.m. and 6 a.m. unless using a recognised road or footpath, or is taking part in cultural, scientific or recreational activities;

c. erect any building or livestock enclosure, except where the same is allowed for a prescribed fee;

d. smoke, where smoking is by notice prohibited, or kindle, carry or throw down any fire, match or other lighted material;

e. de-pasture or allow any livestock to be therein;

f. clear, cultivate or break up land for cultivation or for any other purpose;

g. enter any part thereof which may be closed to any person;

h. collect any honey or beeswax, or hang on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or enter therein for the purpose of collecting honey and beeswax, or be therein with any equipment designed for the purpose of collecting honey or beeswax;

i. construct any road or path;

j. set fire to, or assist any person to set fire to, any grass or undergrowth or any forest produce;

k. possess, bring or introduce any chain saw or logging tools or equipment;

l. damage, alter, shift, remove or interfere in any way whatsoever with any beacon, boundary mark, fence notice or notice board.

2. Any person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.

3. Any person who contravenes the provisions of [section 60](#) shall be guilty of an offence and is liable on conviction to a fine not exceeding one million or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

4. Any person who contravenes the provisions of [section 59](#) shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

[Act No. 18 of 2018, Sch.]

21. Clearly, the offence under section 64 is a composite one involving different acts which are clustered in the section under the rubric **Prohibited activities in forests**. The penalty against a person who, in common parlance, is in *possession* of, or, in the language of the Act **fells, cuts, takes, burns, injures or removes**, any forest produce commits the one and **same** offence under section 64 (1) of the Act and is liable to punishment in accordance with sub-section 2 thereof, by **“a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment”**. The applicant’s counsel’s submissions on the point distinguishing *possession* from *cutting* trees is, therefore, not well founded. As regards, the magnitude, the fines of Ksh.10,000/- and Ksh.5,000/- respectively for being in possession or **taking** in the language of the Act, and for entering a state forest without a permit are obviously modest.

Default sentences of imprisonment

22. For both the offences in Counts I and II under the Alcoholic Drinks Control Act and those in Counts III and IV under the Forest Conservation and Management Act, the trial court chose to impose a fine instead of a sentence of imprisonment or both the fine and imprisonment as it was entitled to do under the respective Sections. Having chosen, the penalty of fine, the provisions of section 28 (2) of the Penal Code which guide courts on the default sentences applied, and the trial court scrupulously kept within its scales as follows:

“(2) In the absence of express provisions in any written law relating thereto, **the term of imprisonment** or detention under the Detention Camps Act (Cap. 91) **ordered by a court in respect of the non-payment of any sum adjudged to be paid** for costs under section 32 or compensation under section 31 or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court **or in respect of the non-payment of a fine** will satisfy the justice of the case, **but shall not exceed in any such case the maximum fixed by the following scale—**

Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Exceeding Sh. 15,000 but not exceeding Sh. 50,000 ...	6 months
Exceeding Sh. 50,000	12 months

23. The applicants have not demonstrated any error in the sentencing as would justify interference by this court in accordance with the guidance for appellate consideration of the sentencing discretion of the trial court as laid down in *Wanjema v R* (1971) KLR 493 494, as follows:

“An appellate court should not interfere with the discretion 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 trial court also ordered consecutive service of the sentences of fine wholly in accordance with the provisions of section 37 (2) of the Penal Code.

Orders

24. Accordingly, for the reasons set out above, pursuant to section 364 (1) and 354 (3) of the Criminal Procedure Code, the court considers that there is no merit in the applicants’ application for revision herein, and the same is declined.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Makori Nyangau & Co. Advocates for the Applicants.

Mr. Mongare, Ass. DPP for the Respondent.