



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO. 11 OF 2019

(From original conviction and sentence in Criminal Case No. 11 of 2019 from Original Conviction and sentence in Criminal Case No. 1043 of 2019).

GRACE WANJIRA MAINAAPPLICANT

V E R S U S

REPUBLICRESPONDENT

RULING

1. The applicant Grace Wanjira Maina filed a Notice of Motion under **Section 364 and 365 of the Criminal Procedure Code** and under **Article 165 of Constitution of Kenya 2010** seeking an order that the court be pleased to revise the orders of sentence of Hon. Kivuti dated 24/9/19 at Baricho Court Criminal Case No. 1043/2019.

2. The application is based on the ground that the sentence meted out was manifestly excessive. The trial Magistrate failed to consider the option of a fine. The sentence passed was the maximum the Magistrate could award which was not fair. That there were conflicting details as to whether the applicant was a first offender or not.

3. The applicant supports the application with her affidavit sworn on 1st October 2019. She depones that she was charged with the offence of dealing with traditional liquor without a licence contrary to **Section 8(1)(b) as read with Section 64 of the Kirinyaga County Alcoholic Drinks Control Act 2014** and pleaded guilty. The prosecutor indicated that she was a 1st offender and ordered for a Probation Officer's report. Upon the report being produced in court she was sentenced to serve Twelve months imprisonment without an option of a fine. That there was a conflict as the prosecutor indicated she was a 1st offender and the report by Probation stated she was a repeat offender. That she is illiterate and didn't understand the charges. That the sentence was excessive as there was no option of a fine. She prays that the sentence be reviewed.

4. The State opposed the application and filed grounds of opposition and submissions. He refers this court to **Section 348 of the Criminal Procedure Code** which provides that:-

“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 sub-ordinate court except as to the extent or legality of the sentence.”

5. He further submits that **Section 364(5) of the Criminal Procedure Code** provides that –

“When an appeal lies from a finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the instant of the party who could have appealed.”

6. It is submitted that the recourse by the applicant is to file an appeal on the sentence and there being no appeal no revision can be entertained.

7. Mr. D. N. Gitonga for the applicant submits that under **Section 38(1) (b) of Kirinyaga County Alcoholic Drinks Control Act of 2014** it is provided that a second conviction of an offence under the Act the person is liable to a fine of Kshs 100,000/- or a maximum Twelve months imprisonment. That there was a contradiction as to whether the accused was a 1st offender or a repeat offender. That the court should therefore order a revision.

8. I have considered the application and the submissions. The issue before this court is Revision. Revision is provided under **Section 362 of the Criminal Procedure Code** which provides:-

“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.”

The powers of the High Court on Revision are provided under **Section 364 of the Criminal Procedure Code.**

9. As submitted by Mr. Ashimosi the Prosecuting Counsel, where an appeal lies from the finding, sentence or order, and no appeal has been brought, no proceeding shall be entertained by way of revision.

10. The question is whether the court can proceed to consider the matters raised in this application. In the case of **Emily Shanguli Mabisi – v- Republic Cr. Rev 1 of 2016** my sister Justice Jackie Kamau quoted with approval the decision Justice Ojwang as she then was in the case of **Charles Gitau –v- R 2008 eKLR** where it was stated:-

“----- In our Judgment, the court can in its discretion act ‘suo moto’ even when the matter has been brought to its notice by an aggrieved party who had a right of appeal.”

Similarly in **R –v- John Wambua Munyao & Others Cr. Rev. 215/18** Justice Ondunga stated that:-

“Article 165(6) and (7) of the Constitution confers upon this court supervisory jurisdiction upon this court to make any order or to give any direction it considers appropriate to ensure fair administration of justice.”

11. When a matter has been brought before the High Court for revision the court has to consider the matter in its entirety. The powers of revision are invoked to enable the court to satisfy itself as to the correctness, legality or propriety of any finding sentence or order and as to the regularity of any proceedings.

12. Where the decision of the lower Court does not call for this court to look in the question of its legality, correctness or propriety, the right way of approach is to appeal. In my view the jurisdiction of this court on revision should only be invoked where there are glaring acts of omission by the trial Magistrate. The parties should be discouraged from arguing an appeal which is disguised as revision. The court exercises its supervisory jurisdiction over sub-ordinate court to correct apparent mistakes and to prevent a miscarriage of justice. In the case of **Charles Gathuo Kamau (2016) eKLR** Justice Waweru stated,

“As for Revision the supervisory jurisdiction is exercised in respect of findings, sentences orders and regularity of any proceedings see Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code.”

13. It should therefore not be lost to the mind of this court that what is before this court is an application for revision specifically on the sentence.

The appellants were charged under **Section 8(1) (b)** as read with **Section 64 of the Kirinyaga County Alcoholic Drinks Control Act 2014.**

14. It was alleged that on 7/9/2019 at Ngando Village she was found in possession of traditional liquor namely Makabo to wit 40 Litres without a licence.

15. The applicant pleaded guilty and confirmed that it was the exhibit before court. She was convicted. The prosecution informed the court that she was a 1st offender. She was given a chance to mitigate and she pleaded for leniency. The court ordered for a pre-sentencing report. The proceedings that far were not flawed.

16. The report which was filed in court indicated that she was a repeat offender. The court proceeded to pass a sentence of Twelve months. The report shows that the views of the applicant were taken. **Section 216 of the Criminal Procedure Code** provides that:-

“The court may before passing sentence or making an order against an accused person under Section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.”

17. In my view the stage at which the report was presented was to inform the trial Magistrate on the appropriate sentence to be passed. The procedure was not flawed.

18. The court imposed the sentence based on the evidence received from the Probation Officers report.

19. I have considered the persuasive decisions in the case of **Priscilla Koech Kipket –v- the Director of Public Prosecution** where Justice Muriithi stated that since the trial court failed to consider the means of the accused, the trial court may have imposed a fine that the accused is unable to pay and ends up being practically in imprisonment for default period of Twelve Months.

In **Emily Sanguli Mabishi –v- R Rev. 1 of 2016 Voi**, Justice Kamau considered the Judiciary sentencing Policy guidelines which recommends that imprisonment for petty offenders ought to be discouraged as the rehabilitative objective of sentencing is rarely met when offenders serve sentences in custody.

20. In this case the sentence provided for was a fine of Kshs 100,000/- or a maximum of Twelve months imprisonment. The trial Magistrate

opted for imprisonment which was well within the discretion of the trial Magistrate. However where a sentence of a fine and imprisonment is provided, the trial Magistrate ought to impose a fine first as that is the least severe of the prescribed punishment. **Article 50(2)(p) of the Constitution** states in part:-

“Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence-----“

21. Considering the above persuasive decisions which are discouraging incarceration of petty offenders there would have been no harm in considering the option of a fine as the Act provides for an option of a fine even for repeat offenders.

In conclusion:

I find that the proceedings before the trial Magistrate were proper and there was nothing for this court to issue orders on revision. However in view of the Judiciary sentencing Policy Guidelines I will alter the sentence and order that the sentence of Twelve months imprisonment be set aside and be replaced with a sentence of a fine of Kshs 80,000/- or i/d serve Eight months imprisonment. The sentence to run from 24/9/19.

Dated at Kerugoya this 5th day of November, 2019.

L. W. GITARI

JUDGE