REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTA AT MERU

MISC. CRIMINAL APPL. NO. 20 OF 2018

BETWEEN

BEATRICE MAKENA...APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION..........................RESPONDENT

R U L I N G

1. By a Motion on Notice dated 26th March, 2018 brought under ***section 362 of the Criminal Procedure Act, Cap 75 of the Laws of Kenya,*****BEATRICE MAKENA ("the applicant")** has asked this court to call for the record of the trial court in the **Meru CM Cr. Case No. 300 of 2018 Republic v. Beatrice Makena** consider the same and declare that conviction and sentence metted out to her was null and void. That the charges preferred against her were not in conformity with the ***Alcoholic Drinks Control Act No. 4 of 2010.***

2. The applicant also sought a second order that the court does declare the charges, conviction and sentence as being unconstitutional and a violation of the applicant's human rights.

3. The grounds upon which the application was predicated upon were set out in the body of the Motion and in the supporting affidavit of applicant sworn on 26th March, 2018. These were that the particulars of the charge are incurably defective, illegal and contrary to the ***Alcoholic Drinks Control Act No. 4 of 2010;*** that the rights of the applicant have been violated in so far as the conviction and sentence was based on a defective and irregular charge.

4. The applicant deposed that she was arraigned in court on 30th January, 2018. That she was convicted and sentenced to pay a fine of Kshs. 500,000/- and in default serve 6 months imprisonment. That she had been advised that the said charges were defective and a violation of her human rights. She urged the court to revise the conviction and sentence.

5. Mr. Gikunda Anampiu who appeared for the applicant relied on the averments of his client. Mr. Namiti Learned Counsel for the State did not oppose the application.

6. I have considered the record. The applicant was arraigned in the Meru Chief Magistrates'Court on 30th January, 2018 on a charge of processing alcoholic drinks without a licence contrary to ***section 37 (1) as read with Section 62 of the Alcoholic Drinks Control Act No.4 of 2010 ("the Act").***The particulars of the charge were that on 30th January, 2018 at Nkabune area in Imenti North sub-county within Meru County, the applicant was found in possession of 100 litres of muna for processing changaa without a license (sic).

7. The applicant admitted the charge. The prosecution told the court that the facts were as per the charge sheet. The court entered the plea of guilty, convicted the applicant and sentenced her to pay a fine of Kshs.500,000/- in default to serve 6 months imprisonment.

8. The jurisdiction of this court on revision is clear. The court is to call for the original record and satisfy itself as to the legality or efficacy pf an order made or proceeding undertaken. The applicant was convicted under ***sections 37(1) as read with section 62 of the Act*** which provides as follows:-

Copy here the 2 sections.

9. From the foregoing, it is clear that ***section 37(1) of the Act*** creates the offence of a licensee selling alcohol to a person when such licensee has no licence or his/her licence does not cover the alcohol in question. ***Section 62 of the Act is the punishment section.***

10. The particulars of the charge were that the applicant was found in possession of Muna which is a substance that processes changaa. The particulars did not state that the applicant was found selling or had sold an alcoholic drink which she had not been licenced to sell. She was only in possession of Muna which the charge did not state that it was an alcoholic drink.

11. To my mind, the charge was hopelessly defective in that; ***section 37 (1) of the Act*** does not create an offence of possession, but rather sale on an alcoholic drink which ones licence does not cover. Secondly, there was no evidence that the substance in court was an alcoholic drink in terms of ***section 2 of the Act.*** There was no evidence that was produced to prove that the said substance had the alcoholic content as defined in the Act. To that extent, although the applicant admitted having been found to have the substance that was produced in court, it was not established that that substance was an alcoholic drink.

12. In the premises, I hold that the conviction and sentence was not proper and cannot stand. The same is hereby quashed and set aside.

13. Prayer noumber two of the motion is denied as it was not demonstrated that the actions complained of were unconstitutional. To this court's mind the action complained of was only irregular.

14. Accordingly, the application is allowed in terms of prayer number 1 of the Motion. The applicant is to be released forthwith unless otherwise lawfully held.

DATED and **DELIVERED** at Meru this 5th day of April, 2018.

A. MABEYA

JUDGE