



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL APPEAL NO. 28 OF 2018.

STEPHEN MASIKA MATERE.....APPELLANT

VERSUS.

REPUBLIC.....REPOENDENT

(An Appeal from the Conviction and Sentence in Original Bungoma CM CRI. 699/2018 delivered on 6th June, 2018 by Hon. J. King'ori Chief Magistrate).

JUDGMENT.

The appellant was charged with dealing in alcoholic drinks without a license contrary to Section 7(1)(b) as read with Section 62 of the Alcoholic drinks Counterfeit No. 4 of 2010.

The charge was read to him on 21.5.2018 whereupon he pleaded guilty. The facts were narrated by the Prosecutor and appellant and appellant admitted the facts. He was then convicted on own plea of guilty. The appellant pleaded for mercy in his Mitigation. A presentence report was called for, which was not favourable and appellant was sentenced to

1 year and 8 months imprisonment. Aggrieved by the conviction and sentence, the appellant filed this appeal on the following grounds;

- 1. THAT the trial Magistrate failed to consider my age of 60 years as am suffering from old age related ailments.*
- 2. THAT the trial magistrate failed to consider my mitigation and subject me to an option of a reasonable fine and even or just a warning as I was a first offender.*

Mr. Anwar for the appellant filed written Submissions. He submitted that the particulars of the charge sheet were vague. He submitted that the appellant was charged with offence of dealing in alcoholic drinks without a license but the facts do not disclose the offence of dealing which involves an act of selling, purchase and exchange or distribute. The Counsel secondly submitted that the sentence meted out was excessive and harsh being a first offence. He submitted that the presentence report which dis-recommended him for a non-custodial sentence overstepped its limits and veered off to digging out the appellants Criminal record.

M/s Njeru for the state opposed the appeal. Counsel for state submitted that the charge and particulars were read to the appellant. He pleaded guilty. The facts and the particulars of the offence were not vague. He admitted the facts, was convicted and presentence report sought by the court was not favourable for non-custodial sentence and the sentence of one year 8 months was not excessive.

The first ground raised by the appellant is that the particulars of the offence were vague. The appellant was charged with offence under Sec. 7(1) is of the Alcoholic Drinks Control Act. Section 7 provides;

7 Control of alcoholic drinks

(1) No person shall

(a) *Manufacture or otherwise produce;*

(b) *sell, dispose of, or deal with;*

(c) *import or cause to be imported; or*

(d) *export or cause to be exported,*

any alcoholic drink except under and in accordance with a license issued under this Act.

The particular of the offence stated that the appellant was found dealing with alcoholic drinks without a license and the quantity he was dealing with is given as 2 litres. The particulars of the offence have captured the act that is prohibited by Section 7 (1) (b) under “sell, dispose or deal with” Having specifically stated the act that amounts to an offence as described in the provision he is charged with, the particulars were specific and not vague. The expression deal with is not defined in the act but would mean an act of buying, selling, exchange or distribute and failure to acts of dealing he committed is not fatal to the charge.

The 2nd issue raised is that the sentence of 1 year 8 months is excessive in the circumstances. The appellant pleaded guilty and was properly convicted under Section 348 of the Criminal Procedure Code he can not appeal against conviction. He can only appeal on the extent or legality of the sentence. Mr. Anwar submits that the sentence was excessive and the court was unfairly influenced by the pre-sentence report. He submits that he pre-sentence report overstepped its mandate and attempted to provoke the court to give a more stiffer sentence.

The trial magistrate rightly in my view called for a pre-sentence report as the offence the appellant was charged with attracted a maximum sentence of 3 years imprisonment or fine not exceeding Kshs.500,000/= or both. A pre-sentence report must not be confused with a Probation Report. A Probation report when called for is limited to gathering information on the suitability of the accused to be placed on probation. It would cover information as to whether the accused is likely to comply within conditions of probation, with benefit from “Probation Programs at is likely to be rehabilitated by being placed on programs under Probation. Pre-sentence Reports when called for is aimed at providing information to the court to enable it consider which of the sentences will be appropriate for the offender. Inquiry will consider such issues as whether accused is first offender, the nature of the offence, the feelings of the victim of the offence; attitude of the offender to the offence and victim; the continuous sentiments to the offender and the offence; and what sentence which properly achieve the objective of sentencing in Criminal cases. The report is to enable this court to know the person it is sentencing. The court called for and received a Pre-sentence report. Nothing in that report in my view is outside the mandate of a Pre-sentence report.

On sentence I note that the appellant was sentenced to serve one year 8 months imprisonment. I also note from the pre-sentence report, that although the appellant is said to have engaged in dealing with alcoholic drinks, no records were produced and was therefore a first offender. I also note that the quantity of alcoholic drink he was charged with was 2 litres. For these reasons, I set aside the sentence of one year 8 months imprisonment and substitute thereof a sentence of Twelve (12) months imprisonment.

Dated and Delivered at Bungoma this 12th day of November, 2018.

S.N. RIECHI

JUDGE