REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 30 OF 2018

JENTRIX MAKOKHA NAKHAUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original sentence in criminal case number 697 of 2018 in the Chief Magistrate's Court at Bungoma – J. Kingori (CM) on 6th June 2018*)

JUDGMENT

1. This is an appeal against a sentence imposed upon the Appellant by J. Kingori Chief Magistrate in Criminal Case No. 697 of 2018. **Jentrix Makokha Nakhauka** the Appellant herein was charged with dealing in alcoholic drinks without a licence contrary to **section 7(1)(b)** as read with **section 62** of the **Alcoholic Drinks Control Act No. 4 of 2010**.

2. The particulars as per the charge sheet were that on the 18th day of May, 2018 at about 7.00 p.m. at Mungore village in Bumula sub-county within Bungoma County the Appellant was found dealing with alcoholic drinks without a licence to wit one (1) litre of *chang'aa* in contravention of the said Act.

3. The Appellant pleaded guilty to the charge and she was consequently convicted on her own plea of guilty and sentenced to serve one and half (1) years imprisonment. Aggrieved by the sentence, the Appellant preferred the present appeal in which she raised four (4) grounds which are that the sentence was excessive.

4. Mr. Were counsel for the Appellant submitted that the trial court ought to have considered all the factors and the Appellant's mitigation and meted out a lighter sentence. He urged the court to allow the appeal and vary the sentence imposed against the Appellant.

5. The state opposed the appeal through learned state counsel Mr. Oimbo who submitted that **section 7(1)(b)** of the **Alcoholic Drinks Control Act** under which the Appellant was charged provides for a sentence of up to three (3) years and, or a fine not exceeding five hundred thousand shillings, or both. He contended that the Appellant was sentenced to one and half years imprisonment without an option of fine because the presentencing report showed that she was a habitual offender who had been in and out of court for the same offence. He urged the court to dismiss the appeal and uphold the sentence.

6. The present appeal is on sentence. I am alive to the fact that sentence is an exercise in the discretion of the trial court. For this reason, a court on appeal will only interfere with the sentence imposed by a trial court where it is shown that the sentence was imposed against legal principles. Sentence may also be interfered with where relevant factors were not considered or irrelevant or extraneous matters were considered, or where the sentence is manifestly excessive in view of the circumstances of the case. See – **Mbogo & Another vs. Shah (1968) EA 93** and **Republic vs. Kutbuddin Mohammedali [2001] Criminal Revision No. 1 of 2001 [2001] eKLR**.

7. The Appellant was charged with dealing in alcoholic drinks "*chang'aa*" without a licence contrary to **section 7(1)(b)** of the **Alcoholic Drinks Control Act**. The punishment for the offence is prescribed under **section 62** of the **Act** which provides thus:

> **"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."**

The implication of **section 62** cited above is that the court can, upon conviction, impose a fine in lieu of imprisonment or in addition to an imprisonment term. What is in issue however, is whether in light of the provision, the court can proceed to impose a custodial sentence without the option of a fine.

8. Section 26(3) of the **Evidence Act** sheds some light on this issue. The section stipulates that:

"A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that-

(i) where the law concerned provides for a minimum sentence of imprisonment a fine shall not be substituted for imprisonment."

9. The law and policy on sentencing is that where the option of a fine is provided, the court must first visit it before proceeding to impose a prison term as observed by Mwera J (as he then was) in **Annis Mihidin Nur vs. Republic High Court Criminal Appeal No. 98 of 2001 (unreported)**. If in the circumstances a fine is not a suitable sentence, then the court should expressly indicate why a fine is inappropriate before it proceeds to impose the available option. See – **Fatuma Hassan Salo vs. Republic, Criminal Appeal 429 of 2006 [2006] eKLR.**

10. The record shows that in sentencing the Appellant, the trial court noted that her pre-sentence report was unfavorable as it stated that the Appellant is a habitual offender and discommended a non-custodial sentence. It was on this basis that the court proceeded to impose a one and a half year imprisonment term against the Appellant.

11. The pre-sentence report dated 31st May, 2018 which is on the record described the Appellant as a habitual offender, stating that she had been arrested severally for offences similar to the present one. That she was last charged with the offence in February 2018 and fined Kshs. 15,000/-. The probation officer noted that the Appellant's home environment was not conducive for her rehabilitation and found her unsuitable for a non-custodial sentence.

12. In considering whether to impose a custodial or a non-custodial sentence, the court is required to consider a number of factors including the criminal history of the offender. According to the **Kenyan Judiciary's Sentencing Policy Guidelines**, repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance. It further stipulates that previous convictions should not be taken into consideration unless they are admitted or proved.

13. I note that there is nothing on the record to demonstrate that any of the Appellant's previous convictions were proved as no records or certificates of her previous convictions were produced in this regard. The prosecution also failed to disclose the case in which the Appellant had been convicted in February and fined as alleged. It is trite law that he who alleges must prove, and this being a criminal trial the burden of proof always rests on the prosecution and at no point does it shift to the defence.

14. Based on the foregoing, I find that the trial court failed to exercise its sentencing discretion in accordance with the relevant principles on sentencing, since no proof was provided for the claims that the Appellant is a habitual offender. For this reason alone, I find that the Appellant should have been treated as a 1st offender and that the imprisonment term imposed upon her was harsh and excessive. In any event, the pre-sentencing report is meant to guide as opposed to influencing the court in meting out a sentence.

15. In the premise therefore, I allow the present appeal on sentence as filed. In place of the one and a half year imprisonment term, I substitute a fine of Kshs. 30,000/- and in default the Appellant shall serve one (1) year imprisonment which shall run from 6th June, 2018 which is the day on which she was sentenced by the trial court.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF DECEMBER 2018.

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H. K. CHEMITEI

HIGH COURT JUDGE