

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. 3 OF 2017

LYDIA KARAMU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original conviction and sentence in CM's Criminal Case No.230 of 2014 of the Senior Resident Magistrate Hon. M. Sudi at Chuka).

RULING

1. **LYDIA KARAMBU** the Applicant herein has applied for a revision of her sentence imposed in ***Chuka CM's Court Criminal Case No. 230 of 2014***. In that case the applicant had been charged with the offence of selling alcoholic drinks contrary to **Section 7 (1) (b)** as read with **Section 62** of the **Alcoholic Drinks Act No. 4 of 2010**. The facts as per the charge sheet presented in court were that on the 5th day of March 2014 at Magutuni Market within Tharaka Nithi County the applicant was found selling 400 litres of an alcoholic drink namely "**Mugasha**" against the requirements of **Alcoholic Drinks Control Act No.4 of 2010**. The applicant denied the charge and the case proceeded to full trial whereupon the applicant was found guilty convicted and fined Kshs.200,000/- or imprisonment of 18 months in default.

2. The applicant has now invoked this court's revisionary powers faulting the learned trial magistrate for failing to consider the sentencing policy guidelines of the judiciary 2016. The other grounds for the application for review are as follows:-

a) *That the sentence is harsh unfair and inordinate.*

b) *That the trial magistrate's consideration of the applicant's character and antecedents were unfounded as there was no pre-sentencing report filed.*

c) *That the trial court failed to take into consideration the plight of the applicant's children as mitigating factor and the fact that she was a first offender.*

3. The powers of this court to revise a lower court's order or Judgment is provided under **Section 362** of the Criminal Procedure Code. Under the said provision, this court may call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding sentence or under recorded or passed and/or as to its regularity. In the exercise of those powers this court called for the lower court file No. Chuka PM's Court Criminal Case No.230/2014. I have perused at the record and noted that the trial proceeded well in accordance with the law when the applicant denied the charges against her. When put to her defence, the applicant gave unsworn statement and looking at what she told the court in addition to what PW3 (Catherine Muthoni Elias), it is not hard to fathom the reasons behind the trial court's finding on the character and the antecedent of the applicant herein.

4. I have looked at the charge sheet presented to the trial court against the applicant and noted that the applicant was charged under **Section 7 (1) (b)** of the **Alcoholic Drinks Control Act No. 40 of 2010** which is an Act of parliament passed to provide regulations of the production, sale and consumption of alcoholic drinks. It should not be lost that this Act of Parliament was a Legislature measure taken by the people of Kenya through their representatives in the National Assembly after a public outcry over the health concerns and the menace associated with unregulated sale and consumption of illicit brews. It is in the light of this that the sanction or if you will the stiff penalties provided under Section 62 of the Act should be understood. The section provides as follows:-

"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."

I have looked at the section creating the offence under which the applicant was charged, that section does not provide any penalty. The operation of **Section 62** of the Act therefore comes into play and that may explain why the trial court applied it and used her discretion to impose a fine of Kshs.200,000/- or 18 months imprisonment in default. The applicant herein was satisfied with the conviction. The trial court's finding or guilt is not challenged and cannot be challenged vide an application of review because doing so is contrary to the provisions of **Section 364 (5)** of the Criminal Procedure Code. In the light of this, this court finds that grounds (g) and (h) of the application are incompetent and can only be entertained on appeal and not on review. If the applicant was aggrieved by the trial court's finding of fact or law, she should have preferred an appeal and not an application for review.

5. This court finds that the sentence meted out against the applicant though appearing harsh cannot be described as unfair or inordinate in view of what I have observed was the intention of parliament to discourage the practice and act as a deterrent to others in order to check or control the menace associated with the consumption, sale and distribution of illicit brews. The sentence meted out against the applicant was legal, correct and proper in the circumstances. The quantity of alcohol found with the applicant (400 litres) in my view justified the sentence meted out against her considering the high number of people that would have been affected had they consumed the illicit brew.

In the premises, this court finds no merit in this application. The same is disallowed.

Dated and delivered at Chuka this 14th day of March, 2017.

R.K. LIMO

JUDGE