



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
CRIMINAL APPEAL NO. 61 OF 2017
FORMERLY ELDORET HCCRA NO. 24 OF 2015

REPUBLIC

VERSUS

CHRISTINE ACHUKA.....APPELLANT

JUDGMENT

1. The appellant was convicted for the offence of selling traditional liquor without permit contrary to section 7(1) as read with section 27(4) of the Alcoholic Drinks Control Act No. 4 of 2010 and sentenced to serve imprisonment for 3 years on 10/2/2015.
2. The accused pleaded guilty for the offence whose particulars were that on 7th day of February, 2016 at Marigat Bus stage in Marigat Sub-county within Baringo county (She) was found selling traditional liquor (changaa) to wit 4 ½ litres without permit.
3. In accordance with section 348 of the Criminal Procedure Code, the appellant's appeal could only be on the severity of the sentence.
4. Upon conviction of the offence herein the prosecution presented previous convictions of the appellant in Criminal Case 620 of 2012 on offence of causing actual bodily harm contrary to section 251 of the Penal Code where she was sentenced to serve 1 year probation and criminal case No. 410 of 2013 where she was imprisoned for 9 months for assault causing actual bodily harm. The appellant admitted the previous convictions.
5. Before this conviction and the trial court the appellant pleaded for leniency and stated that her children depended on her and that she was unwell. "In (Grounds of mitigation" attached to the petition of appeal, the appellant alleged that her husband had been killed by cattle rustlers and that she had twin children aged 15 months who had been left under the care of her neighbor when she was imprisoned and that she did the business of selling changaa without licence because she had no other means of earning a living for her children and her aged mother.
6. The appeal was opposed by the DPP who urged the habitual offender status of the appellant evidenced by the multiple convictions.

DETERMINATION

7. I have considered the appeal on the sole question of severity of sentence as permitted under Section 348 of the CPC upon a conviction on plea of guilty. These are well known principles upon which an

appellate court may interfere with his sentence imposed by a trial court. See *Griffin v. R* [1981]KLR 121 (Hancox & (Gachuhi, JJ) citing *Wanjema v. Republic* EA at P. 494 [D] where Trevelyan J set out the principles as follows:-

*“A sentence must in the end depend upon the facts of its own particular case. In the circumstances with which we are concerned, a custodial order was appropriately made, but that which was made can’t possibly be allowed to stand. An appellate court shall not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlook some material factors, took into account some material factor, acted on a wrong principle or his sentence is manifestly excessive in the circumstances of the case. See also *Ogulo s/o Owuora v R* (1954) 21 EACA 270.*

8. The offence of selling changaa without permit is punishable under section 27(4) of the Alcoholic Drinks Control Act by a fine not exceeding two million shillings or to imprisonment for term not exceeding five years or to both. Although the previous convictions were on offences of assault causing actual bodily harm, the appellant cannot be said to have been seen to have been a first offender for purposes of sentencing in accordance with the principle in *Josephine Arissol v. R* [1957] E. A 447 that “it is unusual to impose the maximum sentence on a first offender”. In any event the imprisonment term of three years is not the maximum sentence for the offence. See also *Mavuta v. R* [1973] E.A 89.

9. Although the court is not under statutory requirement to question an accused person on his mitigation (See *Nilsson v. R* [1970] E A 599, and as a matter of general practice evidence is not required of matters relied upon by the defence in mitigation of sentence (See *Saleh v. R* [1971] EA 38) there was nothing to indicate that the appellants alleged children were not receiving good care by the neighbour and the appellants aged mother whose age was not disclosed. The appellants ill-health was not demonstrated.

10. In the end, the court does not find that the sentence of 3 years imprisonment for the offence of selling illicit liquor (changaa) is manifestly excessive in view of the penalty prescribed herein under section 27(4) of the Alcoholic Drinks Control Act and considering the fact that the appellant had two previous convictions for other offences of assault causing actual bodily harm and the matters raised in mitigation not being founded on evidence.

11. The Alcoholic Drinks Control Act No. 4 of 2010, was enacted to address the problem of excessive consumption of alcohol affecting whole communities of the Republic of Kenya and having adverse effects to the economic or social development of the nation. In being an active cause and facilitator for the Alcoholic abuse manace, the appellant is a key contributor of the under development of the country a deterrent. sentence is warranted in these circumstances.

12. Accordingly, for the reasons set out above, I do not find sufficient reasons to interfere with discretion of the trial court in sentencing the appellant, and the appeal in that regard is declined.

DATED AND DELIVERED THIS 20TH DAY OF MARCH, 2017

EDWARD. M. MURIITHI

JUDGE

In presence of

Appellant in person

M.s Kenei for DPP