



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL REVISION CASE NO. 2 OF 2017

JOSEPH MWANGI ACCUSED

-VERSUS-

REPUBLIC PROSECUTION

RULING

1. This court is moved via revision application dated 28/03/2017 which is anchored on the provisions of Section 363 Criminal Procedure Code Cap 75 Laws of Kenya.
2. The back ground being that on 27/03/2017, the Applicant was taken to Senior Resident Magistrate's Court Makueni in Criminal Case No. 169 of 2017 charged with and offence of being drunk and disorderly person contrary to Section 33 (1) as read with Section 32 (2) of the Alcoholic Drinks control Act 2010.
3. On charge being read to him, he admitted the charge and the facts as per the charge sheet.
4. When given opportunity to mitigate, he stated that he had no mitigation.
5. The court thereafter convicted him and sentenced him to serve 3 months imprisonment.
6. The Applicant has opted to seek a revision rather than appeal against the sentence which is the source of his complaint.
7. The matter came for hearing on 04/04/2017, and he was represented by Mr. Tamatta and the Respondent was represented by Ms. Gitau State Counsel.
8. The Applicant case is that he was charged with an offence herein above stated in which he pleaded guilty to.
9. According to him he should have been fined but not awarded custodial sentence. He therefore seeks the court to set aside same sentence and that he be discharged absolutely having regard to the jail term he has served.
10. Ms. Gitau State Counsel response is that, first there was an error on the provisions cited in the sheet as read with Section 32 (2) of Alcoholic Drink Control Act but instead Section 33 (2) Alcoholic Drink Control Act ought to have been cited. However same issue is not raised nor has the Applicant suffered any prejudice.
11. On sentence the state counsel contend that Section 33 (1) as read with Section 33 (2) provides a sentence of Kshs. 500/= or imprisonment of 3 months or both.

12. The trial court gave a maximum sentence of 3 months. The sentence is within the law.

13. I have looked at the record and the provisions of law cited namely, Section 33(1) and 33(2) Alcoholic Drink Control Act 2010. The record shows that the Applicant pleaded guilty to the charge and admitted the facts read to him. He never mitigated when opportunity arose.

14. He was noted to have no previous record. However the court failed to award a fine in sentencing but instead awarded a maximum sentence of three months. It is not known as to what factors made the trial court to award such sentence though within the law.

15. In the treatise of **ESSENTIALS OF CRIMINAL PROCEDURE IN KENYA BY PATRICK KIAGE at P. 180**, the same states: The matters that court should consider in determining proper sentencing include:- "**Value of subject matter, Antecedents of the accused, age, conduct of accused during trial inter alia**" The court in the instant case did not consider any noted elements stated above as far as the record is concerned.

16. The High court is empowered on being moved by a party..... or *suo moto* to exercise all the powers as court on appeal and may enhance the sentence. It has power to alter or reverse sentence or any impugned order except for an order of acquittal.

17. I have noted that the provisions of Section 33(2) Alcoholic Drink Control Act provides that the sentence of being drunkard and disorderly person under Sec. 33(1) Alcoholic Drink Control Act on conviction is a fine of Kshs.500/= or imprisonment of a term of 3 months or both. The accused refused to mitigate. The court thus did not consider the untendered mitigation when sentencing.

18. However, there was no previous record of the accused or antecedents to show his criminal record.

19. The court rationally ought to have awarded either fine or a reasonable period of imprisonment not maximum sentence in the circumstances of the instant case.

20. I find the accused refused to mitigate. I would therefore alter sentence considering the period he has served in prison, as follows:-

1) The accused shall pay a fine of Kshs.500/- in place of sentence of 3 months imprisonment.

2) Upon payment of the said Kshs.500/= he shall be released forthwith unless otherwise held.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 5TH DAY OF APRIL, 2017.

C. KARIUKI

JUDGE

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