



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 84 OF 2015

NAOMI JEPKOGEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An Appeal from the Judgment of the Resident Magistrate Honourable C. M WATTIMAH*

*in Kapsabet Criminal Case No. 1436 of 2015, dated 29<sup>th</sup> June, 2015)*

**JUDGMENT**

1. The appellant was charged with the offence of being in possession of an alcoholic drink without a licence contrary to **Section 27(1) (b)** as read with **Section 27(4)** of the **Alcoholic Drinks Control Act No. 4 of 2010**.
2. The particulars of the offence were that on 29<sup>th</sup> June, 2015 at Kapkemil village in Nandi County, the appellant was found in possession of Kangara to wit 90 litres for preparation of changaa without a licence.
3. On 29<sup>th</sup> June 2015, she was arraigned before the Principal Magistrate's Court at Kapsabet in Criminal case No. 1436 of 2015. She pleaded guilty to the charges and was thus convicted on her own plea of guilty. She was subsequently sentenced to serve 7 months imprisonment.
4. The appellant was aggrieved by the sentence meted out against her by the trial court. She lodged an appeal to the High Court challenging the sentence. In her petition of appeal filed on 15<sup>th</sup> October, 2015, she complained that the sentence imposed upon her was harsh given that she was the sole bread winner of her family and that she had told the trial court in her plea in mitigation that she was remorseful. She beseeched the court to either reduce the sentence or substitute it with a non-custodial sentence.
5. At the hearing, the appellant was represented by learned counsel *Mr. Songok*. In his submissions, *Mr. Songok* urged the court to review the sentence passed by the trial court and substitute it with a lenient fine considering that the appellant was a single mother of four young children; that a custodial sentence would be prejudicial to her children who were innocent; that the appellant was remorseful and promises not to commit a similar offence in future.
6. The appeal is contested by the state. Learned prosecuting counsel *Ms Oduor* opposed the appeal on grounds that the sentence imposed upon the appellant was lawful as it was within the law; that the trial

court had discretion whether to impose a fine or a term of imprisonment. She urged the court to dismiss the appeal for want of merit.

7. I have considered the appeal and the rival submissions made by the appellant's counsel and *Ms Oduor* for the state. I have also perused the proceedings in the lower court. I concur with *Ms Oduor* that sentencing is at the discretion of the trial court. However, that discretion must be exercised judiciously taking into account all relevant factors such as for instance, whether the accused was a first or serial offender; the plea offered in mitigation; the circumstances surrounding the commission of the offence in question and the general principles of sentencing.

8. The principles upon which an appellate court can interfere with the sentence imposed by a trial court were elucidated by the court of Appeal in the case of *Macharia Vs Republic (2003) KLR 115* where the court stated as follows;

***“The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v R, (1950) 18 EACA 147 “it is evident that the judge has acted upon some wrong principles or overlooked some material factors” To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case..”***

9. In this case, the record of the lower court shows that the appellant was supposed to be treated as a first offender. In her plea in mitigation, the appellant sought the court's forgiveness and pledged not to repeat the offence in future. And though the sentence meted out against her was not unlawful as it was well within the law, it is my considered view that a sentence of seven months imprisonment without the option of a fine for a first offender who had expressed remorse and who had promised not to commit a similar offence in future was rather harsh and manifestly excessive. Taking into account the circumstances in this case, I find that there is good reason to interfere with the sentence imposed by the trial court in this case. In the premises, I am persuaded to allow the appeal which I hereby do. Under the powers conferred on this court by **Section 354(3) (iii)** of the **Criminal Procedure Code**, I hereby set aside the sentence imposed by the trial court. In its place, I sentence the appellant to pay a fine of Kshs. 30,000 in default to serve a period of six months imprisonment. The bail granted to the appellant pending the determination of her appeal is hereby cancelled.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 10<sup>th</sup> day of March 2016**

In the presence of:

The appellant

Mr. Nyandoro holding brief for Mr. Songok for the appellant.

Ms. Mokua for the Republic

Ms. Naomi Chonde Court Clerk.