



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL REVISION NOS.143 & 144 OF 2016
FORMERLY RUNYENJES 484 & 483 OF 2016

1. B N

2. C WAPPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being a revision from the original conviction and sentence in CR 484 of 2015 & CR 483 of 2015 at Runyenjes Principal Magistrate's Court by Hon. B.M. Kimemia - PM on 14th July, 2016)

RULING IN REVISION

1. The two consolidated applications are for revision of the sentence of three years imprisonment imposed upon each of the two applicants by the court of Principal Magistrate at Runyenjes. The matter has been sent for revision by the Principal Magistrate at Runyenjes Court (Ms Beatrice Kimemia) vide her letter dated 2nd August 2016.
2. According to her letter, the second applicant (C W) was convicted in criminal case No. 483/15 upon her own plea of guilty and was sentenced to three years imprisonment on 20th April 2016. This applicant had a previous conviction of selling 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, in which she had been sentenced to a fine of Kshs 45,000/- in default to serve six months imprisonment. The said sentence was imposed on 25th February 2016.
3. The first applicant (B N) is the husband of the second applicant. This applicant was sentenced to three years imprisonment following his trial on a charge of selling alcoholic drinks without a licence. He had two similar previous convictions of selling alcoholic drinks without a licence. In those two previous convictions, he had been sentenced to pay fines. In sentencing the first applicant, the trial court considered that a custodial sentence was called for in view of the fact that he had two previous relevant convictions. That court also took into account that the offence with which the first applicant had been convicted was prevalent in that locality.
4. Before the applicants were sentenced to imprisonment, the trial court ordered for and obtained the reports of the Probation Officer (a social worker) which were unfavourable to both applicants. According to the reports, the members of the community as well as the local administrators described the first applicant and his family as “notorious brewers of the illicit alcoholic drinks despite having been convicted several times for the offence. They were therefore of the view that the law ought to take its course and hence reluctant to accommodate him”.

5. Similarly, a Probation Officer's report was prepared in respect of the second applicant. According to the report, the attitude of the local administration was also negative. The report stated as follows. *“The local administration told this social inquiry that it is not the first time the offender was apprehended. This is an activity that the offender has done for long periods even when the local administration asked her to desist which she did not consider. Both the community members and the local administration are of the opinion that the stringent measures taken against the law breakers will work. They do not regret that she is in jail.”*

6. When this first applicant was being sentenced, there were some children in court who started crying and the court found out from the Court's Executive Officer that these children were crying because of the following reasons.

1. That both parents have been convicted and sentenced to 3 years imprisonment.
2. That they have nobody to take care of them as far as food and security is concerned.
3. That they do not have any guardian to pay for their school fees and other needs.
4. That they felt that they may discontinue with their education and engage in bad vices due to lack of parental care and guidance.

7. It is in view of the reaction of the children towards their parents who had both been sentenced to prison for three years that this matter was sent to this court for revision in terms of section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The Principal Magistrate has requested that the sentences of either the mother or the father of the said children be reviewed.

8. The ages of the children of both applicants are as follows:

1. B M N - 20 years in form 3
2. D Gi N - 17 years in form 1
3. J I N - 13 years in std 7
4. B M N - 12 years in std 5
5. R G N - 10 years in std 4

9. This court is authorized to invoke its powers of revision under **sections 362 of the Criminal Procedure Code**. The provisions of that section state as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

10. It is clear from the foregoing provisions that this court is authorized to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by the magisterial subordinate court. In this regard, revision is being sought in respect of the sentence, in view of the reaction of the children towards the sentencing of their parents to three years imprisonment. In terms of **section 62 of the Alcoholic Drinks Control Act (Cap 121A) Laws of Kenya**, the sentence authorized is a fine not exceeding Kshs 500,000/- or to imprisonment for a term not exceeding 3 years or to both. In sentencing the first applicant, the trial court took into account that the first applicant had two similar previous convictions in respect of the same offence. The trial court also took into account that a non custodial sentence was called for in part because the offence was prevalent in that locality and that it was affecting members of the public. The trial court in sentencing the first applicant expressed itself as

follows: “ I have also noted that the accused has 2 previous records for similar offences for which he was convicted on 2/4/2012 and 3/5/13. I note that this offence is very prevalent in this region and it has become a big vice which has affected the members of the community and especially the youth in this region and also country wide hence the reason the president ordered a crackdown on illicit brews. In view of this circumstances I also note that the accused has taken the courts leniency in the 2 previous occasions for granted hence I hereby issue a deterrent sentence. Accused is sentenced to serve 3 years imprisonment”

11. Its clear from the above passage that the trial court took into account extraneous matters in sentencing the first applicant. The trial court remarked that the vice has especially affected the youth: “in this region and also country wide hence the reason the president ordered a crackdown on illicit brews.” These are clearly extraneous matters which a court of law ought not to take into account in sentencing an accused. After taking into account that the **first applicant is a repeat offender in the light of the extraneous matters matters, which the sentencing court took into account I find that the court was influenced by those matters.** In the circumstances, this court is entitled to interfere with the sentence imposed by the trial court in terms of section 362 of the Criminal Procedure Code, by setting it aside. The first applicant is hereby ordered released unless otherwise held on other lawful warrants.

12. Furthermore, in sentencing the second applicant, the trial court considered that the second applicant was a repeat offender. The report of the Probation Officer described her as a notorious brewer of illicit alcoholic drinks. That report also pointed out that her local community are reluctant to accommodate her. In the circumstances, I find no justification for interfering with the sentence imposed upon the second applicant.

13. In the light of the foregoing matters, the sentences imposed upon the first applicant is hereby set aside and is ordered released unless otherwise held on other lawful warrants, while the second applicant's application is hereby confirmed and her application for revision is hereby dismissed in its entirety.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **6th** day of **SEPTEMBER 2016**

In the absence of the applicants and the respondent

J.M. BWONWONGA

JUDGE

06/09/16