



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL REVISION 177 OF 2015

MARGRATE LIMA TUJEAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1 This application for revision has been sought by way of a letter from M/s Mwanyale & Kahindi , Advocates dated 4th December, 2015, under Articles 50 (2) (p) and 165 (6) and (7) both of the constitution and Sections 362 and 364, both of the Criminal Procedure Code.

2 In this letter, the applicant is seeking for the order for sentence in Shanzu Law Courts PCR No. 922 of 2015 on 24th November 2015 revised.

3 The grounds advanced for this are:

(a) that the fine that was meted against the Applicant is excessive and punitive in view of the charge faced by her;

(b) that under Article 50 (2) (p) of the Constitution the applicant is entitled to a less severe punishment.

4 The applicant was charged with the offence of being in possession of Alcoholic drink that does not conform with the requirements of Section 27 (1) (b) as read with Section 27 (4) of the Alcoholic Drinks Control act No 4 of 2010.

5 The applicant pleaded guilty to the charge and particulars thereof stating that she had been found with 3 litres of alcoholic drink namely Mnazi which was not in conformity with the requirements of the said Act as it had been packed into plastic containers. She was convicted and sentenced to pay a fine of Ksh 30,000/= or serve 6 months imprisonment in default. She finds this sentence excessive.

6 Article 165 (6) of the Constitution, provides;-

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

Article 165 (7) of the Constitution ,provides;-

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

7 Under Section 362 of the Criminal Procedure Code, the High court is granted powers of revision in the following manner'

“The High Court may call for and exercise the record of any Criminal proceedings before any subordinate court for the purpose of satisfying itself as to the conviction, legality or propriety of any finding, sentence or order rendered or passed, and as to the regularity if any proceedings if any such subordinate court.”

8 It is worth noting that Section 27 (4) of the Alcoholic Drinks Control Act is the punitive Section and it provides that;

“A person who contravenes the provisions of the section commits an offence and shall be liable to a fine not exceeding two Million shillings or to imprisonment for a term not exceeding five years or both”.

9 To determine whether the sentence which was imposed against the applicant by the trial magistrate in Shanzu Criminal Case No 922 of 2015 was excessive and punitive. I have perused the record of proceedings therein.

10 I have also read into the provision of Article 50 (2) (p) of the Constitution, 2010, which provides that:

“Every accused person has the right to fair trial, which includes the right.”

(p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:

11 In Alister Antony Pariera vs State of Maharashtra, the court held that:

“Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”

12 Clearly, from these findings, the trial court's discretion in sentencing has been emphasized. That in passing sentence, the trial court is expected to consider the purpose of it under the common law This is:

- (a) to ensure that the offender is adequately punished ;
- (b) to prevent crime by deterring the offender and other persons from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender;

(g) to recognize the harm done to the victim of crime and the community;

13 In the instant case, the applicant was sentenced to a fine of Ksh 30,000/= or serve 6 months imprisonment in default, for an offence whose penalty is a fine not exceeding Kshs Two Million shillings or to imprisonment for a term not exceeding five years or to both. It can therefore be clearly seen that the sentence was within the law.

14 A reading into Article 50 (2) (p) of the Constitution relates to a right an accused person is entitled to in a case where the prescribed punishment has been changed between the time the offence was committed and the time of sentencing.

15 The applicant in this case is, according to the particulars of the charge, said to have committed the offence on 23rd November, 2015.

16 The Alcoholic Drinks Control Act No 4 of 2010, under which she was charged, was passed in the year 2010. This therefore means that the applicant committed the said offence after the passing of this law. There has also not been any change in the said Act with regard to the punishment for the offence which the applicant was charged with. As such, the provisions of Article 50 (2) (p) of the Constitution do not, and cannot apply to this case.

17 However, I have considered the issue of the Sentence being excessive and punitive. In cases of such nature, the court also ought to bear in mind the motive for the crime, like in this case, whether possession of alcoholic drink would have been meant for commercial or consumption purposes.

18 I want to believe that one being found with 3 litres of alcoholic drink, most likely, the same may have been for consumption and not for sale. And if this is the case, the packaging would not be a requirement for the consumer but the seller.

19 Having so considered, and there being no criminal records against the applicant, I find the sentence imposed against her excessive and punitive.

21 In exercise of the powers conferred upon this court by Section 362 and 364 (1) (b) both of the Criminal Procedure Code and Article 165 (6) and (7) of the Constitution, I hereby alter the sentence in the following terms;

(a) the applicant is fined Ksh 15,000/= or in default serve 6 months imprisonment in default;

(b) the applicant to be refunded the balance of the fine which had been imposed against her, if at all she had paid.

RULING, DELIVERED DATED and SIGNED at MOMBASA this 8TH day

of September 2016.

D. CHEPKWONY

JUDGE