

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 18 OF 2016

LUCY KARIMI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of dealing in alcoholic drinks without a licence contrary to **Section 7 (1) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010**. The particulars of the charge were that on 8/5/2016 at Maua, in Igembe South, she was found in possession of 100 litres of *muna* and ½ litre of *chang'aa* without a licence.

When the appellant was arraigned before the Court on 9/5/2016, she pleaded guilty and was sentenced to serve a period of one year imprisonment. She filed an amended appeal on 4/7/2016.

At the hearing of the appeal, the appellants' Counsel Mr. Mutembei abandoned all the grounds save for ground 7 in which the appellant states that the trial court erred in sentencing the appellant to custodial sentence without an option of a fine. Counsel urged that there was no evidence that the appellant had any previous convictions and merely based the sentence on the word of the Chief to the Probation Officer, that she was a notorious brewer. Counsel relied on the decisions ***of Ian Kabai Mburu v Rep CRC 211/2015***, which facts were similar as this case and the court held that the court should have considered an option of fine. Counsel was also of the view that the court should have taken into account the quantity of and quality the alcoholic drink received.

Lastly, Counsel urged that the appellant's mitigation was never considered.

Mr. Mulochi, Counsel for the State was not opposed to the appeal because the trial court should have considered the option of fine.

I have considered the submissions of Counsel and the decisions cited. There is no doubt that the appellant pleaded guilty to the offence and was convicted in her own plea. The court called for a probation Officer's report. The Probation Officer reported that the Chief had indicated that the appellant was a notorious brewer of illicit brew in the locality and that therefore a non-custodial sentence would not act as deterrent. However, so far as the prosecution were concerned that the appellant was a first offender. Despite the recommendation of the Probation Officer, it is the Magistrate who has the discretion to consider which sentence to mete on the appellant. The Alcoholic Drinks Control Act provides the punishment to be meted out on an offender and the spirit of the Act seems to be that sentence will be in the form of fine and in default, imprisonment. **Section 62** provides a general penalty of fine in default, imprisonment. The court should have considered that the appellant was found with an alcoholic drink called *muna* whose effects are not serious. She had only ½ litre of *chang'aa*. It is my view that the appellant should have been given an option of fine in default custodial sentence. I find that the court acted harshly and in error considering all the above factors.

In the end, I find merit in the appeal and allow it. The appellant was sentenced on 24/5/2016. So far, she has served 5 months imprisonment. This court will exercise its discretion and sentence the appellant to the term already served and I direct that she should be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF OCTOBER, 2016.

R.P.V. WENDOH

JUDGE

7/11/2016