REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

HCCRA.1 OF 2015

GLADYS NALIAKA ……..……PETITIONER

VERSUS

REPUBLIC …….....RESPONDENT

JUDGMENT

This appeal arises out of conviction and sentence of one Gladys Naliaka who on 21st July 2015 was charged with the offence of being in possession of Alcoholic drink, contrary to section 27(4) as read with section 27(1),(B) of the Alcoholic Drinks Control Act.

The particulars of the offence as carried in the charge sheet are that at Talau within West Pokot County, she was found in possession of Alcoholic drink namely chang'aa to wit 25 litres, without a licence.

When the appellant appeared in court on 21st July 2015, before the Resident Magistrate Hon. M. M. Wachira, she pleaded guilty to the charge and was sentenced to four months imprisonment, of which she is still serving. Dissatisfied with the said sentence, Advocate M/S Risper Arunga & Company brought up this appeal against the sentence on the following grounds;

(1) That the learned Magistrate erred in law when he failed to give the option of a fine to the petitioner.

(2) That the said Magistrate erred in law when he failed to take mitigating factors before sentence.

(3) That the sentence was excessive.

During the hearing of the Appeal on 29/9/2015 Miss Chebet who appeared for the Appellant argued that section 27(4) sets out the sentence for the offence, of which is a fine not exceeding two million or imprisonment not exceeding 5 years or both. She averred that where the sentence provides for option of a fine, it's the custom of the court to grant fine as an alternative to custodial sentence, to which the Appellant was not accorded.

The Advocate mitigated on behalf of the Appellant stating that she is a single mother of two issues aged 6 and 3 years. She is a first offender, and was not accorded a chance to mitigate. The Advocate argued that if these facts had been considered, her client would not have been sentenced to four months imprisonment without option of fine, of which to the learned Advocate's opinion is excessive. She urged this court to allow the appeal, substitute the sentence or set it aside, to accord the Appellant freedom.

Mr. Mark the learned State prosecutor opposed the appeal. He argued that given the sentence provided

for the offence in law, 4 months imprisonment was not excessive. It's a sentence that is within the law. It was not arbitrary and the Magistrate was considerate. He further submitted that fine as an alternative is discretionary and the trial Magistrate was within the law when he did not consider her for fine as an option. He therefore urged the court to dismiss the appeal and uphold the sentence.

In making a finding in this case, I have considered that the sentence provided for the offence the appellant was charged with, is a fine not exceeding 2 million or imprisonment not exceeding 5 years or both. When I consider this against the sentence the appellant was granted of 4 months, I do find the trial Magistrate was considerate and lenient enough. An option of fine in sentence, unless where the provisions may indicate is mandatory, is always at the discretion of the trial court. It's not illegal to deny an accused person the option. The court cannot interfere with the sentence granted to an appellant in the lower court where such sentence is within the law, inexcessive and reasonable, considering the circumstances of the case.

I therefore find no error to correct on sentence in this matter. For the reasons, I do dismiss the appeal, the appellant will serve the sentence granted.

Judgment dated and delivered at Kapenguria this 13th day of October 2015.

STEPHEN GITHINJI J

Miss Chebet for the Appellant and Mr. Mark for the State are present.

STEPHEN GITHINJI J

13/10/2015