

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. APPLICATION NO.211 OF 2015

(An Application for Revision arising out of the conviction and sentence of

W. NGUMI –SRM delivered on 16th September 2015

in Gatundu SRM.CR. Case No.1098 of 2015

IAN KABAI MBURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Ian Kabai Mburu was charged with the offence of **being in possession of an alcoholic drink** that does not conform to the requirements of **Alcoholic Drinks Control Act** contrary to **Section 27(1)(b)** of the said **Act**. The particulars of the offence were that on 8th September 2015 at Gatukuyu Village, in Gatundu North, Kiambu County, the Applicant was found in possession of 2 litres of chang'aa in a polythene bag instead of a container in contravention of the **Alcoholic Drinks Control Act**. The Applicant pleaded guilty to the charge when he was arraigned before the trial magistrate's court. The Appellant was sentenced to serve six (6) months imprisonment without an option of fine. The Applicant was aggrieved by the decision and has moved this court to have the decision revised on several grounds. In particular, the Applicant was aggrieved that he had been sentenced to serve a custodial sentence without being given an option to pay a fine.

This court has carefully considered the reasons put forward by the Applicant in seeking this court to revise the said sentence. Under **Section 362** of the **Criminal Procedure Code**, this court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court with a view to satisfying itself of its correctness, legality and propriety. In the present application, it was clear that the trial court applied the wrong principles in sentencing the Applicant to serve a custodial sentence. It is not clear from the record if the Applicant was a first offender. The trial court did not make this inquiry from the prosecution. It was apparent that the trial court relied on the probation report to sentence the Applicant. The information obtained by the probation officer relied on information obtained from the local administration and from the police. This information essentially dealt with the current effort by the local administration to eradicate alcoholism within the area.

It has got nothing to do with the Applicant's particular behaviour that resulted in the probation officer recommending that the Applicant was unsuitable to serve a non-custodial sentence in form of probation or community service. The probation officer recommended that the Applicant be dealt with otherwise subject to the discretion of the court. The **"otherwise"** in the view of this court included sentencing the Applicant to pay a fine in lieu of a custodial sentence. The **Alcoholic Drinks Control Act** provides punishment to be meted out upon the conviction of an offender. Most of the recommended punishment is in form of fines and in default imprisonment. Under **Section 27(4)** of the **Alcoholic Drinks Control Act**, the Applicant should have been given the option of a fine before being sentenced to serve custodial sentence. In any event, the Applicant being probably a first offender, the custodial option should have been exercised as a last result. The trial court was clearly in error when it meted out the sentence.

In the present application, it is clear that the trial court erred in not giving the Applicant the option of a fine before sentencing him to serve a custodial sentence. That sentence was therefore unlawful and is amenable to be revised by this court. In the premises therefore, this court sets aside the custodial sentence that was imposed on the Applicant. It hereby substitutes the said sentence with a sentence of this court commuting the sentence of the Applicant to the period already served. The Applicant is ordered at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE