



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 36 OF 2015

SENIOR RESIDENT MAGISTRATE,

KILUNGU LAW COURTS.....APPLICANT

VERSUS

WINNIE NDINDA MUTUA.....RESPONDENT

RULING ON REVISION

The request for revision herein is in a letter dated 9th July 2015 by Hon. Patrick Wambugu, the Senior Resident Magistrate at Kilungu Law Courts. The learned magistrate stated that when the case file was placed before him in Kilungu SRM Criminal Case No. 364 of 2015, he inadvertently mistook the case as one of lack of an application for licence for retail purposes, and fined the Respondent Kshs.3000/=. However, that he learnt later that the Respondent was a businesswoman that the trial Court had dealt with last year, and had destroyed her alcohol of almost five tonnes. The learned magistrate stated that he realized that he had been excessively lenient, and requested this Court to review the fine upwards.

The Respondent herein was charged in Kilungu SRM Criminal Case No. 364 of 2015 with the offence of selling beer without a licence contrary to section 7 (1)(b) of the Alcoholic Drinks Control Act, Act No. 4 of 2010. The particulars of the offence were that on 3rd July 2015 at Nanguni Market, Kauti sub-location, she was found selling various alcoholic drinks without an alcoholic beer licence of the year 2015. The Respondent pleaded guilty and was convicted of the offence and sentenced to pay a fine of Kshs 3,000/= or two months' imprisonment. It would appear that the Respondent paid the fine.

I have considered the application and request by the learned magistrate, and note that section 364 of the Criminal Procedure Code provides for the powers of the High Court on revision as follows in this regard:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

The Respondent was charged with an offence under section 7(1)(b) of the Alcoholic Drinks Control Act. It is provided therein as follows:

No person shall—

(a) manufacture or otherwise produce

(b) sell, dispose of, or deal with;

"(1)

c) import or cause to be imported; or

any alcoholic drink except under and in accordance with a licence issued under this Act.”

The offence under **Section 7(1)(b) of the** Alcoholic Drinks Control Act does not have a specific prescribed sentence, and section 62 of the Act which is the general penalty clause therefore applies. The said section prescribes a sentence where no penalty is provided under the provisions of the Act, of a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.

The sentence of Kshs 3,000/= or two months imprisonment meted by the trial Court on the Respondent was therefore a lawful sentence under section 62 of the Alcoholic Drinks Control Act. In addition, there is no record of any submissions or evidence by the Prosecution in the trial Court that the Respondent was a repeat offender, that would justify the enhancement of the Respondent’s sentence.

The application and requests by the learned magistrate is declined for the above reasons, and this order to be furnished to the Senior Resident Magistrate, Kilungu Law Courts and the Respondent without delay.

DATED AT MACHAKOS THIS 10TH DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE