



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. E017 OF 2021

NEWTON KIMUTAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the sentence passed in Criminal Case No. E 636 of 2021 in the Chief Magistrate's Court

at Eldoret by Hon. R. Odenyo, SPM on 13 March 2021)

RULING ON REVISION

[1] This application for revision has been brought by the applicant herein, **Newton Kimutai**, from the sentence imposed on him by the Senior Principal Magistrate, Hon. Odenyo, in **Eldoret Chief Magistrate's Criminal Case No. E0636 of 2021: Republic vs. Newton Kimutai**. The applicant was therein charged with the offence of stealing contrary to **Section 268** as read with **Section 275** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that, on **17 February 2021** in Eldoret Town, the applicant stole one bag, 3 shirts, two note books and **Kshs. 5,000/=** in cash; all valued at **Kshs. 9,500/=** the property of **Michael Otieno Nundu**.

[2] Upon the applicant's arraignment before the lower court on **19 February 2021**, he admitted the charge and was consequently sentenced to 2 years' imprisonment. He now contends that there is an error on the face of the record in so far as he was not given a non-custodial sentence, granted the mitigating factors brought to the attention of the lower court. He further asserted that he had now learnt his lesson and regrets the offence; and added that he is a student at the University of Eldoret and would wish to continue with his education.

[3] **Section 362** of the **Criminal Procedure Code**, recognizes that:

"The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."

[4] In that regard, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."

[5] It is in that light that the lower court record was availed for perusal; and it confirms that the applicant admitted the charge, the facts were then read over and explained to him and he admitted them to be correct. Those facts show that the complainant had gone to a betting shop within Eldoret Town to play video games. He was carrying a handbag containing the items listed in the particulars of the charge, namely: 3 shirts, 2 books, 2 pens and **Kshs. 5,000/=** inside one of the books. He placed the bag in one of the empty seats as he played video games. The applicant made away with the bag while the complainant was distracted by the games he was playing. When he checked, and found his bag missing, he reported the incident to the police. Police officers visited the scene, watched the CCTV footage for the day and time and ascertained that the theft had been committed by the applicant. He was looked for, arrested and accordingly charged.

[6] Upon admitting the facts, the lower court gave the applicant an opportunity to express himself in mitigation. He was thereafter sentenced as aforementioned. It is evident, therefore, that the lower court omitted to record a conviction against the applicant after the applicant admitted the facts. That is a vital step, and its omission amounts to a grave error; an error whose effect is to vitiate the entire proceedings before the lower court. This is because **Section 207** of the **Criminal Procedure Act, Chapter 75** of the **Laws of Kenya**, explicitly states that:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.(emphasis added)

[7] Similarly, in Adan vs. Republic [1973] EA 446 Spry, V.P. set out the elaborate procedure for taking pleas thus:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded.

[8] I find succor in the case of Mohamed Gohad Mohamed vs. Republic [1992] eKLR, wherein it was held that:

“... I wish first of all to point out that no conviction was entered against the appellant. The record does not show that the appellant was convicted of the offence charged whether or not on his own plea of guilty. No punishment can be imposed on an accused person by a Court of law unless such person is found guilty of an offence and duly convicted. Where there is no record of any such conviction having been entered, as is the case here, then such sentence is improperly imposed and the whole proceedings become a nullity.”

[9] Likewise, in Simon Mutisya Mutiso vs. Republic [2018] eKLR, it was held that:

“The circumstances of this case are that the accused pleaded guilty to the charge. He appears to have understood the allegations against him and opted to admit having committed the offence. The only remaining procedure after the accused pleaded guilty was for a conviction and for the accused to mitigate. From the record the accused made a statement in mitigation but no conviction was recorded by the Court. Both counsels are in agreement that the proceedings are irregular, the sentence illegal and should be set aside. I take the position that the plea of the accused was not unequivocal. I find that the proceedings in the trial court against the accused were irregular and not in accordance to the Criminal Procedure Code. As a result the orders made must be set aside due to the aforesaid irregularity.”

[10] Being of the same persuasion as stated hereinabove above, it follows that the appellant's sentence is untenable for being null and void. The same is hereby set aside. It is consequently ordered that the applicant be released forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 27TH DAY OF MAY 2021

OLGA SEWE

JUDGE