REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL REVISION NO. 97 OF 2021

DOMINIC KIPKURUI..... APPLICANT

- VERSUS -

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING ON REVISION

1. This Revision has come to me through Chamber Summons filed under Certificate of Urgency dated 6 September 2021. The Application is brought under section 10 of the Judicature Act, Rule 3(1) & (2) of the High Court Practice and Procedure Rules and section 3A of the Civil Procedure Act. The Applicant sought leave of the court to be heard during the current court vacation due to the urgency of the matter.

2. The background to this Revision is contained in the trial court proceedings which I have perused. The Accused person was arraigned before the Principal Magistrate's Court at Tamu in respect of Criminal Case No. E298 of 2021 and charged with the offence of willfully obstructing a police officer contrary to Section 104 of the National Police Service Act. The particulars are that on 15th day of August 2021 at around 1500hrs, at Cheptenye in Belgut sub-county within Kericho County, willfully obstructed No. 118446 PC Peter Kamitha and No. 114148 PC Mburu, police officers, who at the time of the said obstruction were acting in the execution of their official duty.

3. The substance of the charge was read to the Accused person who responded, "It's true". A plea of guilty was entered and the facts were read out to him.

4. The facts were as follows: That on 15th August 2021, at around 3.00 p.m. police officers from Kapsoit Police Station together with the chief and sub-chief were on an operation on illicit brew and came across a group of people who had gathered without masks. The group of men ran away and left behind a motorcycle, which one PC Kamitha rode to the police station as the Police land cruiser followed behind. At that point, two motor cyclists overtook and blocked the police landcruiser. One (the Applicant) was arrested, and the other ran away.

5. The Applicant accepted the facts as correct and was convicted on his own plea of guilt. He was consequently sentenced to pay a fine of Kshs.100,000 or serve imprisonment for one year.

6. The above forms the basis of this Revision in which the Applicant has listed the grounds that:-

(i) That the Applicant has been sentenced to serve one year in prison or pay a fine of Kshs.100,000 for an offence that does not exist under the section he has been charged.

(ii) That the continued incarceration of the Applicant is illegal and is not supported in law.

7. Filed alongside this Revision is a supporting affidavit dated 6th September 2021 sworn by the Applicant. He avers that the court did not properly explain what the offence was about and that the section of the law upon which he is purportedly convicted of does not provide for the offence with which he was charged.

8. The Revisionary powers of the High Court are provided under **Article 165** of the Constitution and **Section 362 to 366** of the Criminal Procedure Code which provide as follows:-

Article 65 of the Constitution

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or

person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

Section 362 of the Criminal Procedure Code, Cap 75

"Power of the High Court to Call for Records:

The High Court may call for and examine the record 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."

Section 364 further outlines the manner in which this jurisdiction should be exercised. It states as follows:

"Powers of the High Court on Revision

(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 –

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 defense:

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.

9. The Black's Law Dictionary 10th Edition, defines *Review* as a consideration, inspection or re-examination of a subject or a thing. It entails a second view or revision; consideration for purposes of correction.

10. The law requires that Revision is considered from three main facets i.e. **correctness, legality and propriety**. I observer from the trial court record, that the offence indicated on the Charge Sheet is '*Willfully obstructing a Police Officer'* and the law quoted is **Section 104 of the National Police Service Act No. 11A of 2011**. However, the Section provides as follows:-

104. Private use of police officers

(1) The Inspector-General may on application by any person, station an officer for duty at such place and for such period as the Inspector-General may approve.

(2) Notwithstanding subsection (1), the Inspector-General shall only deploy an officer for private use for the protection of public good or interest.

(3) The monies paid for the private use of the police as specified in subsection (1) shall be paid to the Treasury.

(4) ***The Inspector-General shall make regulations generally to give effect to this section."***

11. Evidently, the above section is of no relevance to the facts of this case. It seems clear from the facts that the correct section of the law that the Applicant ought to have been charged under was section 103 (a) which provides as follows:

103. Assault in Execution of Duty

"Any person who -

(a) Assaults, resists or willfully obstructs a police officer in the due execution of the police officer's duties;

(b) ……

Commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both"

12. The issue then is whether the error would defeat a charge or may be curable in law. The test to be applied is whether the error would occasion a failure of justice to the accused person.

13. **Section 382 of the Criminal Procedure Code Cap 75** provides:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall

be reversed, or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

14. From my perusal of the Record, it is apparent from the facts of this case that the Applicant understood the charge that he was facing. He in the first instance stated that, *"It's true"* when he took plea. When the facts of the case were read to him, he confirmed the same by stating, "*The facts are correct."* The Record demonstrates that he had a right understanding of his actions and their consequences which led him to admit that the facts were correct. I am therefore in no doubt that the Applicant fully understood the nature of the offence. To this extent, therefore he suffered no prejudice in admitting the facts which were well within his knowledge.

15. Secondly, Section 382 creates a proviso to the effect that for the court to determine whether injustice had been occasioned to an accused, it must consider whether such an error was brought to the trial court's attention through an objection at the onset or at an early stage in the trial. This position was stated in the case of **Muasya vs. Republic (1969) E.A. 345** where Rudd J. said:-

"…as regards the proviso to this section, no objection to the charge has been raised at all to this very moment by the appellant. On the other hand, if the Appellant in the said case had objected to the charge at any proper time in the lower court, the charge could have been amended to fall within the proper provisions."

16. There is nothing on the record that indicated any objection or concerns from the Applicant. To this end, I must dismiss the assertion by the Applicant that the error is incurable yet it was not raised in the first place.

17. Thirdly, it is incumbent on the court to consider the elements of a proper charge in order to determine whether or not the error therein was curable. A charge has been defined by the **Black's Law Dictionary 10th Edn, 282** as *"A formal accusation of an offense as a preliminary step to prosecution."* Under the **Criminal Procedure Code Section 134**, the elements of a charge are well defined as follows:-

"Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or the offences with which the accused person is charged, together with such particulars as may be necessary for giving information as to the nature of the offence charged."

18. The charge in the present application clearly outlines the actual offence and outlines the particulars, being essential ingredients as stipulated by law. Where these essential ingredients are missing, then such a charge would be defective. In the same fashion, where the offense allegedly committed by the person is not provided for in law, then such a charge would also be rendered defective. These principles were summed up by Kimaru J. in **Sigilani vs. R (2004) 2 KLR, 480** where he stated:-

"The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offense charged should be disclosed and stated in a clear and unambiguous manner so that the accused is able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defense."

19. In the present case, the only 'error' evident to me is misquoting of the actual legal provision. The offense and its subsequent ingredients are clearly outlined in the charge and from the facts of the case. The error on the correct legal provision is something that could be properly cured and not fatal in any way to the prosecution's case. The Applicant has not demonstrated how he was prejudiced by the error. He accepted that the facts as read as depicting the true occurrence of events. As held in the case of ***Avone vs. Uganda (1969) E.A. 129***, where the mis-descriptions in the charge sheet had not prejudiced the appellant, the conviction ought to be allowed to stand.

20. Consequently, I have come to the conclusion that there was no apparent miscarriage of justice or prejudice to the Applicant and the claim in respect of illegality of the trial, conviction and subsequent sentence is unmerited. The Applicant was properly convicted.

21. I will now address the issue of sentencing.

22. It is trite that sentencing is at the discretion of the trial court. Any decisions emanating from an exercise of this discretion should only be disturbed where the court forms a view that from the circumstances of the case, the punishment meted is either harsh, illegal, erroneous, manifestly excessive or inappropriate. In **Mbogo v. Shah (1968) EA 93**, the East Africa Court of Appeal stated the principle thus:-

"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice".

See also **Mwangi vs. Wambugu (1984) KLR at 453 and Kelly Kesses vs Republic.**

23. In the present case, the Applicant was sentenced to a fine of Kshs.100,000/= and in default imprisonment of one year. Section 103 of the National Police Service Act, provides the maximum penalty for an offence such as the one which the Applicant was charged as a fine not exceeding of Kshs.1 million or imprisonment for a period not more than 10 years.

24. The facts of the case however have not disclosed any aggravating actions by the Applicant. The conduct of the Applicant from my perusal of the trial file also indicates that he was indeed honest enough to accept that he had acted in the manner he did and further, that he

was remorseful. He was also a first offender, acknowledged his indiscretion and stated that he would not repeat the offence. He also saved precious judicial time by pleading guilty.

25. Taking all these factors into consideration and the circumstances of this case, I find that the sentence was manifestly harsh and excessive.

26. Consequently, I set aside the sentence of Honorable Rugut issued on 17 August 2021 and substitute therefor a fine of twenty thousand shillings (Kshs.20,000/=) and in default one month imprisonment from the date of conviction and sentence.

27. Orders accordingly.

Revison dated and Signed at Bomet High Court on this 9th day of August 2021 in the absence of the parties who shall be served the Ruling and Orders through the Office of the Deputy Registrar of this Court.

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R. LAGAT-KORIR

JUDGE