



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL REVISION NO. E146 OF 2021

NICODEMUS MUUMBI..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, **Nicodemus Muumbi**, being aggrieved by the decision of **Hon. H. Onkwani PM** delivered on **11th August, 2021** at the Chief Magistrates Court at Mavoko in **Traffic Case No. E619 of 2021** has approached this court vide Chamber Summons application and revision application dated 23/8/2021 as well as a letter dated **19th August, 2021** praying for the reversal of the sentence of the trial court.
2. The Applicant's case is that he was arrested on **7th August, 2021** and therein charged with the offence of driving a motor vehicle on a public road with an abnormal load without permit, contrary to section **9(1)(a)** and section **20 (1)(b)** as read with section **21(1)** of the **East African Community Vehicle Load Control Act 2016**.
3. Upon the Applicant's arraignment before the trial court on **10 August 2021**, the said charge was read to him and he pleaded guilty and on **11th August, 2021** was fined **Kshs. 1,000,000/=** in default to serve **Three (3) years** in prison.
4. The Applicant now contends that he was convicted and sentenced without the particulars of the charge being read to him as per section **207(2)** of the **Criminal Procedure Code** and hence the facts and nature of the offence with he was charged was never disclosed to him. He further contends that the said court did not allow him to mitigate considering that the requisite fee for exemption permit had been paid.
5. In response to the application, learned counsel for the Respondent, Mr. Mwangera, concurred with the Applicant's sentiments. He deponed that the trial court failed to follow the law by ensuring that the facts were read out to the Applicant, and further, that it did not take into account the mitigation of the applicant before sentencing him. He urged this court to grant an order for retrial.
6. 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."
7. In that regard, section **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."
8. It is in that light that the trial court's record was availed for perusal; and it confirms that the applicant admitted the charge but the facts were not read over and explained to him and it seems he admitted to an offence he didn't understand.
9. Upon admitting the to the offence, the trial court did not give the applicant an opportunity to express himself in mitigation. He was thereafter sentenced as aforementioned. It is evident, therefore, that the trial court omitted to record a disclosure of facts and nature of offence and mitigation prior to sentencing of the applicant before and after the applicant admitted to the charges. 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 Code, 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)

10. 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”.

11. 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.”

12. In light of the foregoing circumstances and the authorities, it follows that the applicant's conviction and sentence by the trial court was arrived at in error and must be interfered with. Learned counsel for the Respondent has sought for an order for a retrial. Indeed, a retrial can be ordered where the circumstances of the case warrant. At times a retrial might prejudice an accused person who has been in custody for a long period. At other times a retrial might be used by the prosecution to seal some loopholes or gaps in their case. The accused herein has barely served his sentence and a retrial in my view will not prejudice him in any way.

13. In the result, the Applicant's request for revision is merited. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. An order for a retrial is issued. If any fines have been made, then the same is ordered to be refunded. The accused is ordered to be produced before the Chief Magistrate Mavoko law courts on the 29/9/2021 for the purposes of a retrial.

It is so ordered.

Dated and delivered at **Machakos** this 28th day of **September, 2021**.

D. K. Kemei

Judge