



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 21 OF 2019**

**(A revision of the order of Hon. C.A. Ogwen, Resident Magistrate, made on 6<sup>th</sup> March, 2019 in Mombasa Chief Magistrate's Court Traffic Case No. 651 of 2018 and the decision of Hon. Kagoni, Principal Magistrate made on 10<sup>th</sup> June, 2019 in Mombasa Chief Magistrate's Court Traffic Case No. 2997 of 2019)**

**PHILIP MWAURA NDUNGU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. The applicant has moved this court under the provisions of Sections 363, 364 and 365 of the Criminal Procedure Code. He seeks revision of the decision of Hon. Ogwen made on 6<sup>th</sup> March, 2018 to cancel his Driving Licence for failure to attend court on 14<sup>th</sup> February, 2018 for plea taking and subsequent mentions on 27<sup>th</sup> February, 2018, and 6<sup>th</sup> March, 2018.
2. The charge was withdrawn under the provisions of Section 87(a) of the Criminal Procedure Code on 13<sup>th</sup> March, 2018 since the applicant was nowhere to be traced. The order to cancel the applicant's Driving Licence was made in Mombasa Chief Magistrate's Court Traffic Case No. 651 of 2018. The charge was that of failing to maintain all parts and equipment (sic) contrary to Section 55(1) as read with Section 58(1) of the Traffic Act.
3. The particulars of the charge were that on the 14<sup>th</sup> day of February, 2018, at about 8:00a.m., along Refinery Road in Mombasa County of the Coast Region being the Driver of the said motor vehicle registration No. KCG 135Y make Ashok did drive the said motor vehicle along the said Public Road failed to maintain parts and equipments (sic) namely, (1) Faded chevrons (2) Corroded body.
4. Later, on 10<sup>th</sup> June, 2019 the applicant was charged in Mombasa Chief Magistrate's Court Traffic case No. 2997/2019 with the offence of failing to attend court contrary to Section 117 (A) as read with Section 118(B) of the Traffic Act Cap 403 Laws of Kenya.
5. The particulars of the charge were that on the 14<sup>th</sup> February, 2018 at about 8:00a.m., along the Mombasa-Nairobi Road in Changamwe sub-county within Mombasa County, having been bonded to attend court to answer to the charge of failing to maintain parts and equipment contrary to Section 55 of the Traffic Act Cap 403 Laws of Kenya failed to do so vide TCR No. 334 of 2018 and Court file No. 651 of 2018.
6. In Count II, he was charged with the offence of failing to maintain all motor vehicle parts and equipment (sic) contrary to Section 55(1) as read with 58(1) of the Traffic Act Cap 403 Laws of Kenya. The particulars of the charge were that on the 14<sup>th</sup> day of February, 2018 at about 8:00a.m along Mombasa – Nairobi road in Mombasa County, of the Coast Region being the driver of motor vehicle registration number KCG 135Y make Ashok did drive the said motor vehicle along the said public road failed (sic) to maintain parts and equipment namely .....(parts not disclosed)
7. The applicant pleaded guilty to both counts. He informed the court that he contacted Chikungunya and travelled upcountry for treatment. The Hon. Magistrate entered a plea of guilty and noted that the Driving Licence for the applicant had been canceled and that was enough punishment for Count I. He was discharged under Section 35(1) of the Criminal Procedure Code. The Hon. Magistrate rejected the charge under Section 89(5) of the Criminal Procedure Code. He ordered for Count II to be presented in file No. 651 of 2018 and not in the file for Mombasa Chief Magistrate's Court Traffic Case No. 2997 of 2019.
8. In his application for revision, the applicant states that he was not given a chance to mitigate and therefore finds the decision punitive as the offence he was charged with involved a vehicle that he was not the owner of and maintaining the same was the owner's responsibility. He cited the case of **Republic vs Jane Nambuye Manyonge** [2017] eKLR where the court emphasized that mitigation is a constitutional imperative.

9. I have perused the proceedings of 10th June, 2019 and noted that indeed the applicant was not given an opportunity to mitigate by the Trial Court. I also find it non-procedural for the said court to have read the charges in Count I and Count II to the applicant, entered a plea of guilty and thereafter rejected Count II under the provisions of Section 89(5) of the Criminal Procedure Code. The Hon. Magistrate then directed that the said Count be heard under Traffic Case number No. 651 of 2018.

10. Instead of the Hon. Magistrate entertaining the two counts, he should have at the first instance noted that Count II could be heard in Mombasa Chief Magistrate's Court Traffic Case No. 651 of 2018. He should therefore not have taken plea and entered a plea of guilty in respect to Count II of the charges facing the applicant. The particulars of the charge in Count II were not even fully drafted.

11. I also note that the manner in which the plea was taken renders it to be equivocal. The facts were never read out to the applicant and no conviction was entered. The applicant was also not given an opportunity to mitigate on Count I before he was discharged by the court. The discharge by the said court did not resolve the issue of the cancellation of the applicant's Driving Licence.

12. The procedure for plea taking as provided in the case of **Adan vs Republic** [1973] EA 445 was not followed. Subsequent thereto, the Court of Appeal in **Kariuki vs Republic** [1984] eKLR also outlined the manner in which a plea of guilty should be recorded as follows:-

***(i) The Trial Magistrate or Judge must read and explain to the accused the charge and all the ingredients of the offence, in the language of the accused or a language the accused understands;***

***(ii) He should then record the plea in the accused person's own words and if they are an admission, a plea of "guilty" should be entered;***

***(iii) The prosecution must then, immediately, state the facts and the accused person should be given an opportunity to dispute, to explain or to add any relevant facts;***

***(iv) If the accused does not agree to the facts or raises any question to the facts, his answers should be recorded and a change of plea entered. If there is no change of plea, a conviction should be recorded alongside a statement of facts relevant as well as the reply of the accused".***

13. With regard to the order made by Hon. Ogweni on 6<sup>th</sup> March, 2018 for the cancellation of the applicant's Driving Licence, the powers of the court with regard to suspension, cancellation and endorsement of driving licences is spelt out in Section 76(1)(a) of the Traffic Act. It provides as follows:-

***"(1) Any court before which a person is convicted of any offence in connection with the driving of a motor vehicle may –***

***(a) If the person convicted holds a driving licence or provisional driving licence, suspend the licence for such time as the court thinks fit, or cancel the licence and declare the person convicted (emphasis added) disqualified for obtaining another licence for a stated period."***

14. In the traffic case before Hon. Ogweni, she canceled the applicant's driving licence without a hearing because he failed to attend court. As such there was no conviction as contemplated under the provisions of Section 76(1)(a) of the Traffic Act that could have called for cancellation of his Driving Licence. The said order was therefore irregular and unlawful.

15. I therefore set aside the orders made by Hon. Ogweni and Hon. Kagoni in the 2 cases in issue. I order that the applicant's Driving Licence be reinstated by the National Transport and Safety Authority, as it was cancelled without due process of the law. Once reinstated, the said Driving Licence shall be surrendered to the custody of the Officer-in-charge of Changamwe Traffic Base for safe keeping until the applicant has gone through the retrial process.

16. The applicant shall be retried for both Counts I and II of the charges laid out in Mombasa Chief Magistrate's Court Traffic Case No. 2997 of 2019. The applicant shall attend court on 19<sup>th</sup> August, 2019 for plea taking.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 1st day of August, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Applicant present in person

Ms Mbaeh, Prosecution Counsel for the DPP

Mr. Mohamed Mohamud - Court Assistant