



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL REVISION CASE NO.12 OF 2016**

**NG'ETICH KIPKOECH BERNHARD.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant was charged with the offence of violating the prescribed speed limit contrary to section 42 (1) and 43 (1) of the Traffic Amendment Act No. 37 of 2012. The particulars of the offence were that on 13<sup>th</sup> October 2016 along the Kericho - Nakuru road, at around 8.30 a.m., he drove his motor vehicle at a speed of 114 k.p.h which was greater than the maximum speed of 100 k.p.h. The charges were subsequently withdrawn under section 87 (a) of the Criminal Procedure Code (CPC).
2. The applicant states that he was granted leave by the trial court to revisit the matter before this court by way of revision as regards the nature of the charges that had been filed and withdrawn under section 87 (a), and the constitutional aspects thereto.
3. The applicant filed lengthy submissions which he highlighted before the court. In his submissions which were presented by Learned Counsel, Mr. Langat, the applicant argued that he was charged with the offence of violating the prescribed speed limit contrary to section 42 (1) and 43 (1) of the Traffic Amendment Act, Cap 403. The said section 42 (1) does not create any offence known to law and the applicant should not have been charged with the offence. As there is no offence created under section 42 (1) of the Traffic Act, the charge sheet as drawn cannot stand in a court of law. He submits therefore that he should not have been allowed to take plea on charges not recognized in law which cannot be sustained.
4. He submits further that even if the charges were correct, as the charge sheet indicates, he was doing 114 km per hour. That section 75 (a) of the Traffic Act allows motorists 100 km per hour on the highway and a grace speed of 20 km per hour. If a motorist does a speed of 121 k.p.h, the extra kilometer becomes unlawful. He asked the court to grant the prayers sought in his application dated 17<sup>th</sup> November 2017.
5. Mr. Mutai for the state opposed the application. He submitted that the charges against the applicant were withdrawn under section 87 (a) of the CPC, the effect of which is that the accused was discharged and the file closed. There is therefore nothing for this court to revise.
6. He submitted, further, that the powers of the court in revision under section 364 (1) (b), which grants the court power to revise orders other than an order of acquittal, are clear. In the present case, a discharge is equivalent to an acquittal, and the matter is now dead. Nothing that is done on revision can be useful to any party.

7. It was the state's further submission that the applicant is basically submitting on whether the charges preferred against him were proper or the charge defective. In its view, this is not an issue that can be handled by this court, as it will be dealing with the matter in a vacuum. The forum for challenging the legality of the charges was before the lower court before the applicant took plea, and since the matter before the lower court has been withdrawn, there is no basis for the present application. Counsel therefore urged the court to dismiss the application.

8. I have read the application dated 17<sup>th</sup> November 2016, which essentially constitutes arguments on the law and the constitutionality of the actions of the respondent in this matter. It has however, been brought as an application for revision pursuant to the provisions of section 362 and 364 of the Criminal Procedure Code, so the starting point in considering the matter is to assess the powers of the court under those sections.

9. Section 362 of the Criminal Procedure Code titled "**Power of High Court to call for records**" provides as follows:

***362. 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.***

10. At section 364, the CPC provides that:

***(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."***

11. In this case, the applicant states that he was discharged under section 87 (a) of the Criminal Procedure Code. He is no longer facing any charges before the trial court. He states he was granted leave by the trial court to transfer the matter in Criminal Case No. 2181 of 2016 to the High Court for the purpose of revision. The court record indicates that the applicant applied and was granted leave to present the matter before this court for review following the withdrawal of the charges by the state.

12. Having considered the application, the submissions by the parties and the applicable law, I am constrained to find that the court is being asked to engage in an exercise in futility. The applicant was discharged after the charges against him were withdrawn. There is no longer a case before the trial court. What purpose will be served by the court entering into an inquiry whether the withdrawn charges were proper or not? Where charges are alleged to be illegal, that is a point to be taken before the trial court, before the plea is taken, as the court has the jurisdiction to determine the issue.

13. From the lengthy submissions filed by the applicant, it appears that what the applicant is challenging is the constitutionality of the provisions of section 42 and 43 of the Traffic Act, and the charges against him. At some point, he alleges malice and harassment on the part of the traffic police in Kericho, and violation of his right under Article 50. How, though, the court is to address its mind to these issues under section 364 of the CPC, on the basis of charges that have been withdrawn, is not explained.

14. Accordingly, I find that the present application is really a non-starter. Unlike the case of **David Njogu Gachanja vs Republic Criminal Revision No. 3 & 4 of 2014** which the applicant has relied on, there is no ongoing trial whose proceedings and orders this court can consider and revise. I decline to enter into an inquiry on revision into a matter that is no longer before the court. There may be pertinent issues with

respect to the provisions of section 42 (1) and 43 (1) of the Traffic (Amendment) Act that can be ventilated before the court, but they need to be so ventilated in an appropriate case and forum. An application under section 362 and 364 where charges have been withdrawn is not the appropriate case or forum.

15. Accordingly, I find that the present application has no merit. It is hereby dismissed.

**Dated, Delivered and Signed at Kericho this 12<sup>th</sup> day of April 2017.**

**MUMBI NGUGI**

**JUDGE**