



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

REVISION NO. 2 OF 2017

NOOR ISMAEL AHMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER ON REVISION

1. By an application dated **8th April, 2017** the Applicant through the firm of **Omolo & Company Advocates** brought pursuant for the provisions of **section 362, 362(1) (2), 365 and 367** of the **Criminal Procedure Code**, seek **Revision** of the decision of the lower court.
2. The Application is based on grounds that the sentence imposed by the lower court was **oppressive and draconian**, the applicant was misled and did not understand the consequences of pleading guilty; he was framed by the police at **Mutha Police Station** in **Criminal Case No 417 of 2016** which resulted in an acquittal on the **24th March, 2017** and it is in the interest of justice and fairness that the court revises the sentence imposed.
3. The application is supported by an affidavit sworn by **Chris J. Omollo** the advocate in conduct of the matter who deposes that the Applicant was first arrested on **10th October, 2016** at **Kyale** area within **Kitui County** and driven **37 kilometers** by the police to **Mutha Police Station**. He was charged in **Criminal Case No.406** of **2016** with the offence of entering a game reserve without a permit contrary to **section 102(1) (a)** of the **Wildlife Conservation and Management Act, 2013**. Two days later he was arraigned before **Mutomo Senior Resident Magistrate's Court in Criminal Case No 417** for charges of robbery with violence and rape. He was acquitted of both charges on the **6/3/2017** by **Hon. S. K. Ngii (SRM)**.
4. In a response thereto, **Martin N. Wanjala** of the **ODPP** filed a replying affidavit on behalf of the Respondent where he deponed that the charges were translated to the Applicant from English to Somali language and the sentence imposed was the minimum fine for the offence that the applicant faced.
5. I have examined the lower court record for purposes of satisfying myself of the legality, propriety and regularity of the proceedings. In order to come up with an informed decision. The particulars of the offence stated that the Applicant willfully and unlawfully entered the **Kitui National Reserve** without a permit.
6. What transpired before the court at the point of plea-taking is recorded thus;

“The substance of the charge(s) and every element thereof has been stated by the court to the accused person(s) in Somali, a language he/she understand who being asked whether he/she admits or denies the truth of the charge(s) replies:-

Interpretation – from Kiswahili to Somali done by Rashid Abdi only sworn,

Accused- It’s true

Court - Plea of guilty entered.

Facts

Prosecutor- Facts as per charge sheet.

Accused – Facts are correct

Court – Accused is convicted on his own plea of guilty.

Prosecutor- Accused is a first offender.

Mitigation

Accused – I pray for forgiveness

This being a first offence..”

7. The case of **Adan – v – Republic (1973) EA 445** set out the procedure to be adopted when taking plea. The court of Appeal stated thus;

“The manner in which a plea of guilty should be recorded is:

(a) The trial magistrate or Judge should read and explain to the accused the charge and all ingredients in the accused’s language or in a language that he understands.

(b) He should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;

(c) The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(d) If the accused does not agree to the facts or raises any question of his guilt, his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused’s reply. (Also see section 207 of the Criminal Procedure Code”.

8. This is a case where the Applicant admitted the charge. Looking at the particulars of the offence it is stated that the entry into the park was willful and unlawful. The prosecuting officer was required to state the facts of the case that would establish the act done by the applicant that was intentional, deliberate and did not conform to the law such that he had to be arrested. After the explanation, the Applicant would have been expected to admit, dispute or add anything that he would find necessary. This would be the only way that would make the learned magistrate opine if indeed the applicant understood the charge he faced and if an offence had been committed. The offence the Applicant faced attracts a minimum fine of **Ksh. 200,000/-** or imprisonment for not less than **two (2) years** therefore it cannot be dismissed as a simple or straightforward charge. The law should have been complied with. In the premises I find the plea having not unequivocal.

9. Therefore, I do hereby **quash the conviction** and **set aside** the **sentence imposed**. The fine imposed shall be refunded to the applicant who shall appear before a magistrate with competent jurisdiction other than the **Hon. S.K. Ngii** for plea taking.

10. It is so ordered.

Dated and Signed at Kitui this 23rd day of October, 2017.

L. N. MUTENDE

JUDGE