REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. 32 OF 2017

(From original Conviction and Sentence in Traffic Case No. 1097 of 2017 of the Chief Magistrate's Court at Naivasha - E. Kimilu, PM)

HILLARY MUCHANGI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

IN CHAMBERS ON 18TH OCTOBER, 2017

BEFORE HON. LADY JUSTICE C. MEOLI, J

RULING ON REVISION

1. The lower court file was called up pursuant to the application by the Accused in Traffic Case No. 1097 of 2017 Naivasha. The gist of the Accused's grievance is that the fines imposed in respect of the two offences therein, and to which he pleaded guilty are excessive and illegal, respectively.

2. The Accused was charged with two counts in the lower court, as follows:-

"COUNT 1

Causing obstruction Contrary to Section 53 (1) of the Traffic Act Cap 403 Laws of Kenya.

PARTICULARS

On the 23rd March, 2017 at around 0840hours within Gilgil Township in Gilgil Sub-County of Nakuru County, being the driver of motor vehicle registration number KCH 796P Toyota Hiace matatu did drive the said vehicle on the said road and caused obstruction by stopping the said vehicle in the middle of the road thereby inconveniencing other road users.

COUNT 2

Picking and setting down of passengers contrary to Section 64 (d) of the Traffic Act CAP 403 Laws of Kenya.

PARTICULARS

On the 23rd March, 2017 at around 0840hours within Gilgil Township in Gilgil Sub-County

of Nakuru County, being the driver of motor vehicle registration number KCH 796P Toyota Hiace matatu did drive the said vehicle on the said road while picking and setting down passengers at a place other than bus stage."

3. The Accused pleaded guilty to both charges. I have perused the proceedings of 6th October, 2017 before Hon. E. Kimilu PM, in order to satisfy myself as to the correctness, legality or propriety of the findings, sentence, orders and regularity of proceedings, pursuant to this court's jurisdiction under Section 362 of the Criminal Procedure Code.

4. Firstly I note that the plea taking procedure adopted did not fully comply with the guidelines in the case of **Adan -Vs- Republic [1973] EA 445** to the effect:-

"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are in admission, a plea of guilty should be recorded;

(iii) the prosecution should 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;

(iv) if the accused does not agree the facts or raises any question of his guilty his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded." (Emphasis added)

5. In the case of **John Muendo Musau -Vs- Republic [2013] eKLR** the Court of Appeal having quoted the above passage in **Adan** proceeded to state:

"We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence. The procedure laid out in Adan -Vs- Republic (Supra) is also provided for under Section 207 of the Criminal Procedure Code."

This means that step (iii) in **Adan** is vitally important in ensuring that a plea of guilty is unequivocal.

6. In this case, the charges were properly read to the Accused who pleaded guilty thereto, but the facts were not subsequently read to him as required. The conviction on a plea of guilty was based on a statement by the DPP erroneously described as State Counsel (SC) that:

"Facts as per C/S (Charge Sheet)."

7. I understand this statement to represent step (iii) in **Adan.** To that statement, the Accused did not and could not respond. No facts were stated therein. Thus the conviction recorded thereafter has no legal basis and is irregular. The rest of the procedure adopted is consistent with the guidelines in **Adan -Vs- Republic** and **Section 207** of the Criminal Procedure Code.

8. Turning now to the Accused's complaint in respect of the sentences meted out, I note that the penalty in respect of the first count is provided under Section 53 (4) of the Traffic Act which states:-

(4) Any person who leaves any vehicle on a road in such a position or manner or in such a condition as to cause or to be likely to cause any danger to any person shall be guilty of an offence and liable:-

(a) for a first conviction, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding one year; and

(b) on a second or subsequent conviction, to a fine not exceeding seventy-five thousand shillings, or to imprisonment for a term not exceeding eighteen months, and the court shall exercise the power conferred by Part VIII of canceling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified from holding or obtaining a driving licence for a period of two years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later."

9. In faulting the sentence in respect of count 1 the Accused has relied on a copy of a purported Schedule of offences and sentences whose origin cannot be ascertained. The Schedule, supposedly from National Transport and Safety Authority (NTSA) has no legal backing. His complaint therefore has no basis. The fine imposed in respect of the first count was proper, and indeed proportionate.

10. With regard to the fine on the second count, the Accused once more places reliance on the supposed NTSA Schedule of fines in asserting that the sentence awarded is "illegal". As already observed, this schedule has no legal application in a court of law.

11. Be that as it may, I note that in the second count, the statement and particulars of offence stated that the Accused contravened Section 64 (d) of the Traffic Act by picking and setting down passengers at a place other than a designated bus stop. Section 64 (d) of the Traffic Act does not exist. Section 64 of the Traffic Act proscribes Tampering with motor vehicles without the knowledge or permission of the owner.

12. The offence in count 2 is created by Rule 64 (d) of the Traffic Rules which provides that:-

"The driver of a motor omnibus or matatu:-

(a) ……..;

(b) ……..;

(c) ……..;

(d) shall not pick or set down passengers, in any urban area, at a place that is not authorized as a bus stop or terminal."

13. The penalty thereof is contained in Rule 69 of the Traffic Rules to the effect that:-

"A person who contravenes or fails to comply with any of the provisions of this Part commits an offence and is liable to a fine not less than ten thousand shillings and not exceeding fifteen thousand shillings or, in default of payment, to imprisonment for a term not exceeding six months."

14. This court is alive to the fact that plea courts are often inundated with heavy work load which must be handled with dispatch. However, it is important that procedural steps that exist as a safeguard for fair trial rights of Accused persons are not sacrificed. Of course, some mistakes may arise due to oversight as it seems to be the case here. Had the plea court noted the error in the charge it was entitled to reject the second count as framed, as it did not disclose an offence known to the law. This is provided for in Section 89 (5) of the Criminal Procedure Code.

15. For the foregoing reasons, there is sufficient reason to impugn the findings, sentence and proceedings of the lower court, which I proceed to do by quashing the convictions recorded in respect of count 1 and 2. I also set aside the respective sentences meted out by the plea court.

16. Finally, I have noted references to a plea bargain in the proceedings of 6th October, 2017, the effect of which was stated to be a withdrawal of another matter i.e. **Traffic Case Number 1140 of 2017,** presumably in the respect of the Accused. Although this arrangement may not have a direct consequence on the proceedings in **Traffic Case Number 1097 of 2017**, the plea court in my view ought to have given close attention to the provisions of Section 137A – O of the Criminal Procedure Code which govern the plea bargain procedure, if indeed plea bargain was contemplated. It is always important that the record of the court be as complete as possible in such circumstances. Nothing turns on that question however.

17. In light of the findings and orders made herein, I direct that the Accused person presents himself before the plea court on 1st November, 2017 so that he can plead afresh to proper charges in accordance with due procedure.

Written and signed at Naivasha this **18th** day of **October, 2017.**

C. MEOLI

JUDGE