



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 3 OF 2016**

**M M.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. By an application brought pursuant to the provisions of **Section 362** as read with **Section 364(1)** of the **Criminal Procedure Code** the Applicant through the firm of **Kinyua Musyoki and Company** prayed to this court to call and examine the record of Criminal Proceedings in the **Principal Magistrate's Court at Mutomo – Criminal Case No. DCR 419 of 2015; Republic versus Kimbui Munyoto** for purposes of revising the conviction and sentence of the Applicant and subsequently acquit him under **Section 354(3) (a)(i)** of the **Criminal Procedure Code**.

2. The application is premised on grounds that:

- i. Fundamental rules of procedure were violated and/or ignored leading to the whole proceedings being an illegality.
- ii. The conviction of the Accused person was unsafe, illegal and a violation of the law as it was not aimed at in accordance with the laid down procedure in that;

- The plea was taken on **6<sup>th</sup> August, 2015** and facts were deferred to **10<sup>th</sup> August, 2015**.
- When the report was presented by the Prosecution on **18<sup>th</sup> August, 2015** the court sentenced the Applicant to **2 years imprisonment** without having facts presented.
- The Applicant was denied the opportunity to respond to facts therefore making the conviction illegal.
- The sentence of **two (2) years** is illegal as the sentence provided for by the law is a fine not exceeding **fifty thousand** or **not less than twelve months imprisonment**.

3. The application was canvassed orally. **Mr. Kinyua Musyoki** counsel for Applicant reiterated what is stated in the application. In a response thereto the State through **Ms. Awour** conceded to the application on the grounds that the proceedings were irregular. Facts were not read to the Applicant and the **two (2) years** sentence was not proper in law.

4. The Applicant was charged with the offence of **Neglecting a Child's Right to Parental Care** contrary to **Section 6(1)** as read with **Section 20** of the **Children Act No. 8 of 2011 (The Act)**. Particulars of the offence being that on diverse dates between the year **2014** and **4<sup>th</sup> August, 2015** at **Kanziku Location, Ikutha District** within **Kitui County**, being the father of the following juveniles namely: (1) **K K** aged **15 years** (2) **M K** aged **13 years** and (3) **S K** aged **10 years** failing to provide basic necessities namely

education food and clothing.

5. The penalty provided for the offence is contained in **Section 20** of the **Act** that states thus:

*“Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.”*

This is a case where the Applicant admitted the charge at the outset whereafter the court gave the Prosecuting Officer time to present facts and a Children Officer’s report regarding the charge the Applicant faced. On the **18<sup>th</sup> August, 2015** the report was presented. The trial Magistrate considered it and sentenced the Applicant to **2 years imprisonment** without giving him the opportunity of knowing the content of the report and responding to it. No facts were presented and no summary conviction was entered as required by **Section 20** of the **Act**. The sentence meted out was not proper in law. The irregularity in the circumstances having been occasioned by the court, it would call for a retrial.

6. In the case of **Muiruri vs. Republic (2003) KLR, 552** it was stated thus:

*“Generally whether a retrial should be conducted or not must depend on the circumstances of the case.*

*It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the Appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the Appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution’s making or not .....*”

7. I have been called upon to acquit the Applicant as he has served **nine (9) months imprisonment** out of the maximum **twelve (12) months imprisonment** provided by the law.

8. The circumstances of this case are that the Applicant was accused of having neglected his **three (3) children**, although the report makes reference to **eight (8) children**. He admitted that fact. The report filed by the Children Officer raise serious allegations that would call upon the court to consider the welfare of the children. Incarceration of the Applicant was not a solution to issues that were raised. The circumstances of the case would require the court to deal with the matter to conclusion.

9. In the premises it will be in the interest of justice for a retrial to be ordered. Therefore, I do set aside the sentence meted out by the Lower Court and direct the Applicant to be retried by a Magistrate of competent Jurisdiction other than **Z. J. Nyakundi, Principal Magistrate**. The Applicant shall be produced before **Mutomo Principal Magistrate’s Court** on the **2<sup>nd</sup> June, 2016** for the retrial.

10. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of May, 2016.**

**L. N. MUTENDE**

**JUDGE**