



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF V KENYA**  
**AT NYERI**  
**(CRIMINAL DIVISION)**  
**CRIMINAL REVISION NUMBER 153 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JULIUS MWANGI WACHIRA.....ACCUSED**

**RULING**

This is a revision pursuant to the provisions of Section 362 of the Criminal Procedure Code.<sup>[1]</sup> The power of the High Court under Section 362 of the Criminal Procedure Code<sup>[2]</sup> is for the High Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

The accused was convicted on his own plea of guilty of the offence of stealing by servant contrary to Section 281 of the Penal Code<sup>[3]</sup> and sentenced to serve five years imprisonment on 8.7.2013.

The Community Service Officer, Nyeri Central submitted a sentence review report received in court on 21.1.2015. I find it rather disturbing that it has taken almost one year for the revision to be heard. I find it inappropriate such a matter can last this long. It is an affront to justice and an indication of malfunctioning systems and the necessary steps should be taken to avoid such delays.

The pre-bail report shows that the accused pleaded guilty 'to avoid suffering in remand'. This raises a fundamental legal issue on the said plea and whether it was unequivocal and if the conviction can be allowed to stand.

Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea agreement. The section however does not set out the steps to be followed by a court when taking plea. In *Adan Vs Republic*<sup>[4]</sup>, the Court of appeal set out the steps to be taken in recording plea as follows:-

*“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to*

*dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.*

The court went on to explain the purpose of the statement of facts that it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal. It assists the court to confirm if the accused really understood the position when he pleaded guilty. In *Njuki V. Republic*<sup>[5]</sup> the court, while citing *Hando S/o Akunaay V. R.*<sup>[6]</sup>, re-emphasized the need for caution in recording a guilty plea. It held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

The proceedings before the lower court show that the accused was arraigned in court on 8<sup>th</sup> July 2013. When charges were read to him, he replied "*it is true I stole these items.....*"

*COURT: Plea of guilty entered.*

*COURT PROSECUTOR: narrated the facts.*

*Accused : Facts are correct.*

*COURT: Accused convicted on own plea of guilty*

*MITIGATION: I have a wife and two children. I have no parents. I am the only bread winner.*

For a guilty plea to be unequivocal the steps set out in the *Adan*<sup>[7]</sup> it must be followed. Further the record must be such that it leaves no doubt as to whether or not the accused understood the charges and confirmed the facts as true. Where an accused person pleads guilty for fear of remaining in custody as in the present case, then the plea is not unequivocal. The charge sheet shows the accused was arrested on 6.7.2013 and was in custody for two days before he was produced in court. It was incumbent upon the court to ascertain why the accused was held for two days, whether the two days were working days and even ascertain why he was held in excess of the period provided for under the constitution.

The Supreme Court of India in *Gulabrao Baburao Deokar v. State of Maharashtra and Others*<sup>[8]</sup> cited its previous decision in *Masroor v. State of Uttah Pradesh and Anor*<sup>[9]</sup> where it stated as follows as follows:-

*“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts....”*

Personal liberty, is too precious a value of our constitutional system recognized under our constitution. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial cuts against this principle.

Article **20 (1)** of the Constitution provides that the Bill of Rights applies to all and binds all State organs and all persons.

*(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*

*(3) In applying a provision of the Bill of Rights, a court shall-*

*(a) -----*

*(b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom.*

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-

(a) the values that underlie an open and democratic society based on human dignity, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

**Chaskalson** has argued that “respect for human dignity”, and all that flows from it, is an attribute of life itself and not a privilege granted by the state”.<sup>[10]</sup> This explains why human dignity is the definitive value in international human rights instruments.<sup>[11]</sup> Drawing a very close tie between human dignity and freedom, Ackerman J commented that:-

*"..... Human dignity has little value without freedom..... Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others."*<sup>[12]</sup>

Although the value and right to freedom is not absolute, it is subject to the new constitutional culture of justification. Thus, there is a legal burden on the state to justify why an accused person was not brought to court within the stipulated period. The Bill of Rights is a cornerstone of democracy. It enshrines the rights of all people in our country and affirms the democratic values of human, dignity, equality and freedom and the right to a fair trial.

In their interpretation of these basic laws, the court is bound to 'promote the values that underlie an open and democratic society based on human dignity, equality, and freedom'.

I am persuaded that the accused pleaded guilty for fear of going back to the cells, hence his plea was not unequivocal. The learned Magistrate never asked why the police took longer than the constitutionally provided period to charge him. The accused was incarcerated for a longer period than the constitution provides, hence an infringement of his rights. I have considered the principles of an open democratic society, and the provisions of Article 20 of the constitution and also the sentence review report and I am persuaded that it would not be in the interests of justice to allow conviction in this case to stand.

Accordingly, I hereby quash the conviction, set aside the sentence and order that the accused be released forthwith unless otherwise lawfully held.

Orders accordingly

Dated at Nyeri this **14th** day of **December** 2015.

**John M. Mativo**

**Judge**

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<sup>[1]</sup>Cap 75, Laws of Kenya

<sup>[2]</sup> Ibid

<sup>[3]</sup> Cap 63, Laws of Kenya

<sup>[4]</sup>

[5] {1990} KLR 334

[6] {1951} 18 EACA 305

[7] Supra

[8] Criminal Appeal 2113 of 2013

[9] (2009) (14) SCC 286

[10] Chaskalson A 2000 16 SAJHR,196

[11] Goodman MD 2005-2006 *Nebraska Law Review*, 751.

[12] **Oliver Njuh Fuo**, The significance of the constitutional values of human dignity, equality and freedom in the realisation of the right to social protection in South Africa ,*Paper presented to session of the ANCL Working Group on Social and Economic Rights in Africa, ANCL Annual Conference: Rabat, Morocco 2 – 5 February 2011*