



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 12 OF 2014**

REPUBLIC.....APPLICANT

AND

LAWRENCE NTOMUGANIA.....RESPONDENT

**RULING ON REVISION**

Lawrence Ntomugania was charged with 2 counts of assaulting a police officer contrary to section 254 (b) of the Penal Code. It was alleged that on 6<sup>th</sup> March 2014 at Mwingi township with Mwingi Central District in Kitui County he assaulted No 81503 Police Constable Kennedy Wekesa and No 36328 Corporal Silvester Waigwa while both were on duty. He faces a third count of malicious damage to property contrary to section 339 of the Penal Code an offence allegedly committed on the same day and place as counts 1 and 2. It is alleged that he wilfully and unlawfully damaged one long trouser the property of Police Constable Kennedy Wekesa.

Upon admitting the charges, facts were given and a conviction entered. He was sentenced to serve 3 years imprisonment.

The file in the lower court was brought to my attention for revision because the section of the law cited is the wrong one.

Section 254 (b) of the Penal Code does not exist. What exists is Section 254 which is defines kidnapping from Kenya. It is not on assaults. The correct Section is 253 (b) of the Penal Code which states as follows:

“253 Any person who -

**(b) assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer.”**

Is failure to quote the correct section of the law creating an offence fatal to prosecution case? Section 382 of the Criminal Procedure Code (CPC) provides thus:

**“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.” (emphasis mine).**

The paramount consideration is whether the error has occasioned injustice on the accused person. In this case, the accused person in the lower court understood the charges facing him. The facts were presented and he admitted them. He was convicted and allowed to mitigate. The trial magistrate however made other errors in not entering a plea of guilty after the accused admitted the charges and in not calling for the previous records of the accused before him before he sentenced him but to me mind this error did not occasion injustice to the accused. The trial magistrate also failed to explain the right of appeal. Now that this matter is before this court on revision, it is my considered view that there has been no prejudice to the

accused who has been serving sentence from 7<sup>th</sup> of March 2014 slightly over one week.

This court will and does hereby cure the defects in the charge and on the record by invoking the provisions of section 382 of the CPC. Having done this I do not wish to disturb the sentence imposed on the appellant save to explain to him the right to appeal within 14 days of the date of conviction and sentence, which I hereby do. I make orders accordingly.

**Dated, signed and delivered on 19<sup>th</sup> March 2014.**

**S.N.MUTUKU**

**JUDGE**