



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISC. CRIMINAL APPL. NO.E349 OF 2021**

**EVANS MAINGI NUSU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This is a ruling in an **Notice of Motion** application dated **12<sup>th</sup> October, 2021** brought under **Sections 362, 364(1)(b)** and **365** of the **Criminal Procedure Code (Cap 75 of the Laws of Kenya)** and **Article 159(2)** of the **Constitution of Kenya**.

2. Vide this application, the Applicant, **EVANS MAINGI NUSU** is seeking for orders;-

*a) Spent;*

*b) That the Honourable Court do call for and examine the record of the Criminal Case No.3401 of 2018 (Makadara) – REPUBLIC –VRS- EVAN MAINGI NUSU for the purpose of satisfying itself as to the correctness, legality or propriety of the ORDER passed on 6<sup>th</sup> October, 2021 by the Chief Magistrate (Makadara), Honourable A. R. Kithinji, requiring the Applicant to compensate the complainant Kshs.6,000,000/= (Six Million) and further that the compensation should take precedence.*

3. The application is based on the grounds on its face and in the **Supporting Affidavit** of **LEONARD NZIOKA NGOLYA**, Applicant's counsel. According to the Applicant, he was convicted for the offence of **Burglary** and **Stealing** contrary to **Sections 304(2)** and **279(b)** of the **Penal Code** and sentenced to pay a fine of **Kshs.500,000/=** and in default to serve three (3) years imprisonment.

4. That in addition to the fine, the Applicant was ordered to compensate the complainant **Kshs.6,000,000/=** and further that the compensation to take precedence. It is the Applicant's averment that he is a student at the University of Nairobi and he is currently incarcerated at Industrial Area Prison in Nairobi. That in view of the sentence that was meted against the Applicant, the court's cash office has refused to receive from the Applicant the imposed fine of **Kshs.500,000/=** insisting that he first pays the complainant compensation **Kshs.6,000,000/=**. It has been deponed that the Applicant's right to pay fine has been fettered by the order requiring that compensation should take precedence which order violates the provision of **Section 175(4)(a)** of the **Criminal Procedure Code**. Lastly, no recovery proceedings have been commenced by the complainant under the Civil Procedure Rules in terms of **Section 26(3)** of the **Victim Protection Act**. The Applicant thus seeks to have the order made by the trial court on **6<sup>th</sup> October, 2021** revised.

5. The court directed that the application be served upon the Respondent (State) for interparties hearing on **18<sup>th</sup> October, 2021** and called for the original record of proceedings from the trial court.

6. The Respondent did not file or serve any response or **Replying Affidavit** to the application. However, both counsel for the parties filed and served written submissions on **27<sup>th</sup> October, 2021** and **1<sup>st</sup> November 2021** respectively as directed by the court.

7. To determine the application dated **12<sup>th</sup> October, 2021**, it is important to first appreciate the law under which the application has been brought. **Section 362** of the **Criminal Procedure Code** provides that:-

*“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.*

8. This provision clothes this court with powers to call for and examine the record of any criminal proceedings for any irregularities,

illegacies or propriety in the orders, findings and sentence of a subordinate court so as to revise or correct the same.

9. Accordingly, the original record of proceedings in **Makadara Criminal Case No.3401 of 2018** were called for following the application by the Applicant in which he has raised an issue with an order he finds has fettered his right to pay a fine and be free. I have also read through the supporting Affidavit sworn by counsel for the Applicant, the written submissions filed by counsel for both parties and the cited law with regard to the Applicant's request.

10. Further, I have carefully read through and examined the said proceedings to establish whether the order complained about by the Applicant is irregular or illegal and hence requires correction by this court. I find that it is not in dispute that the Applicant was charged with two others with three offences.

11. In **Count 1**, they were charged with the offence of conspiracy to commit a felony contrary to **Section 393** of the **Penal Code**. The particulars were that:-

*“On 7<sup>th</sup> December, 2018, at Pangani Palace, in Starehe Sub-County, within Nairobi County, jointly with others not before court conspired to commit a felony namely burglary and stealing of Kshs.Six Million (6,000,000/=), safe keys, padlock, assorted clothings and three goggles, the property of CHRISTINE NYARESO MAKONE.*

12. In **Count II**, they were charged with the offence of burglary contrary to **Section 304(2)** and Stealing contrary to **Section 279(b)** of the **Penal Code**. The facts being that:-

*“On the night of 7<sup>th</sup> and 8<sup>th</sup> of December, 2018, at Pangani Palace, in Starehe sub-county, within Nairobi County, jointly with others not before court broke and entered the dwelling house of CHRISTINE NYARESO MAKONE with an intent to steal therein and did steal from therein Kshs. Six Million, safe keys, padlock, assorted clothings and goggles the property of CHRISTINE NYARESO MAKONE”.*

13. And in **Count III**, the Applicant alone was charged with the offence of handling stolen goods. The particulars were that:-

*“On 22<sup>nd</sup> December, 2018, at Komrock Estate, in Kayole Sub-county, within Nairobi County, otherwise than in the course of stealing, dishonestly received or retained a maffin, 3D goggles, hair conditioner, styling dreds 250 ml knowing or having reason to believe it to be stolen goods”*

14. The matter went on trial and the prosecution called evidence of nine (9) witnesses. Upon the close of the prosecutions' case, the 3<sup>rd</sup> accused person was acquitted under **Section 210** of the **Criminal Procedure Code** for all counts while the Applicant and 2<sup>nd</sup> accused person were placed on defence.

15. On **6<sup>th</sup> October, 2021**, the learned Magistrate acquitted the 2<sup>nd</sup> accused person on **Counts I** and **II** but proceeded to find the Applicant guilty and convicted him for Count 2, which was the offence of burglary and Stealing contrary to **Section 304(1)(b)** and **(2)** of the **Penal Code**. The trial Magistrate then sentenced the Applicant to pay a fine of Kshs.500,000/= and in default serve a sentence of three (3) years imprisonment. The court also ordered that the Applicant compensates the complainant with a sum of Kshs.6,000,000/= and directed that:-

*“the issue of fine to be addressed after the complainant is compensated”.*

16. This is what has brought about this application because according to the Applicant, the court staff at the Registry have refused to receive the fine which has since been raised because he is yet to comply with the order requiring that he compensates the Plaintiff first.

17. That the Applicant was properly charged and tried within the confines of the law is not in issue. It is also not in issue that the Applicant was found guilty, convicted and sentenced within the jurisdiction conferred upon the court by statute. The Applicant was convicted and sentenced for the offence of burglary and stealing contrary to Section 304(1)(b) and (2) of the Penal code. **Section 304(1)** of **Penal Code**. **Section 304(1)** of the **Penal Code** provides:-

**(1)(b)**“Any person who-

*Having entered any building, tent, or vessel used as a dwelling with the intent to commit a felony therein, or having committed a felony in any building, tent or vessel, breaks out thereof;*

*is guilty of the felony termed house breaking and is liable to imprisonment to seven years”.*

**(2)** *If the offence is committed in the night, it is termed burglary and the offender is liable to imprisonment for ten years”.*

18. The offence of burglary for which the Applicant was convicted attracts a sentence of ten (10) years imprisonment. The Applicant was sentenced to a fine of Kshs.500,000/= and in default serve three years imprisonment.

19. The sentence meted against the applicant was within the law and the trial Magistrate exercised his discretion as provided for under **Section 26(3)(1)** of the **Criminal Procedure Code** in sentencing the Applicant to pay a fine. **Section 26(3)(1)** of the **Criminal Procedure Code** provides that:-

**“A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment”**

**Provided that:-**

**(i) Where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.”**

20. The trial Magistrate then ordered that the Applicant pays to the complainant Kshs.6,000,000/= as compensation, which again was within his discretion as provided for under **Section 175(2)** of the **Criminal Procedure Code** that:-

**“A court which-**

**a) Convicts a person of an offence or, on appeal, revision or otherwise confirm the conviction;**

**and**

**b) Finds, on the facts proven in a case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this Section as “the injured Party),**

**May order that convicted person to pay to the injured party such sum or it considered could justly be rewarded as damages in civil proceedings brought by the injured party against the conviction in respect of the civil liability”.**

21. All that a trial Magistrate is expected to do in such circumstances is to ensure he/she exercises the said discretion judiciously. And even if it were not, it would not be a matter for this court to determine on application for revision. This power to order for compensation of victims of a crime is also provided for under **Section 23** of the **Victim’s Protection Act** which states that:-

**23. (1) A victim has a right to restitution or compensation from the offender and the enforcement thereof in accordance with this Act.**

**(2) Subject to any limitations and conditions set out in this Act, the victim has a right to compensation by the offender for-**

**(a) economic loss occasioned by the offence;**

**(b) loss of or damage to property;**

**(c) loss of user over the property;**

**(d) personal injury;**

**(e) costs of any medical or psychological treatment; and No. 17 Right to compensation Award of compensation by Court. Compensation or restitution orders not part of a sentence**

**(f) costs of necessary accommodation suffered an offence. transportation and or incurred as a result of**

**(3) A victim has the right to restitution of any property or right to property of which the victim is deprived as a result of an offence in respect of which the victim is entitled to the rights and remedies specified in this Act. (4) A compensation order made against a convicted offender may be enforced as a judgment in civil proceedings.**

22. However, **Section 25** of the same Act provides that compensation or restitution orders are not part of a sentence. **Section 25** of the **Victim’s Protection Act** goes on to provide that the enforcement of an order of compensation or restitution should be governed by the Civil Procedure Rules.

23. It is clear from the proceedings before the trial court that when the sentencing of the Applicant was legally proper and within the confines of the law, and the trial Magistrate within his powers in issuing an order for compensation, there was an error in the order that “the issue of fine to be addressed after the complainant is compensated”. This is because it renders the time when the sentence would start running uncertain as it is not definite when the Applicant would fully compensate the complainant, in view of the amount being such a colossal sum and Applicant being a student at the University.

24. The order by the trial Magistrate directing that the issue of fine to be addressed after complainant has been compensated is clearly an error which has caused and if left to subsist could continue subjecting the Applicant to undue suffering and injustice. I proceed to order the same reversed and set aside as per the provisions of **Section 382** and **364(2)** of the **Criminal Procedure Code**.

25. Consequently, the sentence against the Applicant be and is hereby upheld. It is also directed that the complainant in the **Makadara Chief Magistrate’s Case No.3401 of 2018**, be at liberty to enforce the recovery of the sum of Kshs.6,000,000/= ordered as compensation to be paid to him by the Applicant as a civil debt.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF NOVEMBER 2021**

**D. O. CHEPKWONY**

**JUDGE**