



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL REVISION NO. 291 OF 2020

ERNEST KIARIE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Revision

1. The Applicant herein is Ernest Kiarie. He was arraigned before the Nakuru Chief Magistrate's Court on 29/04/2020 **Criminal Case No. 833 of 2020** charged with two counts and one alternative charge. The first count was malicious damage to property contrary to section 339(1) of the Penal Code. It was alleged that on diverse dates between 25th and 27th April, 2020 at Nakuru-Njoro junction in Nakuru West Sub-county within Nakuru County, wilfully and unlawfully damaged road signs erected at Nakuru-Njoro junction valued at Kshs. 80,000/-, the property of the Kenya National Highway Authority. The Applicant pleaded not guilty to this count.

2. The second count was stealing contrary to section 268 as read together with section 275 of the Penal Code. The particulars were that on diverse dates between 25th and 27th April, 2020 at Nakuru-Njoro junction in Nakuru West Sub-county within Nakuru County, the Applicant stole road signs which were erected at the said junction all valued at Kshs. 80,000 all being the property of the Kenya National Highway Authority. The

Applicant pleaded not guilty to this count as well.

3. The Applicant faced an alternative to count 2 namely handling stolen property contrary to section 322(1) and (2) of the Penal Code. The particulars were that on diverse dates between 25th and 27th April, 2020 at Nakuru-Njoro junction in Nakuru West Sub-county within Nakuru County, otherwise than in the course of stealing, the Applicant dishonestly received or retained road signs knowing or having reasons to believe them to be stolen goods.

4. When the alternative charge was read out in Kiswahili, which the Applicant had indicated he understood, he was asked whether he admitted or denied the truth of the alternative charge. The Applicant replied in Kiswahili: "Kweli" ("It is true.") The Learned

Trial Magistrate entered a plea of guilty and directed that facts be read at noon on the same day.

5. According to the Trial Court record, at noon of the same day, the following facts were read:

On the diverse dates of 25th and 27th April, 2020 at unknown time, the Accused cut and stole the road signs situated and locked at Nakuru – Njoro junction.

On 27/4/2020, police officers from Lanet Police Station received instruction that the heavy metal road signs have been sighted at Kiamunyeki Village at a homestead. The police proceeded to the home of the assailant and found the said road signs. The police positively identified the metal road signs to be the ones belonging to the complainant. The metal rod had symbols of road signs inscribed on them.

After investigations the Accused said he stole the same using Tuk Tuk. The Accused was arrested and escorted together with the six (6) heavy metals and preserved as Exhibits.

Court: Six (6) pieces of heavy metals produced as P. Exhibit a-f.

6. When asked if the facts were correct, the Applicant said: "facts are correct." The Learned Trial Magistrate proceeded to enter a plea of guilty on the alternative charge. Immediately thereafter, the Court recorded the following:

Court: Taking into account the nature of the offence and the Accused mitigation, the Accused shall be sentenced to 3 years in jail in respect to the alternative charge. 14 days Right of Appeal is explained.

7. The Applicant has filed the present request for revision through his lawyer, Mr. Simiyu. I directed that both the Applicant's Advocate and the Prosecuting Counsel address the Court on the application. The Applicant prays that the guilty plea be set aside and the Court directs that another plea be taken on the ground that the Applicant was not warned about the consequences of pleading guilty to the alternative charge. Mr. Simiyu says that the Applicant only pleaded guilty to the alternative charge because he had been informed by the Police that if he pleaded guilty to the alternative charge, which was a "small offence", he would be fined and let go. He was, therefore, quite surprised to find himself behind bars for three years without the option of a sign. Mr. Simiyu insisted that the Applicant had a reasonable explanation for being found in possession of the goods but that he was induced to plead guilty by the prospects of a light sentence. Had the Learned Trial Magistrate warned him of the consequences of pleading guilty to the serious charge of handling stolen goods, the Applicant would not have pleaded guilty.

8. Mr. Simiyu relied on ***Simon Gitau Kinene v R [2017] eKLR*** and ***MK v R [2018] eKLR***.

9. Ms. Odero, the Prosecuting Counsel, opposed the Revision. She argued that the plea was unequivocal and that the proceedings show clearly that the Applicant understood what he was doing; that he pleaded not guilty to the two main counts but elected to plead guilty to the alternative charge; that the language used was Kiswahili which the Applicant indicated he understood well.

10. Mr. Odero argued that while it is true that a Trial Court should warn an Accused Person before recording a plea of guilty in some circumstances, this applied only to serious felonies. She was of the opinion that the offence charged here was not serious enough to warrant a separate caution.

11. The Revision Application turns on whether it was incumbent upon the Trial Court to warn the Applicant of the consequences of pleading guilty; and in particular that he was likely to be sent to prison for a custodial sentence without the option of a fine.

12. In ***Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 [2016] eKLR*** this Court held as follows:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that

where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behoved the Court to warn the Accused Person of the consequences of a guilty plea.

13. In the present case, the alternative charge to which the Applicant pleaded guilty was handling stolen goods contrary to section 322(1) of the Penal Code. The punishment for that offence is imprisonment for up to fourteen years. Although Ms. Odero argues otherwise, there is no question that this is a serious offence which should invite a caution before entry of a guilty plea. Indeed, any offence which attracts a significant custodial sentence must be considered "serious" for purposes of plea taking. Where an unrepresented person pleads guilty to such a felony charge, the plea Court should warn him of the possibility of being sentenced to prison. In this case, the Applicant was sentenced to three years imprisonment. There can be no doubt that an offence which attracts a sentence of three years imprisonment without the option of a fine is a serious one.

14. Another factor makes this revision necessary: there is no record of the mitigation of the Applicant after the plea of guilty was entered. Although the Learned Trial Magistrate indicates that he has "considered" the mitigation given by the Applicant, the record does not show that the Applicant offered any mitigation. As the Supreme Court said in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, mitigation is a critical aspect of sentencing as only through it is a Trial Court able to take due consideration of the individual aspects of the case before it and exercise judicial discretion in sentencing.

15. In the end, therefore, the orders and directions of the Court are as follows:

a. The guilty plea entered in Nakuru Chief Magistrate's Court Criminal Case No. 883 of 2020 is hereby set aside. In its place a plea of not guilty shall be recorded with respect to the alternative charge in the case.

b. The sentenced imposed on the Appellant is hereby consequently set aside.

c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Nakuru Chief

Magistrates' Court for a retrial.

d. The Appellant shall be presented before the Nakuru

Chief Magistrates' Court on Monday, 8th June, 2020 to take plea. The case shall be allocated to a

magistrate other than the Learned Honourable B.

Limo who initially heard the case.

16. The Deputy Registrar is directed to send back the Trial Court file in ***Criminal Case No. 833 of 2020*** and a copy of this file and ruling to the Nakuru Chief Magistrate's Court for compliance.
17. Orders accordingly.

Dated and delivered at Nakuru this 4th day of June, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Vena Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.