REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 46 OF 2016

REPUBLIC……...……...……..……..…….....APPLICANT

Versus

1. HAMMOND ANDERSON KWESI

2. AZIZ GILLA

3. JOVIN BANYEZA

4. PETER NJENGA.....RESPONDENTS

RULING

The Director of Public Prosecutions Kajiado County vide a letter dated 9/11/2016 written by Senior Principal Prosecution Counsel Mr. Igonga moved this court pursuant to Article 165 (6), (7), Article 157 (6) (c) (9) (11), Article 159 (1), Article 50 (1) of the Constitution of Kenya 2010, section 80, 85, 87 (a), 207, 362 and section 389A of the Criminal Procedure Code, Cap 75 Laws of Kenya, section 211 and section 214 of the East African Community Customs Management Act 2004, section 67 (7) and 187 of the Customs and Excise Act, Cap 472.

The applicant sought the following orders:

1. That this honourable court be pleased to grant an interim conservatory order staying the proceedings, ruling and orders issued on the 8th November, 2016 in Kajiado Chief Magistrate's Court in Criminal Case No. 256 of 2016 pending the hearing and determination of this revision.

2. That this honourable court be pleased to review, vary, revise and/or set aside the proceedings, ruling and orders of the Hon. M. Kasera –PM issued on the 8th November, 2016.

3. That this honourable court be pleased to revise, review and set aside the plea of guilty by the fourth (4th) accused and order the same to be irregular, unlawful and inadmissible.

4. That this hourable court be pleased to revise, review and set aside the sentence of Ksh.100,000/- in default to serve three (3) years imprisonment imposed on the fourth (4th) accused and order the same to be irregular and unlawful.

5. That this honourable court be pleased to revise, review and set aside the application by the learned prosecution counsel's application on the 8th November 2016 withdrawing the charges

against the second (2nd) accused Aziz Gilla under section 87 (a) of the Criminal Procedure Code and order the same to be irregular, unlawful and an abuse of the court process.

6. That this honourable court be pleased to revise, review and set aside the orders discharging the second (2nd) accused Aziz Gilla under section 87 (a) of the Criminal Procedure Code and order the same to be irregular, unlawful and an abuse of the court process.

7. That this honourable court be pleased to revise, review and set aside the order discharging the security deposited by the fourth (4th) accused.

8. That this honourable court be pleased to revise, review and set aside the order by the learned prosecution counsel's application to release the motor vehicle registration number T 342 CZN Volvo Bus and order the same to be irregular, unlawful and an abuse of the court process.

9. That this honourable court be pleased to revise, review and set aside the order releasing the motor vehicle registration number T 342 CZN Volvo Bus.

10. That this honourable court be pleased to expunge from the record the proceedings, ruling and orders of Hon. M. Kasera – PM issued on the 8th November, 2016.

11.That this honourable court be pleased to order that the Kajiado Chief Magistrate's Court Criminal Case No. 256 of 2016 proceed from where it had reached as at the 7th November, 2016 before any other magistrate other than Hon. M. Kasera – PM.

The grounds in support are as outlined in the letter and constitute:

The case came up for hearing on 7th November, 2016 wherein the learned prosecutor misdirected the court that there were no exhibits in court whereas the exhibits are available and are in the custody of the Kenya police of Kajiado police station. That sample from the exhibits was extracted and the said samples were forwarded to the government analyst department at Nairobi for analysis. The withdrawal of the charges against the second (2nd) accused was not sanctioned by the Director of Public Prosecution through the head of station as required by law; the said withdrawal was unlawful and irregular as it negated the provisions of section 87 of the Criminal Procedure Code and Article 157 (9) of the Constitution of Kenya, 2010. In addition no reasons were given for the withdrawal of the charges by the accused nor was the fourth accused given time to respond to the withdrawal.

- The hon. learned magistrate failed to discharge the second (2nd) accused as per the law. The alleged discharge under section 87 (a) is a nullity as the court is only allowed to withdraw the charge but the accused must be discharged under section 30 of the Criminal Procedure Code which was never done.
- The learned prosecuting counsel did not exercise the discretion under Article 157 for the public good or for the interest of justice while making the application for withdrawal as such an injustice was occasioned to the state and the government agencies that are the complainants in this matter.
- Further, the learned prosecution counsel did not furnish the court with the reasons or grounds supporting or necessitating the withdrawal of the charges against the 2nd accused.
- That the application by the learned prosecution counsel is applying for the release of the motor vehicle registration number T 342 CZN Volvo Bus was irregular and unlawful as impartiality doctrine and the laws governing forfeiture.
- Under the law the owner of the motor vehicle is mandated to make such applications and to give satisfactory reasons as to the need for the release. In the presence case, the owner never made any such requests or gives the court satisfactory reasons indicating a breach of his rights to property.
- The hon. learned magistrate erred in releasing the motor vehicle registration number T 342 CZN Volvo Bus for which was not in the hands of the court or produced as an exhibit. The

hon. Magistrate did not have jurisdiction to release what was not in the court's possession.

- The said motor vehicle was and is still and exhibit to be relied on by the prosecution in the criminal case and releasing the same amounts to interfering with the exhibits and the case. In addition the release will interfere with the exhibits which were concealed in the said motor vehicle. The release of the said motor vehicle was premature and unlawful.
- The accused persons were never accorded an opportunity to comment on the release of the said motor vehicle as such their rights to a fair trial were infringed.
- The plea of guilty by the fourth (4^{th}) accused was unequivocal, defective, irregular and unlawful as the facts were never read to the accused nor the exhibits availed in court for the fourth (4^{th}) accused to verify the charges and the exhibits.
- In addition, the sentence of the fine imposed was not in accordance to the Act and/or commensurate with the prison custodial orders imposed. Further the fourth (4^{th}) accused was not accorded the fourth (4^{th}) days right of appeal as required by law.
- The court orders were also ambiguous and were never directed to any specific person to execute the same. Court orders ought to be specific and must be directed to a specific agency/person for execution.
- While granting the orders for the release of the said motor vehicle, the learned magistrate failed to direct and specify the person/agency that were to keep the exhibits/good which were concealed by the accused persons in the said motor vehicle.
- In addition, the person to photograph the said motor vehicle and oversee the execution of the said order was never identified.

Factual background:

The respondents Hammond Anderson and Peter Njenga and two others not before court were charged with various counts as per the charge sheet namely:

COUNT I: Conveying uncustomed goods contrary to section 185 (1) (a) (iii) of the Custom and Excise Act, Cap 472 as read together with section 199 (b) (iii) of the East African Community Customs Management Act, 2004.

> - 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found conveying ninety eight bales of second hand used clothes using motor vehicle registration number T 342 CZN Volvo Bus all valued at Ksh.200,000/= while knowing them to be uncustomed goods contrary to the said Acts

ALTERNATIVE COUNT: Being in possession of uncustomed goods contrary to section 186 (b) as read together with section 195 (i) of the Custom and Excise Act, Cap 472 Laws of Kenya.

> - 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found conveying ninety eight bales of second hand used clothes using motor vehicle registration number T 342 CZN Volvo Bus all valued at Ksh.200,000/= while knowing them to be uncustomed goods contrary to the said Acts

COUNT II: Conveying uncustomed goods contrary to section 185(1) (a) (iii) of the Custom and Excise Act, Cap 472 as read with section 199 (b) (iii) of the East African Community Customs Management Act, 2004.

> - 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found conveying one hundred and eight cartons of spaghetti (santa lucia) 450 grams x 20 using motor vehicle registration number T 342 CNZ Volvo Bus all valued at Ksh.50,000/= while knowing them to be uncustomed goods contrary to the said Acts.

ALTERNATIVE COUNT: Being in possession of uncustomed goods contrary to section 186 (b) as read together with section 195 (i) of the Custom and Excise Act, Cap 472 Laws of Kenya.

- 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found conveying one hundred and eight cartons of spaghetti (santa lucia) 450 grams x 20 using motor vehicle registration number T 342 CNZ Volvo Bus all valued at Ksh.50,000/= while knowing them to be uncustomed goods contrary to the said Acts.

COUNT III: Conveying uncustomed goods contrary to section 185 (1) (a) (iii) of the Custom and Excise Act, Cap 472 as read together with section 199 (b) (iii) of the East African Community Customs Management Act, 2004.

- 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found in possession of one hundred and twenty 500ml fanta sodas, two hundred and forty 500ml sprite sodas, three hundred and sixty 500ml, novida sodas using motor vehicle registration number T 342 CNZ Volvo Bus all valued at Ksh.500,000/= while knowing them to be uncustomed goods contrary to the said Acts.

ALTERNATIVE COUNT: Being in possession of uncustomed goods contrary to section 186(b) as read together with section 195(i) of the Custom and Excise Act, Cap 472 Laws of Kenya.

- 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found in possession of one hundred and twenty 500ml fanta sodas, two hundred and forty 500ml sprite sodas, three hundred and sixty 500ml, novida sodas using motor vehicle registration number T 342 CNZ Volvo Bus all valued at Ksh.500,000/= while knowing them to be uncustomed goods contrary to the said Acts.

COUNT IV: Conveying uncustomed goods contrary to section 185(1) (a) (iii) of the Custom and Excise Act, Cap 477 as read with section 199 (b) (iii) of the East African Community Customs Management Act, 2004.

- 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found conveying thirteen jerycans of 20 litres ethanol spirit using motor vehicle registration number T 342 CZN Volvo Bus all valued at Kshs. 500,000/= while knowing them to be uncustomed goods contrary to the said Acts.

ALTERNATIVE COUNT:

- 1. Hammond Anderson Kwesi, 2. Aziz Gilla, 3. Jovin Banyeza that on the 21st day of February, 2016 at Bissil along Namanga – Kajiado road within Kajiado County, jointly with others not before court were unlawfully found conveying thirteen jerycans of 20 litres ethanol spirit using motor vehicle registration number T 342 CZN Volvo Bus all valued at Kshs. 500,000/= while knowing them to be uncustomed goods contrary to the said Acts.

COUNT V: Importing uncustomed goods contrary to section 200 (d) (iii) of the East African Community Customs Management Act, 2004.

- 1. Jovin Banyaze, 2. Peter Njenga Njau that on the 21st day of February, 2016 at Namanga Border point within Kajiado County in the Republic of Kenya, jointly with others not before court were unlawfully imported into Kenya ninety eight bales of second hand used clothes using motor vehicle registration number T 342 CZN Volvo Buss all valued at Ksh.200,000/= while knowing them to be

uncostomed goods contrary to the said Acts.

The four accused persons initially denied participating in committing the alleged offences on diverse dates indicated in the respective information in the charge sheet. The trial court scheduled the matter to be heard on 8/11/2016. The undisputed record on the events of the 8/11/2016 reveals the following:

"NYAMU: I have just been given instructions. I am told Aziz is unwell. He recently lost his wife and on that I pray for bond reduction for accused.

PROSECUTOR: I am ready with my witnesses in court. I am facing some difficulties. Some reports are missing e.g. report from KBS and government analyst.

NYAMU: Accused 4 wishes to change his plea.

COURT: CROLE and in English.

ACCUSED 4: IT is true.

COURT: P.O.G.E.

PROSECUTOR: Facts as per charge sheet.

COURT: Fine Ksh.100,000 in default 3 years imprisonment. Accused to pay duty before the release of the consignment.

PROSECUTOR: I wish to withdraw the case against accused 2 under section 87(a) of the CPC as he was a driver hence an agent.

COURT: Matter withdrawn against accused 2 under section 87(a) of the CPC.

Security for accused 4 is released to the depositor.

COURT: Hearing on 28/12/2016 for accused and accused 3.

PROSECUTOR: May the vehicle be released to the owner.

COURT: Vehicle to be photographed and who should bring the same at the hearing".

This application which is required to be expeditiously disposed off has taken unusually long due to the following reasons:

The application touched on the accused persons in the charge sheet. By the time the letter of complaint was filed before this court the two of them had been dealt with by the court. The 4th accused – Peter Njenga pleaded guilty to the charge and was fined Ksh.100,000 in default 3 years imprisonment. The immediate perusal of the record revealed that he had paid the fine and a release order issued in his favour. On the issues raised in the letter involved the proceedings and order touching on the 4th accused person.

As a requirement of the law the court is obligated under section 364 of the Criminal Procedure Code to give him an opportunity to show cause why an adverse order should not be issued against him on the impugned order. The efforts to trace the 1st accused Hammond Anderson Kwesi took a considerable period of time. The case against accused 2 had been withdrawn under section 87(a) of the Criminal Procedure Code and a possibility was being sought to establish whether he could be apprehended and be brought within the jurisdiction of this court. That muddle occasioned the delay in disposing off the application timeously. However in moving the process forward the 1st accused was traced and notified of the pending proceedings before this court. The 4th accused who had been fined and released was also

served with a notice to attend and participate in the proceedings involving his release on a plea of guilty and subsequent sentence.

I have read and perused the letter by the Office of the Director of Public Prosecutions Kajiado, the oral submissions by the senior prosecution counsel Mr. Akula in support of the issues raised in the letter and the reply by each of the respondents who were traced and purposed to attend the hearing.

The key issue for this court's determination is whether the applicant has brought himself within the jurisdiction provided for under section 362 as read together with section 364 of the Criminal Procedure Code. Whether a basis has been laid by the applicant for this court to exercise the revisionary powers vested under section 362 as read with section 364 of the Criminal Procedure Code.

In navigating though these issues I consider the starting point to be to restate the law applicable. Section 362 of the Criminal Procedure Code provides that:

> **"The High Court may 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."**

The powers of the High Court to exercise revisionary jurisdiction are provided for under section 364 of the Criminal Procedure Code which provides for the following;

> **"In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may:**
>
> > **(a) In the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence.**
> >
> > **(b) In the case of any other order other than an order of acquittal alter or reverse the order.**
>
> **2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."**

The provisions of section 362 as read with section 364 of the Criminal Procedure Code are clear that revision jurisdiction is by no means an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.

The question to be answered is whether the circumstances of the matter does justify a revision by a superior court from subordinate court. On this issue I draw guidance as elucidated in the Tanzania case in the case of ***Dr. Aman Walid Kaborou v The A.G & Another Civil Application No. 70 of 1999 UR*** where the court observed as follows:

> **"That a review should be carried out when and where it is apparent that:**
>
> **First there is a manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further that such an error resulted in injustice.**
>
> **Second the decision was obtained by fraud.**

Thirdly the applicant was wrongly deprived the opportunity to be heard.

Fourth, the court acted without jurisdiction."

See also reference to ***C.J Patel v Republic Cr. Application No. 80 of 2002.***

The same Criminal Procedure Code under section 380 and 382 sets out statutory restrictions to delineate some of the errors, omissions and orders in the proceedings which this court would be called upon to exercise powers of revision. However it should be noted that the power of revision is not governed by set timelines as its in the case on the right of appeal. This was clearly stated in the case of ***Republic v Ajit Singh S/O Vir Singh [1957] pg 309*** where the court held:

"(a) Sub-section (5) of section 364 (Criminal Procedure Code) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or who has had a right of appeal and is not intended to derogate from the wide powers conferred by section 362 and 364 2of the CPC.

(b) The Supreme Court can, in its own discretion, act *suo motto* even where the matter has been brought to its notice by an aggrieved party who had a right of appeal."

I acknowledge that Indian Code has similar provisions with our CPC (Cap 75 of the Laws of Kenya). The legal proposition by the Supreme Court can therefore be said to be applicable to our own code.

The power of revision:

Section 380 provides as follows:

"No finding, sentence or order of a criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong area, unless it appears that the error has occasioned a failure of justice."

Section 382:

"Subject to the provisions herein before 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."

I am therefore satisfied that the applicant has satisfied the first hurdle that the issues raised do fall within the revisional jurisdiction under section 362 as read with section 364 of the Criminal Procedure Code.

I now proceed to determine each singular ground subject matter by the applicant.

(1) Whether the conditions of withdrawal of the case against the second accused under section 87(a) of the Criminal Procedure Code were fulfilled:

Section 87 of the Criminal Procedure Code provides as follows:

"In a trial before a subordinate court a public prosecutor may with the consent of the court or instructions of the Director of Public Prosecutions at any time before judgement is pronounced withdraw from the production of any person and upon withdrawal:

(a) If it is made before the accused person is called upon to make his defence, he shall be

discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

(b) If it is made after the accused person is called upon to make his defence he shall be acquitted."

The withdrawal of charges under section 87(a) of the Criminal Procedure Code by the prosecution should be read in conjunction with Article 157 (5) (c), (7) and (8) of the Constitution which states:

(c) Subject to Clause 7 and 8 the Director of Public Prosecution may discontinue at any stage before judgement is delivered any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b).

(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of the person or authority.

(7) If the discontinuance of any proceedings under Clause 6 (c) takes place after the close of the prosecution's case the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

Under Article 157(a) provides as follows:

"The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or specific instructions."

Section 29 of the Office of the Director of Public Prosecutions Act 2013 states:

"29(1) The Director may appoint any qualified person to prosecute on his or her behalf.

(2) A person appointed under subsection (1) shall be known as a public prosecutor.

(3)A public prosecutor appointed under subsection (1) shall be responsible to the Director and shall be bound to comply with all guidelines and instructions issued by the Director in respect of prosecutions."

The issue raised by the applicant in his letter is in respect of the prosecutor entertaining the application for withdrawal without instructions. That therefore calls for this court to satisfy itself as to the legality, correctness and propriety of the order granted under section 87(a) of the Criminal Procedure Code.

In the face of this application I have gone through the record though no reasons are indicated there is a presumption to be drawn that the prosecutor under delegated authority as provided for in section 29 (1) of the Officer of the Director of Public Prosecutions Act made the application for withdrawal in good faith and for the interest of justice. In seeking a withdrawal of the charges against the 2nd accused and the learned trial magistrate allowing the order by consenting to the application no material has been placed before me that each of them acted malafides or contravened their respective jurisdiction.

In disposing of matters in every appropriate case the constitutional and the criminal procedure code places enormous legal responsibility on the prosecution. As a professional one is required to conduct a trial bearing in mind the tenets of right to a fair trial under Article 50 of the Constitution. It is neither permissible for the court clothed with powers of adjudication and supervision of the trial not to apply its legal mind in every occasion. I must confess I am unable to see how the learned trial magistrate could have expressly consented to the withdrawal if no valid reasons were provided by the prosecutor.

On the other hand I do not think that in every situation under an application made under section 87(a) of the Criminal Procedure Code giving reasons is a conditional precedent to the withdrawal. I have therefore considered the complaint on withdrawal of the application and subsequent consent by the trial magistrate and I find no error or illegality and impropriety of procedure to exercise discretion under section 362 to correct the error.

I am of the conceded view that the drafters of section 362 had in mind an error, irregularity or omission considered to have resulted in the failure of justice or has been occasioned by it.

The failure of justice test is echoed in the persuasive authority in the case of ***Public Prosecutor v Yangyin [2015] 2 SLR 78*** where CJ Merion of Singapore summarized the principles governing the exercise of revisionary powers of the High Court thus:

> **"Having decided that this court could exercise powers of revision in the present case, the next question that arose for consideration was whether I should exercise those powers. It is settled law that threshold is that of serious injustice and that revisionary power should be exercised sparingly."**

See ***(Yunani bin Abdul Hamid v PP [2008] 3 SLR 383 at 47:***

The requirement of serious injustice was explained by **Yong Pung How CJ** in the High Court decision of ***Ang Polichuan v PP [1995] 3 SLR 929 at 12*** in the following terms:

> **"There cannot be a precise definition of what would constitute such serious injustices for that would in any event widely circumscribe what must be a wide discretion vested in the court. The exercise of which would depend largely on the particular facts. But generally it must be shown that there is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below."**

This principle in my view fits the present situation as regards the claim on the withdrawal application under section 87(a) of the Criminal Procedure Code. Accordingly this ground lacks merit and the same is dismissed.

The second issue I was asked to address is in respect of the sentence of a fine of ksh.100,000 in default three years imprisonment passed against the 4th accused person. The 4th accused person was charged with the offence of importing uncustomed goods contrary to section 200 (d) (iii) of the East African Community Customs Management Act 2004. The applicant argued that the procedure of taking the plea by the learned trial magistrate was defective.

Section 136(1) of the Criminal Procedure Code and section 207 (1) of the Criminal Procedure Code provides as follows:

> **"The substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge."**

Section 281 provides that:

> **"An accused person may plead guilty or not guilty subject to a plea agreement."**

The classic case of ***Adan v Republic [1970] EA 24*** outlines the proper procedure on recording of pleas as follows:

> **"That the charge and particulars of the offence should be explained to the accused, in the language that he/she understands.**
>
> **(ii) That the plea should as far as possible be recorded in the words of the accused.**

(iii) That in the event of plea of guilty the fact should be stated to the accused, and he/she should be granted an opportunity to respond.

(iv) That if an accused disputes the facts of the charge a piece of not guilty must be entered.

(v) Where there is more than one accused jointly charged, the plea of each should be recorded separately. And if a charge or indictment contains several counts, the accused must be asked to plead to them separately.

(vi) If an accused does not change his/her plea, a plea of guilty should be entered and a conviction recorded and after mitigation and facts relevant to sentence are taken, the sentence can be meted out."

In the present case the brief plea hearing taken on 8/11/2016 presents the following elements:

Before Hon. M. Kasera P.M

C/Prosecutor Akoth

C/A Kobai

Accused 1 present

Nyamu for accused 2 and 4

NYAMU: I have just been given instructions. I am told Mr. Aziz is unwell, he recently lost his wife and on that I pray for bond reduction for accused.

PROSECUTOR: I am ready with my witnesses in court. I am facing some difficulties some reports are missing e.g. report from KBS and government analyst.

NYAMU: Accused 4 wants to change his plea.

COURT: Charge read over and explained and accused 4 in English

ACCUSED 4: It is true.

COURT: P.O.G.E.

PRO: Facts are per charge sheet.

COURT: Fine Ksh.100,000 in default 3 years imprisonment. Accused 4 to pay duty before release of the consignment.

Going by this record and the proceedings before the learned principal magistrate there is nothing to show the circumstances that led to the change of plea which was done in absence of other accused persons. When the accused allegedly pleaded guilty the learned principal magistrate did not address the issue when an entry of guilty and an order of conviction to the charge was made. The learned prosecution counsel is indicated to have submitted that the facts were as per the charge sheet. The record bears me witness on this point.

What is intriguing from the record is the absence of facts placed before court to establish the ingredients of the charge. It is then at this stage that the learned principal magistrate would convict the accused on his own plea of guilty after admission of the facts. In the present case none of this procedure was complied with by the trial court. It is crystal clear that the accused though fined for the offence he was never convicted as per the requirement of the law. The procedure in plea taking was revisited by the Court of

Appeal in the case of **Kariuki v Republic [1984] eKLR** 809 where the court held interalia:

"The word 'do' recorded by the trial court as the accused persons' answer to the charge meant nothing and was neither an admission nor a denial of the facts."

The court proceeded to provide an outline of the manner in which a plea of guilty is to be recorded, as follow:

> **"(i) The trial magistrate or judge must read and explain to the accused the charge and all the ingredients of the offence, in the language of the accused or a language the accused understands.**
>
> **(ii) He should then record the plea in the accused person's own words and if they are an admission, a plea of 'guilty' should be entered.**
>
> **(iii) The prosecution must then, immediately, state the facts and the accused should be given an opportunity to dispute, to explain or to add any relevant facts.**
>
> **(iv) If the accused does NOT agree to the facts or raises any question to the facts, his answers should be recorded and a change of plea entered. If there is no change of plea, a conviction should be recorded alongside a statement of facts relevant as well as the reply of the accused."**

Compliance with section 136(a) and section 207(1) of the Criminal Procedure Code entails the explanation of the charge the accused is charged with all the necessary ingredients to the accused in the language he understands. That inquiry then gives the court the opportunity to satisfy itself that not only has the charge been framed but also proved against the accused. The learned trial principal magistrate was therefore under a legal duty to confirm that the prosecution has discharged the burden of proof under section 107(1) of the Evidence Act Cap 80 of the Laws of Kenya. The original record shows that the accused pleaded guilty to the charge which he replied in English. The next sentence which followed was in abbreviation letters P.O.G.E. There is no standard legal dictionary or any provisions of the criminal procedure code which provides the standard definition of P.O.G.E. That acronym abbreviation letters can only be interpreted by the author of the proceedings who in this case is the learned principal magistrate.

In my considered view there is no entry of plea of guilty known in the language of the court. The court further in the case ***of Njuki v Republic [1990] KLR 334*** held as follows interalia:

> **"It has been said time and again that the pleas recorded in the words such as I admit, accept it, I plead guilty, it is true I am guilty and so on cannot be considered as unequivocal pleas."**

In the case of ***M'Mwenda v Republic [1957] EA 429*** the court made reference to the word guilty and held interalia that there is no corresponding word guilty in any of the languages of Uganda and Kenya. See also (an outline of criminal procedure in Kenya by ***P.L.O. Lumumba Law Africa 2nd Edition pg 144***).

In the instant application the irregularities and defects pointed out in this trial were of such a nature which can be said to be untenable in law. There is a clear omission which is not curable under section 382 of the Criminal Procedure Code.

It is therefore clear that law did not permit the learned principal magistrate to do any of such things while administering a plea of guilty against the 4th accused.

In line with the above finding to the defects in the plea hearing this court has the mandate under section 362 to consider the order on sentence. The accused 4th respondent to this case was charged with the offence of importing uncustomed goods contrary to section 200 (d) (iii) of the East African Community Custom Management Act 2004. The particulars of the offence being that on 21st February 2016 at

Namanga border point within Kajiado County in the Republic of Kenya, jointly with others not before court were unlawfully importing into Kenya ninety bales of second hand used clothes using motor vehicle registration number T 342 CZN Volvo Bus all valued at Ksh.200,000 while knowing them to be uncustomed goods contrary to the said Acts. The penalty for the offence which the accused allegedly pleaded to is one of a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved or both.

Section 201:

> **"Where on conviction for an offence under this Act a person is liable to pay a fine, that person shall unless the goods are prohibited goods or are ordered to be forfeited under this Act pay duty on the goods in addition to the fine."**

In the instant case while the plea of guilty to the charge was offered and accepted by the learned principal magistrate there was an omission by the learned principal magistrate as follows:

> **"(i) The learned trial principal magistrate erred in law and facts from not subjecting the uncustomed goods to duty assessment by Kenya Revenue Authority.**
>
> **(ii) Secondly the learned trial principal magistrate erred in law and fact in first imposing the fine of Ksh.100,000 without ascertaining the dutiable value of the goods.**
>
> **(iii) Thirdly the learned trial principal magistrate erred in law and fact by making an order on sentence of Ksh.100,000 without complying with the law under section 200 that the fine payable to be equal to fifty percent of the dutiable value of the goods."**

The principles upon which an appellate court can interfere with the lower court sentence are well settled. This was well illustrated in the case of ***Wilson v Republic [1970] EA 599,*** following ***Ogalo S/O Owuor v Republic [1954] 21 EACA 270*** where it stated as follows:

> **"The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence. Secondly it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely that the sentence is manifestly excessive or ordinarily low."**

In view of the circumstances of the case the principles in these cited authorities justify my respective position that the learned trial magistrate overlooked the provisions of section 200 and 201 of the East African Community Customs Management Act 2004 on sentencing and punishing the offender who is in breach of the provisions of section 200 (d) (iii) on uncustomed goods. In view of my finding on the detective plea and subsequent sentence order I find the trial unsatisfactory. The conviction and sentence were irregular and improper in breach of the clear provisions of the law and judicial precedents.

I am further inspired on this issue on the threshold intervention in the principles stated in the case of ***Knight Glenn Jeyasingam v PP [1998] 3 SLR*** from Singapore where the court held:

> **"The courts immediate duty is to satisfy itself as to the correctness/legality or propriety of any order passed and as to the regularity of any proceedings of the subordinate court. However, this is not sufficient to require the intervention of the courts on revision. The irregularity or otherwise noted from the record of proceedings must have resulted in grave and serious injustice *(emphasis original)."***

As for me what happened in this case as at the time of plea and the unusual circumstances the plea was being hurried, there was no time even for the prosecutor to read the full facts of the case accused was charged with, the process in sentencing hearings and final order impacts on the integrity and sanctity of

the trial. This court will not sit back and condone actions which do contribute in eroding public confidence on the Judiciary.

I find the circumstances and facts in the case of ***Uganda v Polasi [1970] EA 638*** are similar to the present application where revisionary jurisdiction was invoked to correct an error which had occasioned an injustice. The court held as follows:

> **"The case has come to this court's notice in the exercise of its functions. The accused, it would seem, was unaware of the illegality of the sentence…. Once this state of affairs has come to the notice of the High Court, what must it do when it is enjoined to exercise general powers of supervision and control over the magistrates' courts, coupled with the specific powers of revision, under…. The Criminal Procedure Code? The court is clothed with authority to correct errors… Here the accused is sentenced to undergo imprisonment for seven years, a sentence which exceeds the legal limits by five years and, accordingly, there's a gross illegality. In these circumstances, the clear duty of this court, notwithstanding the fact that the accused has abandoned his appeal, is to invoke… the Criminal Procedure Code and cure the illegality. I wound hold that in the circumstances of this case, even if this court *is functus officio*, it has jurisdiction under its revisional powers to correct the formidable error of the trial magistrate which has already occasioned an injustice."**

The above principles were also discussed in the persuasive authority by the Supreme Court of India in the case of ***Sunilkumar Pal v Plofa Sheikh [1984] 4 SCC 533*** the court commenting on the unusual procedure adopted by the trial court opined as follows:

> **"We have no doubt that under these circumstances the trial could not be regarded as fair and just so far as the prosecution was concerned. The entire course of events shows that the conduct of the trial was heavily loaded in favour of the respondents 1 – 9. The trial must in the circumstances be held to be violated and the acquittal of the respondents 1 – 9 as a result of such trial must be set aside. It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process that would be subversive of the rule of law."**

This is an important passage which adds a new dimension to our jurisprudence on the rule of law and administration of criminal justice. It is a rallying call in the preamble of our constitution 2010. In one of the stanzas it states recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. That is the Republic constitution speaking in a powerful way. I associate myself with these principles and values in this duty of adjudication of disputes. My take therefore in this matter is that the trial be and is hereby vitiated for being irregular and defective.

I have considered the stage the respondents are in these proceedings. I am satisfied that this is a clear case that an order for retrial should be made in favour of the applicant. The case of ***Koome v Republic [2005] 1KLR 575*** shades light on the principles to guide the court in exercising discretion to order for a retrial. In regard to this case an order for retrial will serve the interest of justice.

The upshot, the following orders do issue in effect to the letter dated 9/11/2016 by the applicant:

> **(1) That the retrial of Criminal Case No. 256 of 2016 be heard and determined before another magistrate besides Hon. M. Kasera (P.M).**
>
> **(2) That the Chief Magistrate do allocate the case before her or Hon. Chesang RM to hear and determine the case involving the respondents.**
>
> **(3) That the order on section 87(a) of the Criminal Procedure Code shall remain in force as**

per the order issued on 8/11/2016.

(4) That the issue of motor vehicle registration number T 342 CZN Volvo Bus which is particularized in the charge sheet be dealt with expeditiously and the trial court makes an order on the merits.

(5) That the earlier order by Hon. Kasera that the motor vehicle be released and the owner do avail it at the trial is hereby set aside.

(6) That the trial court to take into account that the motor vehicle has foreign registration and the efforts to secure its availability during the trial be considered.

Those are the orders of this court.

Dated, delivered and signed in open court at Kajiado on 18/5/2017.

……..

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Itaya for Accused 4

Mr. Aziz - present

Mr. Akula for Director of Public Prosecutions

Mr. Njenga present

Lenard Court Assistant