REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL REVISION NO. 1 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

SIMON WAMBUGU KIMANI & 20 OTHERS.....ACCUSED/CONVICT

RULING

A. **BACKGROUND OF THE MATTER**

1. On 3rd February 2015, twenty one (21) people were charged in the Principal Magistrates Court at Mandera with disobeying lawful order contrary to Section 131 of the Penal Code. The particulars of offence were that on 25th January, 2015 at Karrow quarry Mandera East Sub County within Mandera County disobeyed an order by the OCPD Mandera East requiring them to vacate the quarry for security reasons. The names of the twenty one accused persons were annexed to the charge.

2. All the accused persons except one John Peter Irungu (the 14th accused), appeared in court before the Resident Magistrate on 3/02/2015. When the charge and elements was read to them in Kiswahili, all the twenty persons present were recorded as having responded that it was true. Pleas of guilty were thus entered by the trial court against each of the twenty accused.

3. Thereafter, the prosecutor stated that the facts were as per the charge sheet. The learned Magistrate then recorded that all the accused persons present were "committed", which I presume was convicted, on their own plea of guilty.

4. In mitigation, the respective twenty accused persons stated as follows:-

Accused 1: I will not repeat the offence again.

Accused 2: I ask the court to forgive me, it was not my fault as the lorry broke down.

Accused 3: I ask court to forgive me. I will not repeat again. Lorry broke down.

Accused 4: I ask court to forgive me.

Accused 5: I ask court to forgive me. I will not repeat again

accused 6: I ask court to forgive me.

Accused 7: I ask court to forgive me. I will not repeat again.

Accused 8: I ask court to forgive me

Accused 9: I ask court to forgive me

Accused 10: I ask court to forgive me I will not repeat again

Accused 11: I ask court to forgive me. I will not repeat again

Accused 12: I ask court to forgive me.

Accused 13: I ask court for forgiveness. I will not repeat again

Accused 15: I ask court to forgive me. I will not repeat again.

Accused 16: I ask court to forgive me. Vehicle broke down. I will not repeat again.

Accused 17: I ask court to forgive me

Accused 18: I ask court to forgive me. I will not repeat

Accused 19: I ask court for forgiveness, I will not repeat again

Accused 20: I ask court for forgiveness, I will not repeat it again

Accused 21: I ask court to forgive me.

5. Thereafter, the prosecutor asked for a warrant of arrest to issue against the 14th accused who was absent.

6. Following what transpired in court above, the learned Magistrate preceeded to sentence the twenty persons present in court in the following terms-

> "***Accused persons mitigation has (been) duly considered. Though the offence they have been charged with is a misdemeanor, their conduct was an outright threat not only to the security in Mandera but also their lives. Whilst the events of December, 2014 were still clear in their minds, the accused persons proceeded to disobey lawful orders of to the OCS Mandera to stay away from the quarry. To ensure security is maintained and unnecessary loss of life is avoided the accused's conduct must be discouraged. This court will endeavor to assist all security organs in the pursuit of peace and security in the region and this includes assistance to ensure that all their lawful orders are obeyed and complied with by the citizenry. In the circumstances above, and as a means to deter persons who may wish to disobey orders properly issued for the protection of that lives (sic) and property. Accused 1, 2, 3, 4, 5, 6, 7, 8,9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20 and 21 are hereby sentenced to pay a fine of kshs. 60,000/- each and in default to serve 5 months imprisonment. Right of appeal 14 days"***

7. In addition to the above orders, a warrant of arrest was issued by the court against the 14th accused person who was absent and a mention of the case fixed for 12/02/2015 with regard to the 14th accused John Peter Irungu.

B. **REQUEST BY THE DPP**

8. On the 6th February, 2015, the DPP through the Prosecuting Counsel Mandera moved this court through filing a letter. In the letter, the DPP requested that this court do urgently look in to the proceedings of the subordinate court herein to satisfy itself as to the correctness and propriety of the

sentence imposed.

9. The DPP relied on Section 362 of the Criminal Procedure Code (Cap 75), and expressed the following views:-

- **The courts sentence was excessive and unwarranted in the circumstances considering that the accused persons were only trying to eke a living out of the quarry fields and were not in outright defiance per se.**

- **The court in the circumstances ought to have meted out a lesser sentence.**

- **The trial court in its judgment appeared to have premised its findings on the events of late November and early December, 2014, while the area in question had since been pacified.**

10. The DPP's letter further sought leave of the court for the Prosecuting Counsel to have audience and address the court in the absence of the convicted persons, as the DPP was not seeking adverse orders against them**.**

11. The court granted the Prosecution Counsel Mr. Allen Mulama audience to address it in the matter as requested.

C. **DPP'S SUBMISSIONS**

12. In his address to the court, Mr. Mulama submitted that, except for one of the 21 accused persons who was absent, all the rest pleaded guilty to the charge of disobeying lawful orders contrary to section 131 of the **Penal Code**. The learned Magistrate convicted and sentenced them to a fine of Kshs. 60,000/- or in default to serve 5 months imprisonments each.

13. Counsel submitted further that none of the 20 convicts had raised the fine. As a consequence, all the 20 convicts were in custody serving the prison sentence.

14. In counsel's view the sentence imposed by the court was harsh, excessive and unwarranted, since all the convicts were mere quarry workers trying to make a living from the quarry fields. They were not according to counsel, people who had deliberately set out to defy lawful orders. Counsel felt that an unconditional discharge of the convicts by the court would have been an adequate sentence or punishment in the circumstances of the case.

15. Counsel submitted further that the DPP was not questioning the discretion of court in sentencing. However, in counsel's view, the learned Magistrate was wrong in entirely basing his decision in sentencing on the security situation prevailing in the area towards the end of last year 2014. Counsel felt that, though the court was entitled to take into account the previous occurrences in the area in sentencing, the court should not have based its sentence solely on the past security situation.

16. Counsel asked this court to make favorable orders on the sentence in this matter in the interests of justice and in the public interest. Counsel relied on the provisions of Section 362 of Criminal Procedure Code (cap 75) and Article 165 (6)(7) of the Constitution of Kenya 2010.

17. When asked by the court to clarify the substance of the charge brought against the convicts, counsel submitted that the way the charge was drafted was not very clear as the specific lawful order was not stated. In counsel's view, different courts could as well have come to different conclusions on the specific order disobeyed. Counsel opined that this might be the reason why though the charge sheet talked about an order issued by the OCPD, in sentencing the learned Magistrate referred to an order issued by the OCS. Counsel felt that in case matter went to full trial the prosecutor would probably have found it difficult to prove the case.

18. Counsel emphasized however that though a "public officer" was not defined under Section 131 of the Penal Code, provided an order was lawfully issued by a person who was acting in lawful duty, then disobedience of the same would amount to commission of the offence charged.

D. **DECISION OF THE COURT**

19. I have considered the matter, submissions by the State, and perused the record of the trial court.

20. This is a matter that has come to this court under its review jurisdiction under Section 362 of the Criminal Procedure Code (Cap. 75). Article 165 (6) and (7) of the Constitution of Kenya 2010 is also relevant. It is not an appeal. The law does not require that the court should be addressed by any of the affected parties. However this court has allowed the Prosecuting Counsel on behalf of the DPP to address it. The revision powers of this court are similar to those that this court exercises on appeal.

21. I will start by highlighting the Constitutional and statutory provisions applicable in revision matters for clarity and understanding. Article 165(6) and (7) of the Constitution of Kenya 2010 provides as follows:-

> **"(6) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial functions but not over a superior court.**
>
> **(7) for purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

22 Section 362 of the Criminal Procedure Code (Cap 75) on the other hand provides as follows:-

> **"362. The High Court may call 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 subordinate court".**

22. It can be seen from the above Constitutional and statutory provisions, that the High Court has wide powers of review of proceedings in subordinate courts and other judicial or quasi-judicial bodies, except Superior Courts. The Constitutional provisions are broader and cover criminal as well as other proceedings. Since these are criminal proceedings, section 362 of the Criminal Procedure Code was correctly relied upon by the DPP.

(i) The Sentence

23. I have perused the original record of the subordinate court at Mandera. I have already highlighted the sentence imposed by the court. The DPP has requested that this court considers reviewing the sentence imposed by the subordinate court. The DPP does not have a problem with the conviction. In my view though the DPP is only questioning the sentence this court has an obligation imposed under its review jurisdiction to consider all the record and to be satisfied that both the conviction and the sentence are lawful and proper, as well as whether the proceedings were conducted in a proper manner.

24. On the sentence, I note that the prosecutor in the subordinate court did not state before the sentences were pronounced whether any of the accused was a first offender. In my view, he should have done so in order to assist the learned Magistrate in determining whether each particular accused should be handed down a lesser or more severe sentence.

25. The prosecutor also did not give any information to the court on whether there were specific surrounding circumstances of the case that would aggravate the offence such as the prevailing security

situation in the area and the general security concerns of the public. The surrounding facts would also have helped the trial court in determining appropriate sentences.

26. In my view, these shortcomings by the prosecution had the effect of creating a hollow situation for the learned magistrate in the delicate task of sentencing.

27. Sentencing is the discretion of the trial court, which should be exercised fairly and within the law and jurisdiction of the particular court – **See Karuki Vs. Republic (1970) EA 230.** The exercised of that discretion is based on facts and circumstances that are availed to the trial court, by the prosecution in their address as well as the defence in mitigation.

28. A superior court will not interfere with that exercise of that discretion merely because it might have somewhat passed a different sentence. It must be shown that the trial court acted upon some wrong principle or overlooked some relevant facts when sentencing – **see Macharia vs. Republic (2003) KLR 115 and Ogalo S/O Owuor vs. R (1945) EACA270.**

29. In the present case, only the accused personssaid something in their mitigation. The prosecution did not even attempt to assist the learned trial Magistrate in determining an appropriate sentence or sentences. The prosecution said nothing regarding the previous convictions of the accused. They did not highlight the prevailing circumstances of the offence. The same prosecution now complains about the severity of the sentence, and say that the security situation had been pacified, and that the accused were poor people trying to earn an honest living.

30. In my view, the court was fully entitled to take judicial notice of notorious prevailing facts in the public domain, even where the same were not formally brought to the attention of the court by either the prosecution or the defence. The subordinate court was thus, in my view, perfectly entitled to take into account the known recent happenings regarding security and loss of life in the same area. The prosecution cannot now blame the learned Magistrate since they did not bring to the attention of the learned Magistrate any new developments in the security situation, nor did they inform the learned Magistrate about the status and situation in life of the accused.

31. The sentence for the offence charged was a maximum of 2 years imprisonment. The learned magistrate handed down a fine of kshs. 60,000/- and in default a prison term of 5 months. The State has not informed this court that the Magistrate did not have jurisdiction to impose the fine, or any part of the sentence.

32. In my view, though the convicts appear to be poor people, and the fine imposed appears to be a bit high, I do not think that it can be said that the trial court acted irregularly In the exercise of its sentencing discretion. The court acted on facts and circumstances of the case known to it. The sentence imposed cannot thus be said to be harsh, excessive, and unreasonable. I disallow the complaint of the state.

(ii) The Charge

33. I now turn to the charge. Having perused the charge sheet and the proceedings, I find that the charge as drafted was incurably defective. Secondly, the pleas of the convicts were not unequivocal. As such the convictions and sentences imposed cannot be sustained.

34. The particulars of charge state that the accused disobeyed an order issued by the OCPD Mandera West requiring them to vacate Karrow quarry for security reasons. Section 131 of the Penal Code under which the convicts were charged requires that such order has to be lawful and issued by a public officer, for its disobedience to constitute a crime.

35. The word "**lawful**" is missing from the particulars of the charge. Disobeying an order not backed by law is not an offence under that section. Such an order not backed by law cannot be lawful. The alleged order is to vacate a quarry for security reasons. One may ask whether the OCPD Mandera East had

lawful authority or power to order people to vacate a quarry for security reasons. From what statute or subsidiary legislation did the OCPD get the powers to issue such an order?

36. Even assuming there was such law, the law or regulations under which that order was issued was not mentioned anywhere in the charge sheet. In addition, the manner in which the said order was issued or communicated, and to whom, was not stated in the charge sheet. Finally, the name and identity of the public officer who issued that order was not stated in the charge. The acronym "OCPD" is not the person or public officer, but an office. No wonder, though the charge sheet refers to the order issued by the OCPD Mandera East, the learned magistrate in sentencing referred to an order from the OCS. It thus shows that the order not being backed by law, created confusion even to the trial court. The accused must have been in a worse situation of confusion as to the charge they were pleading to.

37. In my view, the charge and particulars here in did not disclose an offence. The defect was not a minor defect that was curable under Section 382 of the Criminal Procedure Code. It was a fatal defect and is not curable. The case of **Pappyton Mutuku Ngui vs. Republic (2012) eKLR** distinguished**.**

38. Even if all the convicts pleaded guilty to the charge as framed, as they did, they cannot be said to have pleaded guilty to any offence known in law. Since the charge did not disclose an offence, pleading to it could not be said to be admitting the commission of the offence.

39. In addition to the above, the learned trial magistrate erred in convicting three of the accused persons on their pleas of guilty. These were accused No. 2, 3 and 16 who sated in mitigation that they could not vacate the quarry because a lorry broke down. The statements by the three accused was a sufficient reason for their pleas to have been changed by the court to "not guilty" before sentencing. If indeed, they could not obey the order because there was no transport available, how could they have been said to have disobeyed the order to vacate the quarry? Such a statement by them was possibly a full defence to the charge. As such their pleas should have been changed to not guilty.

40. It is apparent in my view, that much of the confusion was caused by the failure of the prosecutor to summarize the facts of the case after the pleas were taken. The prosecutor was recorded as merely saying that the facts were as per the charge sheet, which was wrong.

41. In my view, the prosecutor should have complied with the clear procedure laid down in the case of **Adan v Republic (1973) EA 445.** In which, while appreciating the scant provisions of section 281 of the Criminal Procedure Code, the Court of Appeal for East Africa laid down the following steps in recording a plea of guilty:-

> 1. **the charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands:**
>
> 2. **the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> 3. **the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> 4. **If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered**
>
> 5. **If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.**

42. In my view, had the prosecutor given facts of the case in the court after pleas were taken, the confusion in these proceedings would have been avoided. This is because, any doubts as to the pleas of guilty of the accused would have been cleared since each of the accused would have been given an opportunity to respond to the facts. If this procedure was followed, the issue of availability of lorries

would have come up before conviction was wrongly recorded against the three.

43. In my view, the practice of prosecutors saying that the facts are as per charge sheet should be avoided. Sometimes, the facts tendered in court to support the charge may even include documentary exhibits. The facts given either orally or through documents might differ with the allegations in the charge sheet. In that case, the court cannot enter a conviction as to do so will be a fertile ground for appeal.

E. **CONCLUSION**

44. To conclude, I find that the convictions against all the convicts are not proper. The charge is incurably defective. It does not disclose an offence known in law. The pleas of guilty were thus not unequivocal, and cannot be sustained. The sentences imposed also cannot be stand on that account.

45. The defective charge also operates in favour of even the 14th accused who is at large. The charge against him herein is incurably defective.

46. I thus find justification in exercising this court's powers of review under section 362 of the Criminal Procedure Code (cap 75). I quash the convictions of all the 20 convicts and set aside the sentences imposed on each of them. I order that all of them be set at liberty forthwith unless otherwise lawfully held. If any of them has paid the fine, same should be refunded in full. I also quash the defective charge against the 14th accused.

SIGNED, AND DELIVERED AT GARISSA THIS 11 DAY OF FEBRUARY, 2015.

GEORGE DULU

JUDGE

In the presence of :

Mr. Okemwa for state

Martin Court Clerk