



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL REVISION NO. 241 OF 2013**

**(BEING REVISION OF THE CONVICTION AND SENTENCE IN PMCRC. 1075 OF 2011 AT NYAHURURU ON 20/02/2012)**

ALI ABDI DULACHA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**R U L I N G**

This matter though heard in Nyahururu Court vide Criminal Case No. 1705/2011 has been placed before me for Revision under the decongestion program. I have read through the probation Officer's report recommending Community Service Order (CSO) at Rumuruti Primary School, Laikipia for the offender.

Upon perusal of the record I have noted a number of anomalies which I wish to point out.

1. The Coram and even the proceedings do not show the date on which the offender first appeared in Court.
2. The Charge Sheet was however endorsed on 2/9/2011, which make me believe the offender's first appearance in Court was on 2/9/2011.
3. On the date of plea, the offender admitted the first count of theft and denied the 2nd count. The prosecutor was not ready to give facts. The matter was adjourned to 5/9/2011 for facts.
4. When the matter came on 5/9/2011 the Court proceeded to take facts. In the first instance there is no indication of what language was in use in the Court. Secondly the offender was not reminded of the charge as was expected. The Prosecution proceeded to present the Court with facts soon after the mention. This to me was unprocedural. The offender ought to have been given a chance to plead afresh considering that three (3) days had lapsed since the date of plea on 2/9/2011.
5. After all this, the offender was convicted on admission of the facts. On antecedents the Prosecution indicated that the offender had a previous conviction of theft of a bicycle. The learned trial Magistrate considered all this including the accused's mitigation and sentenced him to 2 years imprisonment on 5/9/2011.
6. In the same charge sheet was a second count which read as follows:-

***“Stealing after previous conviction contrary to Section 285 of the Penal Code”.***

The particulars stated in the charge sheet were as follows:-

***On the 1st day of September 2011 at Rumuruti in Laikipia West District within the Rift Valley Province, having been convicted for offences of (1) Theft of a bicycle contrary to***

***Section 275 of the Penal Code before Nyahururu PM's Court Criminal case No. 2825 of 2009 and (2) Stealing contrary to Section 275 of the Penal Code before PM's Court Nyahururu Criminal Case No. 2830 of 2010, stole 32 hens valued at Kshs.9,600/= the property of HENRY MUTURI KABERIA.***

7. With all due respect to the learned trial Magistrate there is no offence in law or otherwise known as ***“Stealing after previous conviction”***. My understanding of Section 285 of the Penal Code is that the same is used when the Prosecution is giving the Court the offender's antecedents to assist the Court to determine sentence.

In this case the said second count was fixed for hearing where only one witness was called by the Prosecution which closed its case and the offender was placed on his defence. Thereafter a judgment was delivered and the offender convicted and sentenced to 2 years imprisonment.

8. It is important to take note of the casual manner the learned trial Magistrate handled this matter. On 23/12/2011 the Prosecution called its only witness and the learned trial Magistrate fixed the date of Ruling as 17/2/2012. Reason? He would be on leave in January 2012 and in any event the offender was serving sentence. He also made similar remarks on 18/10/2011 while adjourning the case.

I have outlined the above issues just to show the insensitivity with which the said Court handled this matter. The Court convicted and sentenced an accused person on a non-existent offence. By his action the offender has been in Prison serving an illegal sentence since 20/2/2012. He ought to have been released in January 2012 after serving the sentence in the first count.

I therefore quash the conviction and set aside the sentence on the second count. The offender to be set at liberty forthwith unless otherwise held under a lawful warrant. To the offender I apologize on behalf of the Judiciary.

It is important that a copy of this Ruling is sent to the Resident Judge Nakuru High Court under whose jurisdiction Nyahururu Court falls just in case the police there still charge Kenyans with this non-existent offence.

The learned trial Magistrate Mr. D.N. Musyoka (Resident Magistrate then) should be sent receive a copy of this Ruling.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 5TH DAY OF NOVEMBER, 2013.**

**H.I. ONG'UDI**

**JUDGE**