



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. E023 OF 2021

REPUBLIC.....APPLICANT

VERSUS

ROBERT KIRUI.....1ST RESPONDENT

ERICK OCHIENG.....2ND RESPONDENT

RULING

1. The application for revision of sentence was made by the prosecution vide a letter dated 3rd December, 2021. The same in respect to Chief Magistrate's Court at **Naivasha Traffic Case No. 997 of 2021 - Republic v Robert Kirui and Erick Ochieng**. The complaint in the letter is that the Learned Trial Magistrate imposed an illegal sentence.

2. The charge sheet had two Counts. In Count I, Robert Kirui was charged with driving a motor vehicle on a road with load greater than the load specified contrary to **Section 56 (1)** as read with **Section 58 (1)** with **Rule 41 (2)** of the **Traffic Act Cap 403 Laws of Kenya**. Particulars being that on the 19th October, 2021 at around 1915hours at Naivasha area along Naivasha Nakuru road in Naivasha Sub-County within Nakuru County of the Republic of Kenya being the driver of the motor vehicle registration number KCJ 343V Make Howo, drove the said motor vehicle on public road with load greater than the load specified in by carrying 37,300Kg instead of the legal limits of 26,000Kgs an overload of 11,300Kgs as per attached Kenya National Highway Authority weighing ticket.

3. In Count II, Erick Ochieng was charged with the offence of permitting the use of a Motor vehicle on road with load greater than the load specified contrary to **Section 56 (1)** as read with **Section 58 (1)** with **Rule 41 (2)** of the **Traffic Act Cap 403 Laws of Kenya**, with the particulars being that on the 19th October, 2021 at around 1915hours at Naivasha area along Naivasha Nakuru road in Naivasha Sub-County within Nakuru County of the Republic of Kenya being the transport manager of the motor vehicle registration number KCJ 343V Make Howo, permitted the use of the said motor vehicle on public road with load greater than the load specified in by carrying 37,300Kg instead of the legal limits of 26,000Kgs an overload of 11,300Kgs as per attached Kenya National Highway Authority weighing ticket.

4. Both accused persons were convicted on their own plea of guilty. With respect to the 1st Accused in Count I, he was sentenced to pay a fine of Kshs 25,000/= in default serve six (6) months imprisonment while the 2nd Accused in Count II, was fined Kshs 5,000 in default serve one (1) month imprisonment.

5. The powers of the High court to review a sentence of a subordinate court are provided for under **Section 362** of the **Criminal Procedure Code** which states as follows:

“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.”

6. The orders that this court can give are provided for under **Section 364** of the Act without restating **Section 364**. One of the powers that the court can exercise in a review is to correct an illegality in sentencing. The onus of this court in this application therefore is to reexamine the original trial court's record and satisfy itself as to whether an illegal sentence was imposed; and if so set aside the illegal sentence and substitute with the correct one.

7. The two accused person under similar provisions being **Section 56 (1)** as read with **Section 58 (1)** with **Rule 41 (2)** of the **Traffic Act Cap 43 Laws of Kenya**. It behooves to the court to restate the provisions. **Section 56 (1)** reads as follows:

“(1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act.

8. While **Section 58 (1)** provides

“(1) Any person who drives or uses on a road a vehicle in contravention of the provisions of Section 55 or Section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or both.

Provided that rules under this Act may provide that a person who is guilty of an offence under Section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person’s liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.

(2) For the purposes of subsection (1), any person who is shown to the satisfaction of the court to be responsible for the maintenance of the vehicle, and any person who is shown to the satisfaction of the court to have been responsible for the loading of the vehicle, shall be deemed to have used the vehicle on the road.”

9. **Rule 41 (2)** of the **Traffic Rules** provides that:

“Any person who drives or uses on a road a vehicle in respect of which the weights set out in paragraph 2 (1), (2) or (3) of the twelfth schedule are exceeded, shall as respects each overload axle or any excess over the maximum permitted weight be guilty of an offence against Section 58 of the Act, and shall in respect of the offence, on conviction, pay a fine not less than the appropriate fine according to the following scale-

.....10,000kgs or more, Kshs 200,000/= each on first conviction and Kshs 400,000/= each on second or subsequent conviction.”

10. Under the rules, the minimum fines set up for exceeding axle overloading or excess gross weight in kilograms are mandatory. The maximum under each of the exceeded weight is equally given in mandatory terms. With respect to both accused persons, the weight exceeded was 11,300kgs as the subject Motor Vehicle Registration No. KCJ 343V was loaded with 37,300 kgs against a limit of 26,000kgs. Under the schedule, any weight in excess of 10,000kgs is subject to a minimum of a fine of Kshs 200,000/= and a maximum of Kshs 400,000/=. What this implies is that the Learned Trial Magistrate exercised an illegality by imposing an illegal sentence.

11. By the powers conferred upon this court under the **Section 364 of Criminal Procedure Code**, I hereby set aside the sentences imposed against both accused persons in respect of both Counts. I substitute them with an order that each of the accused persons shall pay a fine of Kshs 200,000/= in default serve 3 months imprisonment.

12. The default sentence is given having regard that **Section 58 (1)** of the **Penal Code** provides for a fine with a default imprisonment term not exceeding 2 years. This implies that the court can exercise discretion in the default imprisonment term it imposes.

13. In the event that the accused persons who are the respondents herein paid the previous fines imposed, I hereby issue a warrant of arrest to be executed by the Traffic Base Commander Gilgil Police Station for their placement in custody until the full fines are paid.

14. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF FEBRUARY, 2022.

G. W. NGENYE-MACHARIA

JUDGE