Kosgey v Republic (Criminal Appeal E014 of 2021)
[2022] KEHC 14293 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 14293 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E014 OF 2021

JN NJAGI, J

JUNE 30, 2022

BETWEEN

PAUL KOSGEY .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. W. C. Waswa, RM, in Nyamira CMSs Court Traffic Case No.219 of 2021 delivered on 13/5/2021)

JUDGMENT

1. The appellant was convicted for the offence of driving a motor vehicle on a public road with a load greater than the load specified contrary to section 56(1) as read with section 58 of the *Traffic Act* cap.403 Laws of Kenya and sentenced to a fine of Kshs. 100,000/ = in default to serve one-year imprisonment. The particulars of the offence were that on the 23rd September 2019.

2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:

The Evidence

3. The case for the prosecution was that on the material day officers from Kenya National Highways Authority PW 1 and PW2 were on patrol along Nyamira - Ikonge road in company of a police officer from Rongo Weigh Bridge Pw4 when they stopped the appellant driver carrying building blocks in a lorry. The lorry was weighed and was found to be carrying a weight of 39, 150 Kg instead of the permitted one of 30,000 Kg, thus an overload of 9,150Kg. The appellant was issued with a ticket for the overweight No. 77232. It was the evidence of the witnesses that the Authority has a policy to allow a tolerance of up to 2,000 Kg which when deducted from the overload of the appellant's vehicle left an overload of 7,150 Kg which formed the basis of the charge against the appellant.

4. The appellant subsequently disputed the overload. The vehicle was re-weighed on the 2/ 10/2019 at Rongo Weigh Bridge by Beatrice Achieng PW3. At low speed motion the truck weighed 38,220 Kg, thus an overload of 8,220 Kg. At static mode it weighed 38,500 Kg, thus an excess load of 8,500Kg. Tickets were produced for the two weights. The appellant was then charged with the offence.

5. In his defence the appellant denied that he had carried excess weight. He said that the weight conducted by the authority gave varying readings. That when the vehicle was weighed on 23/9/2019, he was told that it had excess weight of 9,150 Kg. That he was not told about the excess weight of 7,150 Kg or why he was given an allowance of 2,000Kg. That the vehicle was weighed again at Rongo and found to have varying excess weights of 8,220 Kg and 8500 Kg.

Submissions

6. The advocates for the appellant, M/S Nyamurongi & Co. Advocates, submitted that the prosecution did not adduce evidence on the type of vehicle the appellant was driving and that it had a load limit of 30,000 Kg. That this was important as loads are specified based on the type of vehicle. It was submitted that the trial court presumed that the axle load limit for the vehicle the appellant was driving was 30,000Kg. That the presumption absorbed the prosecution of the burden of proving this ingredient of the offence, yet different axle load limits apply to different vehicle types.

7. It was submitted that the trial court found that there were varying excess loads which meant that the prosecution had failed to prove beyond reasonable doubt the exact amount of overload the appellant had. That these inconsistencies were fundamental and were fatal to the prosecution case. That sentencing could not have been possible in such event because the law prescribes sentences based on proved overload weights. Therefore, that the conviction of the appellant ought to be quashed and fine paid be refunded.

8. The state on the other hand through the learned Principal Prosecution Counsel, Mr. Majale, submitted that the description and type of vehicle the appellant was driving was captured in the charge sheet as "motor vehicle registration number KBY 317 D make Scania class 4A." That PW 1 in his evidence informed the court that the vehicle in question was a truck whose authorized limit was 30,000 Kg.

9. It was submitted that the weighbridge ticket Exh.2 is issued depending on the type of vehicle, number of axles, permissible weight tolerance and the actual weight of the vehicle. That there was corroborative evidence that the appellant's motor vehicle was overloaded. That the fact that there were varying excess loads is not excusable to the appellant. That on both occasions when the vehicle was weighed it was found to be overloaded. That the conviction of the appellant was proper and within the confines of the law.

Analysis and Determination

10. This being a first appeal, the duty of the court was as set out in the case of *Okeno v Republic* (1972) EA 32 that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should

be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424."

11. In the case of *David Njuguna Wairimu v Republic* [2010] eKLR the Court of Appeal put this duty to be as follows:

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

12. The appellant was charged under section 56(1) as read with section 58 of the *Traffic Act*. The former section provides 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 or as provided for under the East African Community Vehicle Load Control Act, 2013

13. The appellant submitted that the prosecution did not adduce evidence on the type of vehicle that the appellant was driving or that its authorised load limit was 30,000 Kg. The respondent on the other hand submitted that the type of vehicle was stated in the charge sheet and that its load limit was 30,000Kg. However, none of the witnesses who testified in the case told the court how the load capacity of 30,000 kg was arrived at. PW 1 and PW2 in their evidence said that the vehicle was authorised to carry 30,000kg but they never adduced evidence whether this was the load limit specified by the manufacturer or whether it was determined by an authorised inspector. The witnesses who weighed the vehicle PW 1 and PW3 did not adduce evidence that they were authorised weighing inspectors. If the vehicle was classified as class 4A as indicated in the charge sheet, there was no reference to the particular law that limited the load of such class of vehicles to 30,000 kg. In the absence of evidence of how the load capacity was determined, there was no sufficient evidence that the vehicle had excess load.

14. The motor vehicle produced varying weights when it was weighed at Nyamira - Ikonge road and at Rongo weighbridge. The difference between the two weights was more than 600kg. This calls into question the exactness of the machines that were used to weigh the load.

15. The fines under section 58 of the *Traffic Act* are pegged on the amount of excess weight. Rule 10 of the Twelfth Schedule of the *Traffic Act* allows a tolerance allowance of 5% of the permissible maximum axle load. The prosecution witnesses said that the policy by KENHA is to give a tolerance allowance of 2,000 kg. In my calculation the tolerance allowance given to the appellant of 2,000 kg was equivalent to 5%. There was thereby no law broken in giving a tolerance allowance of 2,000 kg.

16. In face of the fact that there was no evidence as to how the permissible weight limit of the appellant's vehicle was arrived at; I find that the charge against the appellant was not proved beyond reasonable doubt. The conviction is thereby quashed and the sentence imposed on him be aside.

17. I order that any fine paid be refunded to the appellant.

Delivered, dated and signed at NAIROBI this 30th day of June 2022.

J. N. NJAGI

JUDGE

In the presence of:

Miss Kebungo for the Appellant

Mr. Majale for the Respondent

Appellant — Absent

Court Assistant

30 days Right of Appeal.