



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. E006 OF 2020

KITHAKA WANDO VENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon M. Munyekenye (P.M)

in original Bungoma PMC Traffic Case No. 234/2020 delivered on 10/9/2020)

JUDGMENT

1. The Appellant was charged with the offence of evading weighbridge contrary to Section 20(1) as read Section 21(1) of The East African Community Vehicle Load Control Act, 2016, particulars being that at around 1:20 a.m. at Matulo Village along Matulo-Nzoia murram road within Bungoma County, the Appellant being the driver of motor vehicle registration number 0632AE19/0369AC19 make Mercedes Benz while transporting diesel from Eldoret to Democratic Republic of Congo evaded to weigh the said motor vehicle at Webuye weighbridge.

2. The Appellant, of Congolese nationality, initially pleaded not guilty following his notice to attend court at which point he was granted a bond of Kshs. 200,000 with one Kenyan surety of a like amount in default remanded to custody in Webuye Police Station or a cash bail of Kshs. 50,000/=.

3. A summary of the prosecution's case is that on the day in question, PW1, Lydia Masaki, an assistant duty manager of Avery East Africa a company contracted by KENHA to man the Webuye weighbridge, received a call from an informant that 2 trucks were evading the weighbridge. She stated that the trucks had diverted from Webuye-Malaba road into the murram road heading from Nzoia to Matulo.

4. Upon receiving the information from the informant, PW1 together with Richard Kipsang, a police officer and Protus Ochieng a driver, lay in ambush for the 2 trucks at the Matulo junction on the Eldoret-Malaba road. The 3 eyewitnesses watched the truck Reg. No. 0632AEA19 join the main Webuye-Malaba road from the diversion for a period of 10 minutes at which point they proceeded to stop the truck.

5. PW2, Gilbert Limosti, the duty manager at the Webuye weighbridge was in the office at 1:00 a.m. when he received a call from PW1 requesting him to verify whether the truck driven by the accused had passed by the weighbridge and been weighed on that day. PW2 checked the systems and informed PW1 that the truck had not been weighed and that the last time it had been weighed was on 11/8/2020 when it was empty. PW2 stated that he received the call from PW1 while she was at Matulo which is past the weighbridge.

6. PW2 instructed PW1 to divert the truck back to the weighbridge however this was impossible at the time as the truck was stuck in a ditch and had to be towed out before being taken to the weighbridge. The truck was eventually towed to the weighbridge 2 days later on 18/8/2020 at which point a weigh ticket was created marked PMF1 2. There was no weigh ticket produced on 16/8/20 since the truck had not been weighed due to evading the weighbridge.

7. PW1 requested security personnel to assist divert the truck back to be weighed at the weighbridge at which point it was found to be 54,760kg which is an overload of 4,760kg (the permitted weight being 50,000kg).

8. The weighbridge officials proceeded to collect documentation from the truck and the Appellant that indicated the truck had left Eldoret and was headed to Congo. The bill of lading dated 12/8/2020 marked and exhibited as PMF1 1 indicated that the truck driven by the accused was indeed the one caught on the diversion and had evaded the weighbridge. They also confirmed through a second weigh ticket that the truck had last been weighed on 11/8/2020 when it was empty. This ticket was marked PMF1 3.

9. The Appellant initially pleaded not guilty, and the trial commenced. He subsequently changed his plea to that of guilty. The trial

magistrate convicted him and fined him Kshs. 1,500,000/= or 2 years imprisonment in default.

10. The charge and facts of the case were repeated to the accused who affirmed their accuracy. The accused proceeded to change his plea to guilty. The Magistrate fined the Appellant the maximum amount of \$15,000 in default 2 years imprisonment reason being that evading weighbridge is a serious offence that leads to accidents that can cause death.

11. Aggrieved, and exercising his right of appeal, the Appellant filed his petition of appeal to which this judgment refers raising the following grounds:

- a. That he is a first offender and remorseful;
- b. That he prays for an affordable fine;
- c. That the fine of Kshs. 1,500,000/= was harsh and excessive.

12. The appeal was disposed of by way of written submissions. Both parties filed their respective submissions which have been carefully considered. The accused submits that he is a first offender and is remorseful. The prosecution submits that the accused's guilty plea was unequivocal and proper in law as held in the case of **Ombena v R (1981) eKLR**. The prosecution further submits that considering that the charge is a serious offence and may lead to accidents causing death, the Magistrate was squarely within the law to mete the maximum fine and sentence. However, the prosecution concedes that the court should show mercy following the Appellant's humble request for leniency and self-admission of guilt.

Analysis & Determination

13. The offence which the appellant was charged with is that of evading weighbridge. The section states:

A person commits an offence under this Act if that person being a transporter, bypasses, absconds or evades a weighbridge or weighing station.

A person convicted of an offence under section 20 by a national court shall be liable to a fine not exceeding \$15,000 or to imprisonment for a term not exceeding three years, or both.

14. The issue arising for determination is whether the sentence imposed by the trial court is harsh and excessive to warrant an interference by this court.

15. It is trite law that sentencing is a discretionary exercise. The court is bound to consider the law creating the offence as well as the sentence and/or sanction prescribed. The court also considers the mitigation tendered by the Appellant.

16. The court ought to consider the conduct of the accused before, during and even after the trial. In this case the appellant pleaded guilty and pleaded for leniency. He is a foreigner who has been away from his family for long and first-time offender.

17. Having considered all the circumstances of the case, the law and the mitigation offered by the appellant, I note that the Appellant received the maximum sentence although he was a first offender.

18. For the foregoing reasons, the Appellant's sentence is reduced to the period so far served. It is therefore ordered that the Appellant be and hereby set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF OCTOBER 2021

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L.A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in person

In the presence of.....State Counsel