REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 151 OF 2018

BENARD OPIYO OUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background.

1. Benard Opiyo Ouma, the Applicant herein was charged with several counts. In counts I and II he was charged with the offence of careless driving of a motor vehicle contrary to **Section 49(1) of the Traffic Act Chapter 403, Laws of Kenya**. The particulars of both counts were that on 26th August, 2018 at around 4.30 p.m. along Mombasa Road at shell petrol station within Industrial Area Nairobi County, being a driver of a motor vehicle Reg. No. KBR 027D make Mercedes Axio Trailer Reg. No. ZE 12873 did drive the said motor vehicle without due care and attention and caused an accident to motor vehicle Reg. No. KBP 806Z make Toyota Wish and in respect of Count II caused an accident to one passenger namely James Kamau Kiara who sustained injuries.

2. All the subsequent counts related to either the same motor vehicle or the trailer it was hauling. In the Count III he was charged of driving a motor vehicle on a public road with some parts and equipment thereof not maintained in safe condition contrary to **Section 55(1)** of the said **Traffic Act Cap 403, Laws of Kenya** punishable **by Section 58(1)** of the said Act. It was alleged that he was driving the afore stated motor vehicle and trailer while fitted with four worn out tyres (serial numbers not visible).

3. In Counts IV and V he was charged of committing the offence of driving a motor vehicle without inspection sticker contrary to **Section 17A(1) of the Traffic Act 403 Laws of Kenya.** It was alleged that the main motor vehicle registration number KBR 027D make M/Axio and the trailer No. ZE 12873 respectively did not have inspection stickers.

4. In Count VI and VII he was charged with using an un-insured vehicle contrary to **Section 4(1) of the Insurance Act 405 Laws of Kenya** punishable by **Section 4(2)** of the said Act in that both the motor vehicle and the trailer were driven on a public road without insurance against third party risk respectively.

5. The Applicant was arraigned in court on 27th August, 2018. He pleaded guilty to all the counts and was convicted accordingly. He was sentenced in count 1 to a fine of Kshs. 80,000/- in default serve one year imprisonment while in counts II to VII he was sentenced to pay a fine of Kshs. 40,000/- in each count in default serve eight months imprisonment respectively.

6. He lodged an appeal against the conviction and sentence through a Petition of Appeal filed 6th September, 2018 before subsequently making the present application which was filed 17th September, 2018. At the date of the hearing of the application on 3rd October, 2018 his counsel, Mr. Mogire applied to withdraw the appeal, submitting that the Applicant had opted to seek a review of the sentence. The withdrawal of the appeal was not opposed by the Respondent. Hence, this ruling relate to the application for revision of the sentence.

Submissions.

7. Mr. Mogire submitted that the sentence was harsh and excessive, more so taking into account that the Applicant had pleaded guilty which saved the court's time. He also urged the court to take into account that Counts I and II related to the same motor vehicle which was hauling a trailer that was the subject of Count II. He submitted that the accidents in both counts occurred in the same transaction, reasons wherefore the court ought to have been lenient.

8. Ms. Atina for the Respondent opposed the application. She submitted that counts I and II related to the offence under **Section 49(1) of the Traffic Act** which provides for a maximum sentence of one year imprisonment for a first offender or a fine of Kshs. 100,000/- with

subsequent offenders getting stricter sentences. She submitted that the sentence of Kshs. 80,000/- in the 1st count was therefore lenient but the default sentence should have been less given that he was a first offender. With regards to Count II she thought that the sentence was lenient.

9. With regards to Count III she submitted that the offence provides for a maximum sentence of two years or a fine of Kshs. 400,000/-. She submitted that the fine meted out by the trial court was therefore lenient. With regards to Count IV and V she conceded to the prayer as Section 17A(1) under which the Applicant was charged did not provide a penalty. She submitted that they should have been charged together with Section 29 of the Act which provides for the penalty.

10. With regards to Counts VI and VII she submitted that the sentence provided was a fine of Kshs. 10,000/- and she therefore conceded that the sentence passed by the trial court was illegal which this court had the powers to correct.

Determination.

11. The court's power of revision is provided for under Sections 362 and 364 of the Criminal Procedure Code. Its duty in revision is to peruse the record in order to satisfy itself as to the correctness, legality or propriety of the findings, sentence or order recorded and as to the regularity of the proceedings. The court is alive to the fact that it should not alter a sentence on the ground that it would have imposed a different sentence if it were the trying court (**Ogalo s/o Owuora v Republic [1954] 21 EACA 270**). The court must not interfere with the discretion exercised by the trial judge unless it is evident that the trial court acted on some wrong principle, overlooked a material factor or the sentence is manifestly excessive in the circumstances of the case. (**Bernard Gacheru v Republic [2002] eKLR).**

12. The contestation in the instant application is that the sentence was harsh and excessive. The court takes this submission to imply that the learned trial magistrate therefore improperly exercised his powers of sentencing. In as much as the Applicant was convicted on his own plea of guilty and the application herein only challenges the excessiveness of the sentence, the court cannot turn its back from interrogating the manner in which the plea was taken. This augurs with the courts powers in a revision of satisfying itself as to the regularity of the record of the trial court pursuant to **Section 362 of the Criminal Procedure Code**.

13. A glimpse of the proceedings shows that the plea was not unequivocal. The procedure by which the same was taken did not accord with **Section 207 (1) and (2) of the Criminal Procedure Code** and as enunciated in the celebrated case of **Adan Inshair Hussein *v.* Republic[1974] JAL 124.** The court delivered itself thus;

> ***"When a person is charged the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further fact relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.***
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> ***The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.***

14. In the present case, when the Applicant was arraigned before the court and the substance of the charges and their elements informed to him he replied that the charges were true. The court then entered a plea of guilty before turning the matter over to the prosecutor who submitted that the "**facts as per sheet"** at which point the court convicted the Applicant on his own plea of guilty and the "facts as per sheet".

15. The trial court in so doing failed to adhere to the process that was laid out by **Spry V.P in Adan v Republic**(supra)as it failed to grant an opportunity to the prosecutor to read out the statement of facts to the Applicant.

16. The purpose served by the statement of facts was set out in the **Adan case(**Supra**)** as two folds; (i) allowing the magistrate to ascertain that the plea is unequivocal and the accused does not have a defence and (ii) gives him the basic material to rely upon in assessing the sentence. In the present case, the facts were not read out to the court nor the accused given the chance to raise questions as to his guilt which clearly called into question the unequivocal nature of the plea entered. This ultimately violated the Applicant's right to a fair trial.

17. Consequently, the option this court has in correcting the irregularity would be to refer the Applicant back to the trial court to take plea afresh. But in the circumstances of the application, the court must first interrogate whether it serves good purpose to make the order. I will dissect the charges accordingly.

18. Counts I and II are definitely defective. The Applicant was charged under **Section 49(1) of the Traffic Act** for careless driving. Both the drafters and the trial court failed to appreciate that the Traffic Act was amended by **The Traffic (Amendment) (No. 2) Act** which did away with the offence of careless driving and substituted it with the offence of driving without due care and attention. The offence is spelled out at Section 49(9)(a) and (b) thereof. They read as under;

"49. DRIVING WITHOUT DUE CARE AND ATTENTION

1) Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable—

a) for a first offence, to a term of imprisonment not exceeding one year or a fine not exceeding one hundred thousand shillings;

b) for a second or subsequent offence, to a term of imprisonment not exceeding two years or to a fine not exceeding two hundred thousand shillings, and the court may exercise the power conferred by Part VIII of suspending any driving licence or provisional driving licence held, by the offender disqualified from holding or obtaining a driving licence for a period of twelve months starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later."

19. While the substantial elements of the offence in question were not amended, I opine that the amendment to the statement spelling out the offence was occasioned by the fact that careless driving cannot be equated to driving without due care and attention as the element of careless driving involves a level of negligence that surpasses a failure to take due care and attention. This is informed by definition accorded to word "careless" in the **Black's Law Dictionary, 9th Ed.** as an action or behavior engaged in without reasonable care comparable to being reckless. It also defines reckless conduct as much more than mere negligence and a gross deviation from what a reasonable person would do. In my view, the amendment was necessary because an offence with elements similar to the offence of careless driving is set out under Section 47 of the Act, namely reckless driving.

20. In view therefore, where one is deemed to be driving carelessly a charge cannot be brought under **Section 49(1) of the Traffic Act** but under **Section 47 of the Act**. It is a clear tenet that the charge must be supported by the elements of the offence charged. In this case, the charge of careless driving as was stated was not supported by the particulars of the offence. Needless to state then is that both Counts I and II were defective. The Applicant cannot be refereed back for a retrial as it would accord the prosecution the opportunity to fill up a gap in their case through amendment of the charge sheet. This would be prejudicial to the Applicant.

21. I concur with Ms. Atina for the Respondent that Counts IV and V were defective as **Section 17A(1) of the Traffic Act** does not set out the penalty for the offence of driving a motor vehicle without an inspection sticker. The sentence is spelled out under Section 29 of the Act. All the same, the latter provides that the maximum fine for a first offender should not exceed Kshs. 10,000/-. Instead, the trial court imposed an illegal sentence of a fine of Kshs. 40,000/. This court has powers to correct the illegality in the sentence. However, I note that the Applicant has been serving an illegal sentence since 27th August, 2018. That period of close to two months is sufficient punishment. Accordingly, in respect to Counts IV and V, I set aside the sentence and order that the Applicant be forthwith set free unless otherwise lawfully held.

22. With regards to counts VI and VII the Applicant was charged of using an un-insured vehicle contrary to S**ection 4(1) of the Insurance Act 405 Laws of Kenya** punishable under **Section 4(2) of the said Act**. The counts relate to the lorry registration number KBR 027D in Count VI and the trailer registration number ZE 12873 in Count VII. The particulars of the charges were that the insurance was against third party risks which called into question the piece of legislation under which the offences were charged. The Kenya Insurance Act refers to **Chapter 487 of the Laws of Kenya**. **Sections 4(1) and 4(2) of that Act** relate to matters of Insurance Regulatory Authority Fund, setting out no offences.

23. However, there is a separate legislation in Kenya dealing with third party insurance riss known as the **Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405 of the Laws of Kenya**. It would appear that the "Insurance Act 405 Laws of Kenya" as stated in the charge sheet was meant to refer to the latter statute as can clearly be glimpsed from its Section 4 which requires all motor vehicles to be insured against third party risks. The provision sets out the offence for failure to do so and the penalty upon conviction.

24. For avoidance of doubt**, Section 4(1) and (2) of the Act** under which the Applicant was charged read as follows;

"(1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both, and such person upon a first conviction for such offence may, and upon a second or subsequent conviction for any such offence shall, unless the court for special reason thinks fit to order otherwise, be disqualified from holding or obtaining a driving licence or provisional licence under the Traffic Act (Cap. 403) for a period of twelve months from the date of such conviction or for such longer period as the court may think fit."

25. No doubt the charges as framed were defective as the Applicant was charged with a non-existent offence under the Insurance Act. For this reason, he cannot be referred for fresh plea taking as it would aid the prosecution in filing the correct charges which would prejudice him.

26. As regards count III, the Applicant was charged of committing the offence under Section **55(1) of the Traffic Act** as read with **Section 58(1).** The latter provides for the penalty. The particulars of the offence were driving a motor vehicle with four worn out tyres. The penalty provided is either a fine not exceeding Kshs. 400,000/-, or imprisonment not exceeding two years or both the fine and the custodial sentence.

27. The court underscores the fact that the sentence herein was legal. However, taking into account that the Applicant was a first offender and

he had pleaded guilty, the time spent in custody is sufficient sentence. In this respect, I set aside the sentence and substitute it with an order that the Applicant has served sufficient sentence. I order that he be forthwith set free unless otherwise lawfully held.

28. The sum total of my analysis is that the application succeeds. The Applicant shall be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 22nd day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Mogire for the Appellant.

2. Miss Atina for the Respondent