



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

HC CR REV. APPLICATION NO. 33 OF 2017

WAITHAKA MWANGI.....APPLICANT

VS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Arising from Ruling in Traffic Case No 3048 of 2017 of the Chief Magistrates Court - D. Nyambu CM)

RULING

Background

1. The present application is for revision of the decision of the trial Magistrate, and is filed under section 362 of the Criminal Procedure Code, under which the High Court may call for the record of any criminal proceedings in the lower court and satisfy itself as to the correctness, legality or propriety of any finding thereunder.
2. The brief facts of the case in the lower court were that the applicant was charged in the Chief Magistrates Court Naivasha Traffic Case No. 3048 of 2017 with the charge of exceeding the speed limit contrary to **section 42(1)** as read with **section 43(1)** of the **Traffic Act Cap 403**. The particulars were that on 26 September 2017 at about 4.07pm he drove a VW Passat registration number KBZ 542Y at a speed of 114 kmph instead of 100 kmph. He pleaded not guilty and was released in a cash bail of Kenya shillings 20,000/=.
3. The applicant filed a preliminary objection in the lower court to the effect that the charge sheet was fatally defective. He argued that he should have been charged under **Section 70(5)(a)** of the **Traffic Amendment Act No. 37 of 2012** and pursuant to **Legal notice No. 163 of 2012**. He pointed out that under the amendment Act he would not have committed any offence as the law prescribes and creates a tolerance speed allowance of 20 km/h over and above the prescribed 100km.
4. The applicant further relied on **Articles 27(1) and (2), 47(1) and (2) and 50(1) and (2)(a), (b) and (c)** of the **Constitution** and stated that his rights will be violated should the court fail to come to his aid by declaring that the charge was fatally defective for want of disclosure of an existing offence under the law.
5. The trial Magistrate dismissed the preliminary objection in a ruling on 29th September, 2017, noting that under **section 89 (5)** of the **Criminal Procedure Code** she could reject the charge if no offence is disclosed in the charge sheet. She found, however, that a charge was disclosed in the charge sheet and that in the present case the particulars of the offence were that the accused drove at the speed of 114 kmph instead of 100 kmph. She directed that the charges as preferred shall be read out the accused.
6. Dissatisfied with the ruling, the applicant filed this revision in the High Court seeking the following reliefs:

“a). A declaration that the charge sheet in Naivasha Traffic Case No 3048 of 2017 R v Waithaka Mwangi is fatally defective for want of disclosure of an existing offence under the law.

b). A declaration that section 70(5B) of the Traffic Amendment Act No 37 of 2012 Legal Notice No 163 of 2012 creates a statutory tolerance speed of 20 km/h for the benefit and enjoyment by the drivers and that an offence is committed if a person violates the prescribed speed limit by more than 20 km/h.

c). An order setting aside the order of the learned Magistrate made on 29 September 2016 directing that the matter proceed for plea and substituted with an order the charge sheet in Naivasha Traffic Case No 3048 R v Waithaka Mwangi be and is hereby rejected and dismissed under section 89(5) of the Criminal Procedure Code Chapter 75 laws of Kenya.

d) An order directing that the accused person be set free and, consequently, the cash bail deposited in court in the sum of Kenya shillings 20,000/= be released to him forthwith”

7. The applicant adopted similar arguments in the High Court as tendered in the lower court. He urged that the issue for determination was whether the applicant was correctly or properly charged under the law.

8. Both parties filed written submissions, which they highlighted at the hearing.

9. The applicant invited the court to note that there is an unbecoming trend by the Respondent where they are avoiding to bring charges against traffic offenders under section 70(1A) as read together with section 70(5A) (a) and (5B) of the **Traffic Amendment Act No. 37 of 2012** and pursuant to **Legal notice No. 163 of 2012**. The trend, he argues, is geared towards denying the traffic offenders the benefit of enjoying the statutory tolerance speed created under the law.

10. **Section 42(1)** of the **Traffic Act**, he argues, clearly contemplates that an offence thereunder can only be committed when the alleged traffic offender or person in charge of the vehicle causes or permits any other person to drive vehicle on the road at a speed greater such speed as may be prescribed as the maximum speed for that class of vehicle. He asserts that he cannot be charged under this provision because he was driving a VW Passat motor car, and under **section 4** of the **Traffic Act** there is provision for various classifications of motor vehicles, but there is no prescribed maximum speed limit for motor cars category.

11. As I understood him, counsel urged that **section 42(2)** was designed to cover speed prescription for motor vehicles belonging to those specified classes whose maximum permitted speed limit is so prescribed and who have to affix a marking on their vehicles, and that **section 43 (1)** only provides a penalty for the offence created under **section 42(1)**, but do not disclose an offence in so far as the motor vehicle in question (Passat) falls under the class of motor cars.

12. Thus, he argued, in view of the absence of speed prescription in respect of motor cars, Parliament enacted the **Traffic Amendment Act No 37** amending **section 70** and created an offence under **section 70(5B)** in respect of any person driving any motor vehicle who violates a speed limit prescribed for a road user under **section 70(1A)** by more than twenty kmph. It is such person who is liable on that offence to imprisonment for not less than three months or to a fine of not less than 20,000/=.

13. Accordingly, the applicant argues that the proper charge should have been under **section 70(1A)** read together with **section 70 5A (a) and (b)**. Under those provisions, though, no offence arises in his case for driving at 114 kmph because under section 70(5B) there is a statutory tolerance speed of 20kmph for the benefit and enjoyment of drivers.

14. He relied on the decision of Ngenye J in **Criminal Revision No. 160 of 2016 Ankush Manoj Shah v Republic [2016] eKLR** in which, he argues, the court upheld the argument that an offence under section 70(5B) of the Traffic Amendment Act could only be committed by a traffic offender driving in excess of 120kph.

15. The state opposed the application. Counsel pointed out that the applicant’s counsel had conceded that the applicant was travelling on a single carriage road at the speed of 114kmph. He urged that a single carriageway highway is defined in **Rule 2(1)**, and that a Passat is classified as a motor car.

16. Counsel argued that the maximum speed for classes of vehicles is prescribed by the Traffic Act Rules under section 119 **Traffic (Speed Limits) Rules**, at **Rule 2 Schedule 1** which provides for a maximum speed of 100 Kmph for motor cars on a single carriage way. This speed limit covers the class of vehicle which the applicant was driving that is, a private vehicle, and he was driving the vehicle along a single carriageway highway.

17. Further, counsel dismissed the applicant’s contention that he should have been charged under **section 70(1)** read with **section 70(5A)** and **(B)** because those sections create the offence of violation of speed. In this case the applicant is charged with driving a motor vehicle the speed of 114 kmph instead of 100 kmph, and thus exceeded the maximum speed limit by 14 kmph, which falls under **section 42(1)**.

Analysis and Determination

18. Unlike the scenario in the **Ankush Manoj Shah case** where the applicant had been charged under **section 70(5A)(a)** of the **Traffic Act**, the applicant in the present case was charged under **section 42(1)** as read with **section 43(1)** of the **Traffic Act**. There is therefore a substantial distinction in the lines of the argument between that case and the present case.

19. The relevant parts of **section 42** and **43** of the **Traffic Act** under which the applicant was charged provide as follows:

“42(1) No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, a vehicle on a road at a speed greater than such speed as may be prescribed as the maximum speed for that class of vehicle.

(2) On a vehicle subject to a speed restriction under subsection (1), except a vehicle registered as a motor-car or motorcycle or a private hire vehicle, there shall be painted or affixed to the rear, as close as possible to the rear number plate and so as to be clearly legible to a person within ten metres of the rear of the vehicle, a mark in the prescribed form indicating its maximum permitted speed in kilometres per hour.”

20. My understanding of this provision is simply this: that there is a prescription as to a maximum speed and a prescription as to classes of vehicles. Vehicles of a prescribed class are not legally permitted to be driven at a speed beyond the maximum speed prescribed for them. The failure to comply with this provision creates the offence.

21. The Act then provides under **Section 43** for penalties in relation to speed violations under **section 42**. The provisions of **section 43** are as follows:

*“43(1) Any person who contravenes or fails to comply with any of the provisions of **section 42** shall be guilty of an offence and liable to a fine of not less than two hundred shillings and not exceeding two thousand shillings*

(2) A first or second conviction for an offence under this section shall not render the offender liable to be disqualified for holding or obtaining a licence for a longer period than, in the case of a first conviction, one month, or in the case of a second conviction three months:

Provided that, if the offender has been convicted of reckless or dangerous driving within the three years immediately preceding the date of his conviction for an offence under this section, such previous conviction shall be treated for the purposes of this subsection as if it had been a conviction for an offence under this section”

22. Prima facie, therefore, there is an offence at **section 42** whose penalty is prescribed at **section 43**. Thus, I found the applicant’s argument that there was no “speed prescription insofar as the maximum permitted speed in respect of the class of motor cars contemplated under **section 4** is concerned” to be a rather surprising misleading and convoluted argument.

23. **Section 4** of the Act does indeed categorise all vehicles into a number of classes, including motor cars, as follows:

“(4)For the purposes of this act, motor vehicle shall be divided into the following classes-

(a)...

(e) motor cars...”

24. In order to fulfill the requirements of **section 42**, the next question must be whether there is a prescription of speed limit under the Act? **Section 119** of the Act provides that the Minister may make rules prescribing anything which is required to be prescribed under the Act. The provision states :

“(1)The Minister may make rules prescribing-

(a) anything required by this act be prescribed;

(b) ...

(k) the rules of the road ...

(q) the penalties which may be imposed for the breach of such rules...”

25. The Minister in exercise of his powers under **section 119** prescribed speed limits for different classes of vehicles under **The Traffic (Speed Limits) Rules** vide **Legal Notice No 62/1975** as amended by **Legal Notice No 309/1986** which, since they are not too many, I set them out hereunder:

“TRAFFIC (SPEED LIMITS) RULES, 1975

[L.N. 62/1975, L.N. 309/1986, L.N. 139/2011.]

1. These Rules may be cited as the Traffic (Speed Limits) Rules, 1975.

1A. In these Rules unless the context otherwise requires—

“speed camera” means a special gadget that calculates the time taken by a vehicle to travel over a set distance to work out the speed. [L.N. 139/2011.]

2. The speeds set forth in the second column of the Schedule shall, for the purposes of subsection (1) of section 42 of the Act, be the maximum speeds for the respective classes of vehicles set forth in the first column of the Schedule.

3. All the classes of vehicles, other than class 1(a), set forth in the first column of the Schedule shall be classes to which subsection (2) of section 42 of this Act (which requires the appropriate maximum speed to be marked on a vehicle) applies.

(1) A police officer in uniform may use a speed camera for purposes of determining, recording or storing the digital image of the speed of any motor vehicle.

(2) Subject to section 42 of the Act, the speed camera records shall be admissible when produced in court in respect to a traffic

offence under these Rules. [L.N. 139/2011.]

4. The Traffic (Speed Limits) Rules are hereby revoked.”

26. **Rule 2** highlighted above sets out the speed limits and the relative classes to which they apply by reference to columns one and two in the **Schedule** thereto. The **Schedule** reads, in part, as follows:

“1 (a) (i) Motorcycles and motor cars, including motor cars normally used for hire but excluding all other public service vehicles when travelling on dual carriageway highways Second Column: Maximum speed in kmph -- 110.

(ii) Motorcycles and motor cars including all motor cars normally used for hire but excluding all other public service vehicles when travelling on single carriageway highways..... Second Column: Maximum speed in kmph -- 100” (emphasis supplied).

27. The position is thus summarized as follows: there are defined classes of vehicles of which one class is *motor cars* – **under section 4**. There are also speed limits prescribed for the different classes of vehicles including motor cars which are not public service vehicles or vehicles for hire – **under Rule 2 Traffic Speed Limits Rules**. Presumably, **Rule 2(1(a) and (b))** covers the class and speed applicable to the applicant’s vehicle. Whether he was driving a motor car on a dual carriageway or single carriageway are, of course, matters for evidence, and not for resolution in this application.

28. To that extent, I agree with Meoli,J in **Stanley Kihiko Mutungu v Naivasha Divisional Traffic Base Office, Director of Public Prosecutions & 3 others [2018] eKLR** where, dealing with a similar case, she dismissed the petition and stated:

“The above offence relates to exceeding speed limit set for a class of motor vehicle. From the arguments raised by the Applicant before the trial court during plea, and before this court, it seems that the bone of contention is whether the Applicant’s vehicle has a prescribed tolerance speed limit and related thereto, whether the vehicle stated in the charge is a PSV or a private saloon vehicle. These are matters of evidence and cannot be determined at this stage. It is noteworthy that, contrary to the Applicant’s submissions, the charge sheet does not describe the Applicant’s vehicle as a “mercedes benz saloon car”. Besides whether or not a charge discloses an offence should be self-evident, on the face of the charge sheet itself.

For these reasons, I am unable to follow the Applicant’s reasoning for the submission that the charge sheet is defective. Whether the Applicant ought to have been charged under Section 70 (1A) as read with Section 70 (5A) (a) of the Traffic Act is not for this court to decide.

Suffice to say that, as drafted, the impugned charge sheet on the face of it is properly laid and whether or not the offence is proved will be determined by the trial court based on the evidence adduced at the trial.”

29. The applicant also argued that under the **Traffic Amendment Act section 70** he would not have committed any offence as the law prescribes and creates a tolerance speed allowance of 20 km/h over and above the prescribed 100km. **Section 70** of the Act primarily deals with traffic signs. **Section 70(1)(A)** provides that a highway authority shall cause to be placed on or near a road traffic signs prescribing speed limits on a particular road. I understand this to mean that, in addition to prescribed speed limits for vehicle classes, a highway authority may also prescribe – by road signs – various speed limits. This makes sense and is necessary to cater for highly populated areas, for areas around a school, or hospital and so on.

30. For instance, a traffic sign may be erected on a road limiting speed to 40kmph near a school. Such sign, I believe, would apply to *all* vehicles whatever their specific class and their specific class-speed limitation when passing along that section of the road. Violations of that traffic sign stipulated speed would be charged under the provisions of **section 70**. On the other hand, speed violations in respect of the class of the vehicle are chargeable under **section 42**.

31. **Section 70(5)** creates penalties in respect of offences where traffic signs prescribing speed limits have been placed on a road. The provisions are as follows:

“5A The driving licence of a person who has been convicted for the violation of a speed limit prescribed for a road under subsection (1A) shall be invalidated for a period not less than three years where—

(a) the violation of the limit is by more than twenty kilometres per hour; and

(b) the violation is repeated three or more different times.

5B A person who violates a speed limit prescribed for a road under subsection (1A) by more than twenty kilometres per hour commits an offence and shall be liable, on conviction, to imprisonment for a term of not less than three months, or a fine of not less than twenty thousand shillings, or both. (emphasis supplied)

32. These provisions do not, in my view, derogate from or affect the cardinal provisions of **section 42**, which creates the essential classes of vehicles and prescribes their maximum speed limits. My understanding of **section 70(5)** is that it provides for “Road sign-stipulated” speed limits. That is, situations where a driver can be charged and convicted with exceeding the speed limit stipulated by a road sign. If he exceeds the speed limit prescribed for a road with a sign by 20 kmph or more or he has repeated the violation thrice or more, then he is liable to have his license invalidated for a period of not less than three years (section 70(5A)(a) &(b)). The problem of double jeopardy arises with **section 70(5B)** because it imposes a term of three months’ imprisonment or a fine of 20,000/= or both, if the driver exceeds the sign stipulated speed

limit by twenty or more kmph. But this is not the subject of this application, and I will say no more on **section 70**.

33. In conclusion, from the foregoing discussion, the Traffic Act clearly creates two types of speed limit offences: the first are offences arising from vehicle class prescribed speed limits under **section 42** read with **section 4** and the **Traffic (Speed Limits) Rules**; and the second are offences arising from road-sign stipulated speed limits under **section 70** of the Act.

34. Here, the applicant is charged under **section 42(1)** of the **Traffic Act** read together with **section 43(1)**. I have shown that in respect of those sections, there are classes of vehicles and also speed limits attaching to them under the **Traffic (Speed Limits) Rules**. The charge as found by the trial magistrate is not, in my considered view, defective. Whether it fits the specific circumstances of the applicant's vehicle or not is a matter for the trial magistrate to determine when dealing with the evidence which the prosecution shall avail.

35. Ultimately, the applicant's application is dismissed and the orders sought are denied. The matter shall proceed in the lower court.

Orders accordingly.

Dated and Delivered at Naivasha this 20th Day of December, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Mburu F. I. for the Appellant
2. Mr. Koima for the State
3. Court Clerk - Quinter Ogutu