REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.82 OF 2016

DAVIDSON NGATIA MWANIKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Traffic case No. 656 of 2016 of the Chief Magistrate's Court at Meru by Hon. S Abuya – Principal Magistrate)

JUDGMENT

DAVIDSON NGATIA MWANIKI, the appellant, was convicted for the offence of driving a motor vehicle without a licence contrary to section 30(1) of the Traffic Act and for the offence of failing to carry/ produce a driving licence contrary to section 36(1) of the Traffic Act.

The particulars of the offence were that on 5th October 2016 at Mutonga quarry, Meru County, being the driver of motor vehicle KHMA 851 G shovel tractor, drove the said motor vehicle without a driving licence. When he was asked to produce his driving licence, he failed to do so.

The appellant was fined Kshs. 1000/= in default to serve one month sentence in count one and in count 2, he was fined Kshs. 500/= or in default to serve 14 days imprisonment.

The appellant was represented by Mr. Mutuma, learned counsel. He raised five grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and facts by convicting the appellant on a plea that was equivocal.

2. That the learned trial magistrate erred in law and facts by failing to appreciate that the appellant was a mechanic and not a driver.

3. That the learned trial magistrate erred in law and facts by failing to afford the appellant an opportunity to produce his licence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

The appellant was found at the Mutonga quarry driving a shovel tractor. When police officers asked him to produce hi driving licence, he failed to do so. He was arrested and charged. He was convicted on his

own plea of guilty.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

When the charges were read out to the appellant, he pleaded guilty. The facts were then read out to him and he confirmed that they were true. This is how the plea is supposed to be taken. At the mitigation stage he never introduced facts that would have made the learned trial magistrate to enter a plea of not guilty. The plea was unequivocal.

Section 30(1) of the Traffic Act provides as follows:

> ***No person shall drive a motor vehicle of any class on a road unless he is the holder of a valid driving licence or a provisional licence endorsed in respect of that class of vehicle***.

The offence envisaged under the section is very clear; it is any person who drives a motor vehicle on a public road must be a holder of a valid licence. No one is exempted, including a mechanic.

The law does not give one the opportunity, as was previously, to produce the driving licence within a specified time frame. Section 36(1) of the Traffic Act states:

> **Any person driving a motor vehicle on a road shall carry his driving licence or provisional licence, and, on being so required by a police officer, produce it for examination**.

The section is mandatory that any person driving a motor vehicle on the road shall carry his driving licence. The learned trial magistrate cannot be faulted on the failure to give the appellant time to produce the licence.

In my view there were two issues that were not raised by the appellant but which touch on the legality of the charges and the mode of drafting them.

One, section 30(1) and section 36 (1) of the traffic Act are not envisaged to be used in framing two distinct charges. Section 36 (1) is expected to form an alternative charge. This is what section 36(2) states:

> ***For the purposes of this section, "driving licence or provisional licence" includes such other evidence as will satisfy the police that there is no contravention of section 30.***

The second count ought to have been an alternative charge and it was up to him to elect which one to plead guilty to. It was prejudicial to the appellant to be charged with the counts as he was.

Two, for the offence in count one to be committed, the motor vehicle must be driven on a road. Under the Traffic Act a road is defined in the following terms:

> ***"road" means any public road within the meaning of the Public Roads and Roads of Access Act (Cap. 399), and includes any other road or way, wharf, car park, footpath or bridle-path on which vehicles are capable of travelling and to which the public has access;***

In the Public Roads and Roads of Access Act, Cap. 399 public road is defined as follows:

> ***"public road" means—***
>
> ***(a) any road which the public had a right to use immediately before the commencement of this Act;***

(b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the

East Africa Land Regulations, 1897, the Crown Lands Act , 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;

(c) all roads and thoroughfares hereafter reserved for public use;

It is evident therefore that Mutonga quarry is not a public road. Police officer had no business to leave the road and enter into private property to allegedly enforce the law. This is mischief that ought to be discouraged.

From these two grounds, the appeal is allowed. The appellant to be refunded the fine that he had paid.

DATED at **MERU** this **28**th day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE