REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 214 OF 2012

ANDREW KINYUA NGARI…….....APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (D. A. Ocharo) at Wang'uru, Traffic Case No. 241 of 2010 delivered on 30th September, 2010)

JUDGMENT

1. The appellant **Andrew Kinyua Ngari** was charged before the Senior Resident Magistrate's Court Wang'uru Traffic Case No. 241 of 2010 with the offence of dangerous Loading contrary to ***Section 56 (2)*** as read with ***Section 58 (1)*** of the **Traffic Act Cap 403 Laws of Kenya**. The particulars are that on 30th September, 2010 at around 12.15 Hours along Mwea-Embu road in Kirinyaga South District of the Central Province, being the driver of motor vehicle registration number KAP 681S make Nissan Datsun pick-up, did load goods (super foam mattresses) dangerously on the carrier, hence making it a danger to other persons using the road or other persons travelling on the said vehicle.

2. The Appellant pleaded guilty to the charge and also admitted the facts in support of the charge. He was found guilty as charged, convicted and fined Ksh.150,000/= or in default serve a period of nine months in prison.

3. The Appellant was dissatisfied with the sentence and filed a petition of appeal which was amended with leave on 29th March, 2012 raising the following grounds:-

> ***i. The learned magistrate erred in law and in fact by imposing a sentence that is excessive and oppressive compared to the charge against the appellant.***
>
> ***ii. The learned magistrate erred in law and in fact by imposing a sentence without giving the appellant a chance to mitigate.***
>
> ***iii. The learned magistrate erred in law and in fact by imposing a sentence that is unlawful and/or not prescribed by the law.***
>
> ***iv. The learned magistrate erred in law and in fact by convicting the appellant on a charge sheet that was defective.***

Based on these grounds the appellant prays that the appeal be allowed. That the sentence be varied and or set aside.

4. The facts of the case are that on 30th September, 2010 the appellant was driving a motor vehicle registration number KAP 681a Nissan Datsun Pick Up along Mwea Embu road heading towards Mwea direction. He was intercepted by traffic Police officers who were on duty and was found to have dangerously loaded the motor vehicle with super foam mattresses. He was also carrying two passengers. He was arrested and escorted to Wangu'uru Police Station where he was charged with these offences.

5. The parties agreed to dispose of the appeal by way of written submissions. The Appellant filed his submission through his advocate Wangechi Munene and Company Advocates. A response was filed on behalf of the State by D. D. Sitati, Prosecution Counsel. I have considered the grounds of the appeal and the submissions.

6. The Appellant is challenging the sentence of Kshs.150,000/- imposed on him which he says is excessive. It is submitted that **Section 58 (1)** of the **Traffic Act** provides that contravention of **Section 58** or **Section 56** attracts a fine not exceeding Ksh.20,000/- or to imprisonment for a term not exceeding nine months or both.

7. For the state it was submitted that the accused was charged with the offence of dangerous loading contrary to ***Section 56 (2)*** as read with ***Section 58 (1)*** of the **Traffic Act** which attracts a penalty of a fine not exceeding Kshs.400,000/= or to imprisonment not exceeding two years or both. That the penalty of Kshs.20,000/- in default nine months imprisonment is submitted by the appellant is none existent and misleading. That **rule 4I (2) Traffic Rules** deals with stipulated weights by motor vehicle and consequences of overloading. That there is no illegality in the sentence imposed on a plea of guilty.

8. I will deal with the ground that the charge is defective. The defect alleged is that the particulars were devoid of the provision of the **12th Schedule of the Traffic Act.** The Appellant was charged with dangerous loading of goods contrary to ***Section 56 (2)*** as read with **Section 58 (1) of the Traffic Act.**

> ***Section 56 (2)*** provides:
>
> ***"No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle, and should any load fall from any vehicle onto a road or part of a load fall from any vehicle onto a road such fact shall be*** *prima facie* ***evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court."***

The maginal notes states that the Section deals with limitation loads. ***Section 58 (1)*** provides:

> ***"Any person who drives or uses on a road a vehicle in contravention of the provisions of Section 55 or Section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or to both."***

The maginal note states that the section deals with penalty for improper condition or overloading. The offence for which the appellant was charged was specified as dangerous loading. The particulars state that the appellant did load goods dangerously on the carrier hence making it a danger to other persons using the road. ***Section 56 (2)*** **supra** makes it an offence to load a vehicle in such a manner as to make it a danger to other persons using the road or travelling in the vehicle. The question of the weight of that load does not arise under this charge. The appellant admitted the facts which stated that "he dangerously loaded the motor vehicle with superfoam mattresses." He was also carrying two passengers.

9. It is a misconception for the Appellant to claim that the particulars should have stated the weight which was exceeded because the charge was not about overloading or exceeding the prescribed weight. This would have been the case if the Appellant was charged under **Section 56 (1)** which provides:

> ***"No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chasis of the vehicle or than the load capacity determined by an inspector under this Act."***

Rule 41 (2) of Schedule 12 does not apply to the charge facing the Appellant in as far as it deals with weights which are exceeded where a person is charged under **Section 56 (1).** The rule provides:

> ***"A person who drives or uses on a road a vehicle in respect of which the weights set out in paragraph 2(1) (2) or (3) of the 12th Schedule are exceeded shall as respect each overloaded axle or any excess over the maximum permitted weight, be guilty of an offence against Section 58 of the Act and shall in respect of that offence on conviction pay a fine not less than the appropriate according to the stated scale thereunder."***

The maginal note is weights and dimensions of vehicles. The schedule provides for various maximum weights. **Rule 41 (1) (a)** states that refers to **Section 56 (2)** deals with weights and dimensions. It is where a person is charged upon the vehicle being weighed at a weigh bridge and found to be carrying excess weight. The provision, that is, **Section 56 of the Traffic Act** has two distinct offences one being carrying excess weight or load and the second deals with the load carried and dangerous loading which deals with the manner the load is carried. The Appellant was charged with dangerous loading under **Section 56 (2)** of the Act. The State did not have to comply with the provision of **Schedule 12 rule 41 (2)**. This rule was irrelevant to the charge facing the Appellant. I find that the charge as drawn was not defective in any way. The charge was disclosed and the particulars thereof were stated. I find that this ground must fail.

10. The Appellant raised the ground that he was not given a chance to mitigate. The accused pleaded guilty. The plea was unequivocal. The record does not show that the accused offered mitigation. In his submission the Appellant does not state that he was denied the opportunity to give his mitigation. The proceedings are silent. He ought to have been given an opportunity to mitigate. The Court of Appeal in the case of **Isaak Kimanthi Kamuachobi -V- R CR. Appeal No. 97/2007** held:-

> ***"We believe we have said enough on this ground and only reiterate that an accused person has a right to mitigate even in cases that attract minimum mandatory sentences and even in cases which attract death penalty. As rightly submitted by learned counsel for the State, the appellant ought to have been allowed to mitigate before the sentence was pronounced. Failure to mitigate does not however, in our view*** *ipso facto* ***vitiate a conviction."***

Failure to mitigate cannot be a ground to set aside a conviction. It only denied the appellant a chance to plead with the court to be lenient with him. In view of the above authority, this ground must fail.

11. The Appellant raised the ground that the sentence is unlawful. In view of the provisions of **Section 58 (1) Supra** which shows that the penalty under the Section is a fine not exceeding Ksh.400,000/= or two years imprisonment or both, it is therefore a misconception for the Appellant to state that the fine under the Section is Ksh.20,000/= or to imprisonment for a term not exceeding nine months or both. This with respect is not the sentence for the offence under **Section 56 (2) of the Traffic Act.** I find that in view of the provision of **Section 58 (1) Traffic Act**, the sentence imposed on the Appellant was proper and lawful. I find that this ground must fail.

12. Finally the Appellant is contending that the sentence is excessive. From the record the Appellant was not a first offender as he had been charged with a similar offence on 7th September, 2010. Less than a month after he was discharged, he committed this offence. The sentencing policy provides that one of the factors to be considered in determining the sentence is whether the person charged is a first or a repeat offender. **The Judiciary Sentencing Policy Guidelines** provide that when the Court is determining the sentence to impose the court should consider the aggravating and mitigating circumstances. One of the aggravating circumstance is previous conviction particularly where a pattern of repeat offending is disclosed. The guidelines provide that the starting point is 50% of the maximum and where there are aggravating factors add the sentence depending on the circumstances. The Appellant was a repeat offender who had repeated the offence less than a month after being discharged for a similar offence. Based on these guidelines, the sentence should have been 200,000/= as starting point and then add an amount owing to the aggravating circumstance. In view of these I find that the sentence was not manifestly excessive. The appellant was a repeat offender. The sentence was proper, safe and within the

confines of the law. Sentencing is the discretion of the trial court. An appellate court will not interfere with the exercise of discretion where the exercise was proper and within the confines of the law. I find no reasons to interfere with sentence imposed by the trial magistrate. The upshot is that I find no merits in the appeal. I therefore dismiss it.

Dated and delivered at Kerugoya this 29th day of June, 2017.

L. W. GITARI

JUDGE

Judgment delivered in open court M/S Muthoni for the State, M/S W. Munene for appellant, Appellant – present, Court Assistant Naomi Murage this 29th day of June, 2017.

L. W. GITARI

JUDGE

29.06.2017