



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO 11 OF 2016**

*(Being an Appeal from the Judgment of the Resident Magistrate Embu in TR. Case No. 152 of 2016 dated 8/03/2016)*

BENSON MUTWIRI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**J U D G M E N T**

1. The appellant was convicted of the offence of driving a motor vehicle under the influence of alcohol contrary to Section 44(1) and (2) of the Traffic Act Cap 403, Laws of Kenya. He was sentenced to serve twelve (12) months imprisonment and being was dissatisfied with the conviction and sentence and lodged this appeal. He was released on bail pending appeal on 9/05/2016.

2. The parties agreed to dispose of the appeal by way of written submissions. Surprisingly none of the parties filed their submissions. The respondent was under the misapprehension that he had filed its submissions. This occurred after a new prosecutor took over the case. However, there were no such submissions on record save for those filed in respect of the application for bail pending appeal.

3. The petition of appeal consists of four (4) grounds:-

*(i) That the learned magistrate misdirected himself in fact and law by failing to consider that the appellant was a 1<sup>st</sup> offender and failed to grant him the option of a fine.*

*(ii) The learned magistrate erred in law by convicting and sentencing the appellant on fact which did not satisfy the charge he was facing.*

*(iii) The learned magistrate erred in law and fact by failing to ascertain the level of alcohol the in the alcohol blow receipt such that the appellant was “incapable of having control of the vehicle” as per Section 44(1) of Cap. 403.*

*(iv) The learned magistrate misdirected himself in fact by meting out a very harsh sentence under the circumstances.*

4. It was alleged in the charge that on 8/03/2016 at 11.32 a.m. along Embu- Nairobi road in Embu Count, being the driver of motor vehicle registration number make KCC 968 R Toyota Matatu drove the said motor vehicle while under the influence of alcohol as per the attached alcoblow receipt.

5. The accused pleaded guilty to the charge and the prosecution read the facts of the case to the court

which were recorded as follows:-

*On 8/03/2016 at 11.32 a.m. along Embu- Nairobi road accusee was driving motor vehicle registration No. KCC 968R Toyota Matatu. He was stopped by Miss Wangari an officer from NTSA. When test was conducted he was found to be drunk. We have an alcoblow receipt.*

6. The relevant provision of the law is Section 44 (1) and (2) of the Traffic Act, Cap 403 of the Laws of Kenya which provide:-

*(1) Any person who, when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place, is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.*

*(2) A person convicted of an offence under this section shall, without prejudice to the power of the court to order a longer period of disqualification, be disqualified, for a period of twelve months from the date of conviction, for holding or obtaining a licence.*

7. The facts of the case as read by the prosecutor stated that the appellant was driving vehicle registration KCC 968 R Toyota matatu along Embu – Nairobi road. He was stopped by one Ms. Wangari an National Transport and Safety Authority (NTSA) officer who conducted a test and found him to be drunk. The alcoblow receipt was produced in evidence.

8. Section 44 (1) provides for the ingredients of the offence of driving under the influence of drink include the manner in which the driver was driving or controlling the vehicle and the level of alcohol in the blood. From the facts given by the prosecutor, there was no evidence on whether the driver was in proper control of the vehicle or was affected by the drink, if any and to what extent. The question that arises is whether the appellant was in control of the vehicle at the material time.

9. For the court to convict on an offence under Section 44, the control of the vehicle or lack of it is crucial and that evidence ought to have been included in the facts of the case. Although the prosecutor said that he had the alcoblow receipt, it was not available in the appeal record. It was also missing in the original lower court file. The magistrate never acknowledged its receipt. The prosecution therefore did not adduce evidence on the amount of alcohol in the blood which is a critical ingredient in a case of this nature.

10. The learned magistrate proceeded to convict the appellant without being satisfied on proof of the ingredients of the offence which was a misdirection on his part.

11. It is my considered opinion that the prosecution failed to prove the ingredients of the offence in presentation of the facts of the case. As a result, I find that the appellant was wrongly convicted of the offence.

12. Even assuming that the appellant was rightly convicted, the court ought to have taken into consideration that the appellant was a first offender. I am of the opinion that the sentence meted out of 12 months imprisonment without an option of fine was too harsh and unreasonable. The appellant deserved to have been given an option of fine which was within the law and within the discretion of the learned magistrate.

13. It is my finding that the conviction was not based on cogent evidence and that the sentence was excessive.

14. It is hereby ordered that the conviction stands quashed and the sentence set aside.

15. The appeal is merited and it is hereby allowed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF NOVEMBER, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Applicant present**

**Ms. Nandwa for the respondent**