



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

Hccra . No. 34 Of 2015

SGT CATHERINE ELIZABETH RUSSELL ...APPELLANT

-VERSUS—

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal against the Ruling of T B Nyagena Principal Magistrate in (criminal case no. 85 of 2012 made on 18th October, 2013)

1. **CATHERINE ELIZABETH RUSSELL** the appellant was on 9th February, 2013 charged before the Chief Magistrate Court Nanyuki with the offence of careless driving **Contrary to section 49 (1) of The Traffic Act Cap 403**. A plea of not guilty was entered on 9th February, 2012 and a bond of Kshs. 20,000 with one surety was granted by the trial court.
2. The hearing of the case before the lower court was stalled by an application by the appellant on the ground that the Kenyan Court lacked jurisdiction to entertain the criminal case against the appellant who it was submitted was a soldier with the British army, that is the British Army Training Unit Kenya (BATUK).
3. It was argued before the trial court that the said court lacked jurisdiction to try the matter because the appellant being a soldier with BATUK, which is a department of the United Kingdom's Ministry of defence, enjoyed sovereign immunity.
4. The trial court dismissed the preliminary objection by the appellant on the grounds that there was no evidence tendered to prove that the appellant was a British Soldier, and secondly that there was no evidence adduced in court to show that appellant was a designated driver of the subject vehicle.
5. Appellant appealed in this appeal against that dismissed of the preliminary objection.
6. The appellant by her present appeal has raised various grounds. These grounds are:
 - a. *That the trial Magistrate erred to have found that the trial court had jurisdiction to try the appellant,*
 - b. *That the trial court ignored authorizes cited to him;*

- c. *That the trial court ignored the memorandum of understand between the government of the Republic of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland (MoU) and*
 - d. *The trial court had a biased attitude.*
7. Learned Counsel for the appellant, Mr. Mahan, submitted before court in support of the above grounds. He stated that this appeal calls upon this court to determine whether a local court had jurisdiction to try a soldier in the British Army in view of the provisions within the M o U. In respect to the questions posed by the trial court Learned counsel state that the authorities supplied to the court revealed that there was a previous finding, in a civil case, that the appellant was a soldier and that at the material time appellant was in the course of her duty as a soldier. It was therefore submitted by Mr. Mahan that clause 6 of the M o U denied the local court jurisdiction to try the appellant.
 8. The appeal was opposed by Mr. Tanui Principal Prosecution Counsel. He submitted that the M o U has no force of law and does not fall within the source of Laws of Kenya. That if it was to have force of law it would have had to be anchored on a statute. Mr. Tanui submitted that it was necessary for the person who was injured in the accident, which appellant was charged with to know that due process of the Law had been followed.
 9. Mr. Mahan responded to those submissions and stated that this court will have to determine whether the appellant was protected by the sovereign immunity between Kenya and Great Britain's Governments.

10. COURT'S ANALYSIS AND DETERMINATION

11. Appellant was charged before the lower court with the offence of careless driving. **Section 49 (1) of Cap, 403** under which the offence fell is in the following terms:

“49. (1) Any persons who drives a motor vehicle on a road without due care and attention or without reasonable consideration or other persons, using the road shall be guilty of an offence

12. It is clear from that section that the offence is directed at the driver of a vehicle and not the vehicle, which vehicle in the case of the appellant was said to bear British registration number.
13. What then did the M o U, which appellant has relied on in his appeal, provide in respect to the appellant?
14. It is important to start by considering the preamble that M o U. In that preamble it provides that both the Kenyan and British government would strive to strengthen their good and friendly relation, and that they desire to have close defence cooperation. In the fourth paragraph of that preamble it stated thus:

*“**RECOGNISING** that such cooperation will be in accordance with their respective national and international policies and will not conflict with the domestic law of their respective states nor impair the commitments undertaken by their countries in the international field:”*
15. That paragraph shows that the intention of both governments was that in that cooperation there would be no conflict with the domestic law. In other words the domestic Law would prevail over the provisions of the M o U.
16. In section 5 of the that M o U the visiting force, in this case British Soldiers, were required to abstain from infringing the laws of the host Nation, in this case Kenya.
17. Further **Section 5.2** of the M O U it is stated:

“5.2 All activities under this M o U will be implemented in conformity with the domestic law in force in Host Nation. Implementation of some aspects of the programme may be covered by implementing arrangements.”

18. It is clear there under Section 5:2 that the activities envisaged under the M o U were to be implemented in conformity with the domestic law in this Kenya which would be in force at the material time.

19. Mr. Mahan laid emphasis in his submissions to the provisions of Section 6:3 of the M o U. That Section cannot be appreciated without considering also Section 6:4. I will therefore reproduce those Sections as follows:

“6.3 In cases where the right to exercise jurisdiction is concurrent, British Service Authorities will have the primary right to exercise jurisdiction if:

- a. The alleged offence is against the property or security of the United Kingdom, or against the property or person of another member of the British Visiting Forces, their Civilian Component and dependents; or*
- b. The alleged offence arises out of an act or omission in the course of official duty.*

6.4 In any other case, the Kenyan authorities will have the primary right to exercise jurisdiction with respect to alleged offences committed in Kenya and punishable by the law of Kenya. If the party having the primary right decides not to exercise jurisdiction, it will notify the authorities of the other Party in writing as soon as practicable. The authorities of the party having the primary right may give sympathetic consideration to a request from the authorities of the other for a waiver of its right in cases where the other party considers such waiver to be of particular importance.”

20. When one interrogates the provisions of Section 6:3, above, one cannot fail to appreciate that that the British Service authorities would only have primary right to exercise jurisdiction if the offence is against the property or security of United Kingdom; or if the offence arises from acts or omissions in the course of duty. The rights of exercising primary jurisdiction does not arise in the case of a motor accident which occurred in Laikipia County, Kenya, and which involved a motor vehicle of a Kenyan citizen and one which was not shown to be driven in the course of duty. One needs to re-read Section 6:3 to fully appreciate that the offence appellant faced in the lower court is not one envisaged thereof.

21. Section 6:4 even elaborates that finding further. I will repeat provisions of Section 6:4 for the purpose of clarifying this court's determination in respect of Section 6:3, thus:

“In any other case, the Kenyan authorities will have the primary right to exercise jurisdiction with respect to alleged offences committed in Kenya punishable by the laws of Kenya.”

22. The offence of careless driving was committed by the appellant in Kenya and is punishable by the law of Kenya.

23. Those two Sections 6:3 and 6:4 make it abundantly clear that there was no basis for the trial Court to uphold the appellant's preliminary objection to jurisdiction. The trial court has jurisdiction to try the appellant for the offence she faced of careless driving.

24. Mr. Mahan fell in error in interpreting the holding in the case High Court at Nyeri **CIVIL CASE No. 77 of 2005 JIMMY M NDIRANGU & ANOTHER – vs – RQMS (T) BAKER & ANOTHER**. In that case the court made a finding that the plaintiff's case disclosed no reasonable cause of action. That decision therefore did not support appellant's present appeal.

25. Mr. Mahan also erred to argue that the Learned trial Magistrate was bound by the decision of the

Chief Magistrate on the subjection of jurisdiction over a case against a British soldier. The Chief Magistrate's decision was only persuasive but not binding.

26. I could not find any bias in the trial Magistrate's handling of appellant's objections as argued by the appellant.

27. Perhaps to cap it all up Mr. Tanui was right in his submissions that the M o U has no force of all in the Kenya courts.

28. In the end there is no merit in the appellant appeal and it is dismissed. It therefore follows that the appellant's trial for the offence of careless driving should proceed to hearing. In that regard and in keeping with Section 6:5 the United Kingdom authority should assist Kenya government with arrest of the appellant and for the appellant to be produced to the Kenyan court to stand trial, if the appellant fails to attend court.

29. I order that the Chief Magistrates criminal case No. 85 of 2012 be mentioned before the Principal Magistrate on 1st March, 2016 for the purpose of fixing a hearing date of that case.

Dated and Delivered at Nanyuki this 25th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state

For Appellant

Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE