



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEALS NOS 165 & 166 OF 2014**

**SULEIMAN BOI.....1<sup>ST</sup> APPELLANT**

**NEWTON KIPKEMOI KIMUTAI..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the ruling and orders of Hon. R. Koech Ag. PM in Traffic Case No. 362 of 2014 delivered on 17<sup>th</sup> September 2014 at the Principal Magistrate's Court at Makueni)**

**JUDGMENT**

The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were sentenced by the trial Court to serve 1 month imprisonment for contempt of Court, after having been found to be in violation of section 131 of the Penal Code. The proceedings giving rise to the sentence were that the accused person in this criminal case, one James Kioko Kisula, was charged with two offences. The first count was of riding an uninsured motor cycle contrary to section 103(B)(3) as read with section 103(B)(7) of the Traffic Act. The particulars of the offence were that on the 23<sup>rd</sup> day of May 2014 at about 12 pm along Iuani-Intangine road in Makueni District within Makueni County, being the rider of a motor cycle registration number KMCZ 361Y make Skugo, he did ride the said motor cycle without an insurance certificate.

The accused was also charged with a second count of riding a motor cycle on a public road without a driving licence contrary to section 103(B)(5) as read with section 103(B)(7) of the Traffic Act. The particulars of the offence were that on the 23<sup>rd</sup> day of May 2014 at about 12 pm along Iuani-Intangine road in Makueni District within Makueni County, being the rider of a motor cycle registration number KMCZ 361Y make Skugo, he did ride the said motor cycle without a driving licence.

The said accused person was arraigned in the trial Court on 14<sup>th</sup> August 2014, whereupon he informed the Court that he had been in the same Court the previous day on 13<sup>th</sup> August 2014, for the mention of a different criminal case namely Criminal Case 415 of 2014. Further, that the learned trial magistrate on 13<sup>th</sup> August 2014 had ordered the release of motor cycle Reg KMCZ 361Y so that he could deliver it to the owner. However, that when the accused went for the said motor cycle he was arrested by the Appellants who charged him with the two aforesaid offences. The accused stated that when he was arrested the motor cycle had an insurance certificate and had been removed. The trial magistrate then released the accused on his personal bond of Kshs 5,000/= and directed that he appears in Court on 17<sup>th</sup> September 2014.

From the record of the trial Court, on 17<sup>th</sup> September 2014 the Appellants appeared before the trial Court and testified as to the circumstances of the said offences. The 1<sup>st</sup> Appellant, Sgt. Suleiman Boi, and the 2<sup>nd</sup> Appellant, APC Newton Kipkemoi, testified that after the court ordered that the motor cycle be released to the accused, they were directed by the court prosecutor to take the motor cycle to the base commander in order to track down the owner. They stated that the accused ferried them to the base commander, as they believed he had a driving license and the motor cycle was insured. However, that at the police station the accused was asked by the base commander whether he had a valid driving license and he answered negatively. The Appellants stated that the base commander is the one who then decided to charge the accused.

The trial court consequently ruled that the 1<sup>st</sup> and 2<sup>nd</sup> Appellant displayed impunity by riding on the motorcycle as two pillion passengers contrary to traffic rules, and that the decision to charge the accused with the offences herein was meant to negate the trial Court's orders of 13<sup>th</sup> August 2014 in Criminal Case No 415 of 2014. The trial magistrate then cited the Appellants for contempt of Court, and after giving them an opportunity to show cause why they should not be punished for contempt, sentenced the Appellants to serve one month in prison for contempt of Court in violation of section 131 of the Penal Code. The trial also dismissed the charges brought against the accused person under section 89(5) of the Criminal Procedure Code.

The 1<sup>st</sup> and 2<sup>nd</sup> Appellants are aggrieved by the ruling and sentence of the trial magistrate and have preferred this appeal. The Appellants' grounds of appeal as set out in their Petitions of Appeal dated 22<sup>nd</sup> September 2014 are that the learned magistrate erred in law and fact by convicting them for an offence created under section 131 of the Penal Code without the Appellants taking plea or proceedings taken against them; the trial magistrate convicted the Appellants for contempt of court while it was not them that were to comply with orders of the court but the Traffic Base Commander, Makueni Police station; that the finding of the magistrate that the fresh charges against the accused were meant to ridicule the court's orders was in error since the charge sheet disclosed criminal offences known in law; and that there was a miscarriage of justice in sentencing since the proceedings were irregularly taken.

O.N. Makau & Mulei Advocates, the Appellants' learned counsel filed submissions dated 9<sup>th</sup> February 2016. It was argued therein that section 131 of the Penal Code created an offence of disobedience of lawful orders, and if the Appellants had been found capable of disobeying courts orders the trial Court could not have automatically tried them and sentence them without investigations being carried out. Further, that the trial should have respected the rights of fair trial enshrined in Article 49 of the Constitution. It was submitted that the trial magistrate had displayed anger and prejudice against the appellants.

The learned prosecution counsel filed submissions dated 7<sup>th</sup> April 2016 conceding the appeal on the ground that it was possible that it was the Traffic base commander of Makueni Police station who was in contempt of court's orders and not the Appellants, as he was not summoned to respond to the allegations by the Appellants. Further, that the summary dismissal of the charges against the accused on the basis that they were meant to ridicule the Court's orders prevented the police from doing their duties in the case.

I have carefully considered the proceedings in the trial Court and the submissions by Counsel's herein. Summary proceedings for contempt of court in subordinate courts are brought pursuant to section 121 of the Penal Code which provides as follows:-

**“(1) Any person who—**

**(a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken; or**

**(b) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an**

**(c) causes an obstruction or disturbance in the course of a judicial proceeding; or**

**(d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or**

**(e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or**

**(f) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connexion with such evidence; or**

**(g) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or**

**(h) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court; or**

**(i) commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is being had or taken, is guilty of an offence and is liable to imprisonment for three years.**

**(2) When any offence under any of paragraphs (a), (b), (c), (d) and (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding one thousand four hundred shillings or in default of payment to imprisonment for a term not exceeding one month.**

**(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the High Court to punish for contempt of court.”**

In the summary procedure, the requirement is that the accused is detained in Court and dealt with before the Court rises on the same day. There is no requirement that a charge be formally drawn and read to the accused person who is then called upon to plead. From the categories of cases that the summary procedure applies to as stated in section 121(2) of the Penal Code, it is evident that this procedure is to be adopted in cases of contempt in the face of Court. In the present appeal the alleged contempt took place out of the precincts of the Court at the Makueni Police station, and therefore the summary procedure was not applicable.

In addition, in the present appeal the Appellants were sentenced under section 131 of the Penal Code which provides as follows.

**“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or any person acting in any public capacity and duly authorized in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years”**

This section does not provide for any summary trial, and as the provisions of section 121 on summary trial were inapplicable to the circumstances before the trial Court, the normal procedures as to criminal trials were required to be followed in terms of a charge being drawn and plea being taken by the Appellants before trial commenced.

Having taken into account all the circumstances of this case, I am of the considered view that the proceedings before the trial Court were irregular as the due process and provisions on fair hearing were not adhered to. The conviction of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants was therefore unlawful and the sentence

imposed on them was thus also illegal.

I therefore allow the 1<sup>st</sup> and 2<sup>nd</sup> Appellants appeals, quash their conviction and set aside the sentence of one month's imprisonment. Since the Appellants was admitted to bail pending appeal, I direct that the sum of Kshs.10,000/= deposited by the Appellants in Court as cash bail be released to them forthwith.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 31<sup>st</sup> DAY OF MAY 2016.**

**P. NYAMWEYA**

**JUDGE**