



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO. 160 OF 2016

ANKUSH MANOJ SHAH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

BACKGROUND

The applicant was charged in **Traffic Case No. 13101 of 2016** with the offence of violating the prescribed speed limit for a road contrary to Section 70 (5A) (a) of the Traffic Amendment Act No. 37 of 2012 Legal Notice No. 163 of 2012 as read with Section 70(5B)(1A) Cap.403, Laws of Kenya. The particular of the charge were that on 18th June, 2016 about 12.20 along Southern By-Pass Road at Kikuyu within Kiambu County, being the driver of motor vehicle registration number KCG 363T, drove on the said road violating the prescribed speed limit by driving at 120 k.p.h. instead of 100 k.p.h.

Before the taking of the plea, counsel for the Applicant, Mr. Allen Gichuhi raised a preliminary objection on the ground that the charge sheet was fatally defective for the reasons that an offence under Sections 70(5B) and 5(A)(a) is only committed when a person violates the prescribed speed limit for a road under subsection 1(A) by more than 20 k.p.h. Thus, since the Applicant had not exceeded the 20 k.p.h speed allowance, no offence had been committed and the charge was therefore fatally defective as the Applicant had been charged for a non-existent offence. Further, the Applicant was entitled to the benefit of the less severe of the prescribed punishments of Ksh. 300 for exceeding the prescribed speed limit provided under the Traffic (Minor Offences) Rules 1975 which were made pursuant to Section 117 and were still in force.

The preliminary objection was dismissed by the lower court in a ruling delivered on 18th August, 2016 on the ground that counsel for the Applicant was inviting the court to consider matters which could only be determined by consideration of evidence, and thus, fell outside matters of law.

Aggrieved by the decision, counsel filed this revision application dated 26th August, 2016 under Section 362 of the Criminal Procedure Code seeking the following reliefs:

- a. The charge against the applicant be quashed and proper charges commensurate with the offences and penalties under the Traffic (Minor Offences) Rules 1975 be drawn.
- b. A finding that section 70(5A)(a) as read together with section 70(1A) and 70(5B) creates a

statutory tolerance speed of 20 k.p.h. for drivers and that an offence is only committed if a person violates the prescribed speed by more than 20 k.p.h.

c. That the court should direct that standard form charge sheets that are not commensurate with the offence are illegal and unconstitutional.

d. That the court should direct that a person should not be exposed to a penalty greater than the maximum prescribed by the law.

Applicant's Submissions

Counsel relied on the written submissions filed before the trial court in support of the Preliminary Objection dated 23rd June, 2016. He submitted that the charge sheet was defective for the reason that no offence was committed, noting that Section 70(5B) 1A of the Traffic Act did not exist and that an offence could only be committed under section 70 (5A)(a) of the Act if a person violates a speed limit prescribed for a road by more than 20 k.p.h. In support of this submissions, counsel relied on the cases of ***Mathew Warema Gichuhi v Republic (2010) eKLR***, ***Hilda Atieno v Republic (2014) eKLR*** and ***Oremo v Republic (1990) eKLR*** and ***Barcalyys Bank of Kenya City Council of Nairobi (2005) eKLR***.

Counsel further submitted that the Applicant is entitled to enjoy the benefit of the less severe penalty under Article 50(2)(p) of the Constitution. He urged the court to find that the Applicant was entitled to the benefit of the least of the severe of the prescribed punishments for an offence under the Traffic (Minor Offences) Rules 1975 made pursuant to Section 117 which has not been repealed by any subsequent amendments to the Act.

Counsel advanced the view that the charges against the Applicant were duplex, citing the case of ***Criminal Revision No. 36 of 2008 Kengeles Holdings Ltd. v Republic*** in support of this claim. He added that the Traffic (Minor Offences) Rules 1975 made pursuant to Section 117 provided for a lesser penalty of Ksh. 300 for exceeding the prescribed speed limit. He also highlighted the provisions of Sections 43 of the Act which provides for a penalty of a fine of not more than Ksh. 100,000 for contravention of Section 42. Thus, the charges remained duplex since the Regulations made under Section 117 had not been repealed. He submitted in court that if the 2012 amendments to the Act superseded the provisions of Section 117, the charge sheet ought to have read the actual speed by which the Applicant exceeded. He noted that unless the Regulations were amended, many accused persons were being subjected to illegal fines.

Counsel urged that in the circumstances the proper approach to dealing with a person accused of exceeding the prescribed limit was to punish under the less severe penalties prescribed under the Traffic (Minor Offences) Rules 1975 or alternatively, find that under Section 70(5)(B), an offence is only committed when one has exceeded the prescribed speed limit by more than 20k.p.h. The case of ***Republic v Fairview Hotel (2011) eKLR*** was cited.

Respondent's submissions

The application was opposed by Ms. Atina, prosecution counsel for the Respondent. In her oral submissions, counsel submitted that the question of whether the charge sheet was defective was dependent on the determination of the speed limit signs indicated for the particular roads which was a question of evidence determinable by the trial court. In response to the issue of duplex charges, counsel submitted that a question of duplicity of charges only arises where an accused is charged with more than one offence in one count, which was not the case herein since the Applicant faced one charge. Counsel conceded that a Section 70(5B)(1A) did not exist, adding that this was an error that could be amended.

Responding to the assertion that the Applicant was charged with a non-existent offence, counsel submitted that this only arose where the provision under which a person is charged has been repealed. She further submitted that the Traffic (Minor Offences) Regulations made pursuant to Section 117 do not apply to Section 70 as indicated in the schedule thus the fines prescribed under the Rules were not

applicable for charges under Section 42 of the Act. Counsel distinguished the cases cited as being inapplicable to the circumstances of the case herein. Counsel maintained that it was within the DPP's mandate to determine which charges to cite against an accused and which law as basis of the charges. Counsel observed that the Applicant had not been tried thus it was premature to state he would be fined an amount other than that provided by the law.

Determination

The applicant challenges the legality of charges against him as instituted in the lower court. He was charged with the offence of violating the prescribed speed limit for a road contrary to Section **70 (5A) (a)** of the Traffic Amendment Act No. 37 of 2012 Legal Notice No. 163 of 2012 as read with Section **70(5B) (1A)** Cap. 403, Laws of Kenya.

Before proceeding, it is crucial to reenact the relevant provisions of Section 70 of the Traffic Act as follows:

Section 70(5A) (a)

The driving licence of a person who has been convicted for the violation of a speed limit prescribed for a road under subsection (1A) shall be invalidated for a period not less than three years

a. if the violation of the limit is by more than twenty kilometers per hour.

Subsection 1A referred to in this provision reads as follows:

Without prejudice to the generality of subsection (1), a highway authority shall cause to be placed on or near a road traffic signs prescribing speed limits on the road.

Section 70(5B)(1A) cited in the charge sheet as rightly conceded by counsel for the respondent does not exist in law. The Act provides for **section 70 (5B)** which reads:

A person who violates a speed limit prescribed for a road under subsection (1A) by more than twenty kilometres per hour commits an offence and shall be liable, on conviction, to imprisonment for a term of not less than three months, or a fine of not less than twenty thousand shillings, or both.

From the above, one observation is that Section 70(5B) (1A) on the one hand does not exist in the law. On the other hand, Section 70 (5A) on its own does not disclose an offence, since it only prescribes a penalty for a conviction in violation of the speed limits. Reference to subsection 1A refers to placement of traffic signs prescribing speed limits. Thus when considered as a whole, no offence is revealed under provisions of the law cited in the statement of the offence in the charge sheet. This cannot be therefore, simply dismissed as an error as submitted on behalf of the Respondent.

Furthermore, when properly applied to the appropriate charge, the clear import of Section 70(5A)(a) is that the offence is applicable where the violation of the prescribed speed limit is more than 20 k.p.h. Having made the above observation, my understanding of the Applicant's counsel submissions is that apart from the applicant being charged under a law that does not exist there lay another problem that the traffic Act under Section 42 provided for a similar offence. This then represented double jeopardy to the Applicant. It is important however to note that the Cabinet Secretary for Transport gazetted new traffic rules and regulations effective of 30th August, 2016. The rules were gazette in the Kenya Gazette Supplement number 165 under legislative Supplement number 68 on 23rd September, 2016. Under rule 5 of the Traffic (minor offences) Rules 2016, the 1975 rules were revoked. That is to say then that the rules formulated under Section 117 ceased to operate. But again, the revocation of the 1975 Traffic Rules was not harmonized with Sections 70 of the Traffic Act. That creates the leeway that an accused could be charged either under the Traffic (minor offences) Rules 2016 or under 70 of the Traffic Act. Whereas if

an accused is charged under either law, per se, may not be legally prejudiced, it represents a confusion and an unprocedural manner of legislative draftsmanship. My recommendation therefore is that the Attorney General should take up the obligation to harmonize the provisions.

The next issue that the court was addressed on was to find that any other person apart from the Applicant who was charged under Section 70(5)(B)(1)(A) and was convicted paid an illegal fine or served an illegal sentence. My take on this is that this court does not have evidence of existence of such files so as to ascertain that position. The court cannot deal and act on submissions from the Bar. It must be presented with actual evidence to enable it satisfy itself that any illegal fine was paid or an illegal sentence served. The question raised then is not within the mandate of this court to conduct a research on what may have transpired over the years. The court is obligated to determine any question of illegality, incorrectness or irregularity regarding the current matter.

I have already candidly found that the law under which the Applicant was charged does not exist. When the objection was raised before the trial court, the plea should not have been taken on account that the Applicant had been charged under a law that did not exist. The magistrate ought to have made a determination on that objection. The objection raised by the Applicant created a weighty legal question that it was an error to rule that it could only have been determined by adduction of evidence. The defence had argued that the Applicant having been charged under Section 70(5)(B)(1)(A) no offence had been disclosed because under Sub-section (5)(B), an offence was disclosed only if the accused was driving in excess of the prescribed speed by more than 20 k.p.h. In my view, the learned trial magistrate misdirected herself that the question could only be determined at the hearing. This is so because under Section 89(5) of the Criminal Procedure Code,

“where a magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

She ought to have addressed herself on the question of whether the charge disclosed an offence, or was brought under the wrong provision of the law and therefore elect to admit or reject it. The direction she took represented an irregularity which this court under its supervisory jurisdiction over the courts subordinate to it must correct.

Before I make the order for revision, it is also important that I delve into the other question raised that because the Applicant could have been charged under either Section 70 or the Traffic (minor offences) Rules of 1975 made pursuant to Section 117 he was entitled to the lesser punishment in line with Article 50(2)(p) of the Constitution. I have already held that the 1975 Traffic Rules were revoked upon the enactment of the Traffic (Minor Offences) Rules, 2016. In the circumstances, the Applicant could only have been charged under the latter rules which had already taken effect or under Section 70. Under the 2016 Traffic Rules, if he exceeded the speed by between 16 and 20 k.p.h, he was liable to a fine of Kshs. 10,000/=. Had the proper law been cited, under Sub-Section 5(5)(B), he was liable on conviction to imprisonment for a term of not less than 3 months or a fine of not less than Kshs. 20,000/= or both. Article 50 (2)(p) provides as follows:

“Every accused person has the right to a fair trial, which includes the right-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

Therefore, since both Subsection (5)(B) and the Traffic Rules, 2016 deal with prescribed speed limits, had the Applicant been properly charged, he was entitled to the lesser punishment which is under the 2016 Traffic Rules. But I must emphasize that the Applicant having been charged for driving at 120 k.p.h instead of 100 k.p.h, and the law cited being subsection (5)(B) of Section 70 meant that an offence could only have been created if he was driving in excess of 120 k.p.h. He was therefore within the allowed speed limit. Effectively, no offence had been committed by the speed he was driving at. That then was a

legal question which the court could have determined instantly at a glance of the law. The cure to that error or defect was to reject the charge under Section 89(5) of the Criminal Procedure Code.

The next issue was that the charge represented a duplex charge since the Applicant could have been charged and fined under more than one provisions of the Traffic Act. As rightly submitted by counsel for the Respondent, duplicity concerns the counts as opposed to the charged. A charge is said to be duplex when it contains more than one offence in a single count. It is simplified in the definition given in Arcbold Criminal Pleading, Evidence and Practice, 2010 at pg 9 in the following words:

“the indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences...”

The question on whether a count breaches the general rule against duplicity is a question relating to the form of the count not the underlying evidence... thus if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity”

A contrary scenario is represented in the instant case. Only one offence is charged in a single count, that is exceeding the prescribed speed limit. In that regard, I hold that save for the reasons aforestated, the charge was not bad for duplicity.

From the foregoing, having observed that firstly, the particulars of the charge did not disclose an offence and secondly, that the Applicant was charged under no known law, the charge sheet ought to have been rejected. In the result, I set aside the order of the learned trial magistrate made on 18th August, 2016 directing that the matter proceeds for plea. I substitute it with an order that the charge sheet be and is hereby rejected and dismissed under Section 89(5) of the Criminal Procedure Code. The prosecution is at liberty to choose to charge the Applicant afresh. It is so ordered.

Dated and Delivered at Nairobi this 29th November, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. Mr. Kigala h/b for Allen Gichuhi for the Applicant.*
- 2. M/s Sigei for the Respondent.*