REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. 3 & 4 OF 2014

DAVID NJOGU GACHANJA……..……APPLICANT

-VERSUS-

REPUBLIC…….RESPONDENT

CONSOLIDATED RULING

(Arising from Ruling on Case to Answer Naivasha Traffic Case No. 10015 of 2013 and Naivasha Traffic Case No. 1867 of 2014)

The Charges

1. On 18/10/2013 the accused who is an advocate was arraigned before the Chief Magistrate's Court Naivasha on charges of Violating the prescribed speed limit for a road Contrary to Section 70 (5B) of the Traffic Act. The particulars of the Charge are that on the 18th October 2013 at 08.14am along Limuru-Naivasha road in Naivasha Municipality of Nakuru County, being the driver of motor vehicle registration number KBS 343Y Toyota Hillux Pick-up drove the said motor vehicle on the said road violating the prescribed speed limit by driving at 103 kilometres per hour instead of 80 kilometres per hour.

2. The accused pleaded not guilty. The matter subsequently proceeded to hearing and the prosecution closed its case after calling two witnesses.

On 17/7/2014 the accused was placed on his defence, the court seemingly substituting a new charge under Section 42 of Traffic Act. The defence hearing was set for 19/8/2014.

3. In the meanwhile the accused had been arrested on a separate but a similar offence. On 11/3/2014 he was arraigned before the same court on a Charge of Violating the prescribed speed limit for a road Contrary to Section 70 (5B) of the Traffic Act. The particulars stated that on the 11th day of March 2014 at 10.30am along Limuru-Naivasha road in Naivasha Municipality of Nakuru County, being the driver of motor vehicle registration number KBS 343Y Toyota Pick-up drove the said motor vehicle on the said road violating the prescribed speed limit by driving at 105 kilometres per hour instead of 80 kilometres per hour.

4. The accused denied the charge. The second matter also proceeded to trial before a different magistrate who placed the accused on his defence on 7/7/2014. The defence hearing was set for 18/8/2014. However on 13/8/2014 the accused simultaneously filed for revision in respect of the

two pending matters vide letters dated 8/8/2014 addressed to the High Court.

The grounds for revision

5. With regard to High Court Criminal Revision No. 3 which relates to Traffic Case No. 10015 of 2013, the gist of his complaint was as follows. The accused contends that the charge presently facing him under Section 42 of Traffic Act cannot be sustained without proof that there are in place on the road, traffic signs prescribing the speed limit not to be violated. He argues that the requirement for erection of traffic signs was mandatory under Section 42 of the Traffic Act.

6. Further, that the failure by the trial court to take this question into account and its refusal to visit the scene as requested by the accused, apparently to confirm the existence or otherwise of the traffic signs, was prejudicial to the defence. He contends that the denial amounted to a violation of the right to a fair trial under Article 50 (2) (k) of the Constitution. Moreover, the accused asserts that the prosecution was obligated under Section 43 (3) of the Traffic Act to lead evidence by more than one witness in proof of the alleged excessive speed. He pointed out that only one witness was called on this score.

7. His prayer was for the court to call for and examine the record of the proceedings in the lower court to satisfy itself on the legality and propriety thereof and to revise the orders of the court by finding that no *prima facie* case had been established. On the basis of the said complaint the High Court (Omondi J.) sitting in Nakuru called for the traffic file and stayed the proceedings. Subsequently the High Court revision file was transferred to this court.

8. On 21/11/2014 this court ordered that the applicant does file a miscellaneous criminal application and to serve it upon the Director of Public Prosecutions. The applicant complied and filed the Notice of Motion dated 16/12/2014, which essentially repeats the substance of the original letter seeking revision. The application is expressed to be brought under Article 165 (6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code. It is supported by the affidavit sworn by one Clive Onyancha who describes himself as an advocate practicing in the firm of D. Njogu & Co. Advocates.

9. As regards High Criminal Revision 4 of 2014 in respect of Traffic Case 1867 of 2014 the accused raised substantially similar issues as in Revision 3 of 2014. Equally the High Court sitting in Nakuru (Omondi J.) granted temporary stay and called for the lower court file. The said matter was also transferred to this court and a formal Notice of Motion filed by the applicant on direction of this court. The application premised on the same provisions of the law as above.

10. The Notice of Motion filed on 16/12/2014 seeks *interalia*:

> **"THAT this Honourable Court be pleased to call for and examine the proceedings in traffic file no. 1867 of 2014, Republic Vs David Njogu Gachanja so as to satisfy itself and pronounce on the LEGALITY and/or PROPRIETY of the orders of the subordinate court.**
>
> **THAT this honourable court do revise and set aside the order of the subordinate court and make a finding that on the evidence on record and the law, no prima facie case has been established and consequently the accused has no case to answer"**

11. The main grounds upon which the application is based are as follows:

a. **The applicant is charged with the offence of violating the prescribed speed limit for a road Contrary to Section 70 (5B) of Traffic Amendment Act No. 37/12 Legal Notice No. 163/12 CAP 403 Laws of Kenya.**

b. **The particulars of the alleged offence are that the applicant on the 18th October 2013 at**

0.8.14am along Limuru-Naivasha road in Naivasha Municipality of Nakuru County, being the driver of Motor Vehicle Registration No. KBS 343Y Toyota Hillux drove the said vehicle on the said road violating the prescribed speed limit by driving at 103 KPH instead of 80 KPH.

e. **The matter came up for hearing on 30th June 2014 and despite the prosecution witnesses admitting in cross-examination that there are presently no signs to indicate the maximum speed limit, the honourable magistrate nevertheless ruled that accused has a case to answer and put him on defence.**

The grounds are further expanded in the affidavit of one Clive Onyancha an advocate practicing with Njogu & Co. Advocates, the accused's advocates.

The Defence Submissions

12. On 10/2/2015 the two revision matters came up before the court. Mr. Onyancha for the applicant indicated that he would file written submissions. Mr. Omari representing the Director of Public Prosecutions opted not to put in any submissions. The defence has now filed its submission. I have also called for and perused the record of the proceedings in the lower court in Traffic Case No.10015 of 2013 and Traffic Case No. 1867 of 2014.

13. The arguments raised by the defence in both matters were that by virtue of the provisos in Sections 42 and 70 (1A) of the Traffic Act, a charge of excessive speeding under Section 70 (5B) or 42 of the Traffic Act can only be sustained where it is proved that traffic signs have been erected on the relevant road indicating the applicable speed limits. Secondly, that a charge of excessive speeding brought under Section 42 of the Act must be proved by more than one witness by dint of the provisions of Section 43 (3) of the Traffic Act. The defence contends that the prosecution evidence in the lower court fell short of these requirements.

14. In addition, the defence also takes issue with the rejection by the trial court, of the defence request in Traffic Case No. 10015 of 2013 for a scene visit to ascertain the existence of the disputed traffic signs. The defence contends that the outlined shortcomings before the lower court constitute a violation of the accused's right to a fair trial under Article 50 (2) (k) of the Constitution.

Analysis of the Law and Determination

15. A determination of the issues raised by the two revision matters lies in part with a proper construction of Sections 42, 43 (3) and 70 of the Traffic Act, as well as the proper application of Article 50 (2) (k) of the Constitution in the course of the trials. Having considered the foregoing provisions, I note firstly, that Part V of the Traffic Act creates several offences related to speed. For the present purposes, I will confine myself to offences created under Sections 42 and 70 of the Act.

16. Section 42 is headed: **"Speed of Motor Vehicles"** It provides in part as follows:

1. **No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, a vehicle on a road at a speed greater than such speed as may be prescribed as the maximum speed for that class of vehicle.**

2. **On a vehicle subject to a speed restriction under subsection (1) except a vehicle registered as a motor-car or motor-cycle or a private hire vehicle, there shall be painted or affixed to the rear, as close as possible to the rear number plate and so as to be clearly legible to a person within ten metres of the rear of the vehicle, a mark in the prescribed form indicating its maximum permitted speed in kilometres per hour.**

3. **No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit**

any other person to drive, any vehicle at a speed exceeding fifty kilometres per hour on any road within the boundaries of any trading centre, township, municipality or city:

> **Provided that the highway authority shall erect and maintain traffic signs as prescribed so as plainly to indicate to drivers entering or leaving such roads or areas where the fifty kilometre per hour speed limit restriction begins and ends.**

17. Under Sub-section 4, the minister is empowered, notwithstanding subsection (1) & (3) to impose any a lower speed limits that he may consider necessary for purposes of repair or reconstruction, of a road or where damage to or, condition of a road necessitates such limit for public safety, or to avoid damage to a road. Subsection 4(a) indicates that such imposition is intended to be temporary. Under Subsection 4(b) the minister may either permanently or for such time he considers appropriate impose a lower speed limit to prevent damage to a road for the safety of the public, having regard to permanent or temporary hazards, alignment and features of a road, width of streets, nature of traffic and general development of the area.

18. A general proviso that clearly applies to both subsection 4 (a) and (b) appearing at the end of Section 42 (4) is in the following terms:

> **"provided that, in any case whilst such lower limit is in force under this subsection, indication of the maximum speed permitted <u>shall be given by prescribed traffic signs erected and maintained so as plainly to indicate to drivers entering or leaving such restricted roads where the lower speed limit begins and ends.</u>"**

19. It is evident that whereas Section 42 (4) a & b is concerned with lower speed limits that may be imposed on certain roads by the minister or by the authority to whom he delegates his power, section 42 (1), (2) and (3) relate to the prescribed speed for certain classes of motor vehicles, and speed limits applicable within the boundaries of trading centres, townships municipality or city. Upon the Minister under subsection (4) and the highway authority under subsection (3) the law imposes a duty for the erection and maintenance of road signs for purposes of giving clear notice of speed limits to drivers.

20. I accept the defence submissions that the two provisos in Section 42 (3) and (4) are in mandatory terms. It also appears from the wording of Section 42 (1) and (2) the duty of ensuring that the vehicle subject to speed restriction bears the appropriate speed inscription and is driven in accordance with the said limit lies with the driver and the owner of the vehicle.

21. In her ruling now impugned by the defence, the trial magistrate in Traffic Case 10015 of 2013 correctly observed that proof of existing speed limit signs was necessary in a charge brought under Section 70 (5B) of the Act. The learned trial magistrate proceeded to rely on the provisions of Section 42 of the Act to make two related conclusions; first that the evidence adduced between her could sustain a charge under Section 42 of the Act. And secondly, that the scene visit was unnecessary since Section 42 did not make the erection of speed limit signs a mandatory requirement.

22. With respect, that is only true for Section 42 (1) and (2) of the Act. Be that as it may the charge states that the accused was driving a pickup. Both prosecution witnesses were police officers who testified as PW1 and PW2. They stated that the said pick-up was doing 103 instead of 80 kilometres per hour, the latter being the speed limit provided for that class of vehicle in the schedule of the Traffic (Speed Limits) Rules made pursuant Section 119 of the Traffic Act. A commercial vehicle is defined in Section 2 of the Act as:

> **"…….a motor vehicle constructed or adapted for the carriage of goods or burdens of any description in connection with any trade, business or agriculture……."**

23. In my considered view, the trial magistrate was entitled at that stage to invoke the provisions of Section 214 of the Criminal Procedure Code and to exercise her discretion in rejecting a scene visit which was in the circumstances not necessary. Besides, a visit of the scene almost ten months since the date of offence would likely not have yielded any useful evidence as the scene may well have changed.

24. In my opinion, it would amount to an onerous requirement leading to long delays if courts dealing with traffic offences of this nature were to be required to visit scenes supposedly for purposes of affording a fair trial to accused persons. A fair trial is also one devoid of unreasonable delay. I will return to the issue of the application of Section 214 of the Criminal Procedure Code in the trial at a later stage.

25. In respect of the offences under Section 42, namely driving at a speed in excess of the limit prescribed for that class of vehicle or on the road Section 43 of the Act provides the penalty. Further Section 43 (3) states:

> **"A person charged with the offence of driving a motor vehicle of any class or description on a road at a speed greater than the maximum speed allowed shall not be liable to be convicted solely on the evidence of one witness <u>to the effect that in the opinion of the witness the person charged was driving the vehicle at such greater speed</u>."**

26. Regarding the second limb of the defence application my considered opinion is that provisions of Section 43 (3) of the Traffic Act must be read alongside Section 119 of the same act which *interalia* gives power to the Minister to make rules regarding the regulation, control restriction of the use of vehicles as circumstances may require. Rule 3 of the Traffic (Speed Limits) Rules made under the said section allows the use of a speed camera by a police officer in uniform for purposes of "determining, recording or storing the digital image of the speed of any vehicle." Such records are also declared by the Rules to be admissible in court as evidence.

27. On the face of it therefore, the nature of evidence on record in both traffic cases does not conform with the "opinion" of the sole witness anticipated in Section 43(3) of the Traffic Act. The prosecution witnesses relied on the speed camera and not the personal opinion of a police officer, in determining the speed of the subject vehicle. The speed camera is defined in the rules as a **"special gadget that calculates the time take by a vehicle to travel over a set distance to work out the speed."** The defence objection therefore lacks merit.

28. Turning now to Section 70 of the Traffic Act, the relevant marginal note reads "**Traffic Signs**". The Section is primarily concerned with the erection, prescription and retention of traffic signs. Section 70 (1) (A) specifically provides for the placing on or near the road of traffic signs prescribing speed limits on the road. Speed limit traffic signs are the only type of traffic sign specifically mentioned in the section.

29. In my view, Section 70 (1) (A) and the provisos in Section 42 (3) and (4) which as we saw earlier relate to contravention of speed limits imposed on a road, are similar. In both instances the law requires that the road user be given adequate notice of applicable speed limits on a given stretch of road to facilitate compliance. This is because depending on the locality, nature and condition of a road, or activities on road, the speed limit may vary.

30. Indeed, a full reading of Section 42 indicates that in certain situations, the decisive factor as to speed limit may not be the class of vehicle but the exigencies of the moment as they obtain on the road. Hence where a charge is brought under Section 70 (5B) Section 42 (3) or Section 42 (4) as read with Section 43 (1) the prosecution will be under a duty to prove that there were traffic signs on the subject road prescribing the applicable speed limit.

Conclusion

31. In respect of Traffic Case No. 1867 of 2014 apparently conflicting evidence was tendered through PW1 and PW2 as regards the existence of speed limit signs on the road in question. This question was taken up during the submission by the defence. The prosecutor appeared to seek refuge under Section 42 of the Act when he responded that the accused was obligated "to comply with the speed limit indicated on his motor vehicle", described as a pick up in the charge sheet. The prosecution however closed its case before amendment could be done to the charge under Section 214 Criminal Procedure Code.

32. If it was the intention of the prosecution to prefer the two offences created under Section 42 (1) and 70 (5B) in the alternative, they should have done so from the start. Fair trial protections under Article 50 (2) of the Constitution include the right to be informed of the charge with sufficient detail to answer it. This protection is also contained in Section 134 of the Criminal Procedure Code as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

33. Moreover, by dint of Section 214 of Criminal Procedure Code the trial court is entitled, before the close of the prosecution case to order for the alteration of the charge by way of amendment of charge or by substitution or addition of a new charge. However the accused must thereafter be called upon to plead to the altered charge. From the record of the proceedings in Traffic Case No 10015 of 2013 this step was not complied with. Indeed it does not appear that an amended or substituted charge sheet was prepared. The accused however proceeded to make an election under Section 214 (1) (ii) of the Criminal Procedure Code to the effect that he would not be demanding the recall of any witness. The prosecution then closed its case.

34. This failure to comply fully with Section 214 (1) (i) of the Criminal Procedure Code is in my considered view more serious than the trial court's denial of a court visit to the scene. Based on the ruling given by the court, the charge hitherto laid against the accused changed from being a specific one under Section 70 (5B) of the Traffic Act, to one under an unstated subclause of Section 42 of the Traffic Act, and to which the accused was not been given an opportunity to plead. While I agree with most of the reasoning of the learned trial magistrate in declining a scene visit, I think the failure to comply fully with Section 214 Criminal Procedure Code amounts to a misdirection that offends the fair trial provisions in Article 50 (2) of the Constitution.

35. More so because the contention in the matter before her was based on the question whether proof of the existence of road signs prescribing speed limit was necessary. Section 42 of the Traffic Act creates offences relating to exceeding speeding prescribed for class of vehicle (Sub-Section (1), (2)) and also exceeding speed prescribed by a traffic sign (Sub-Section (3), (4)). From the ruling, it appears that the trial court had Sub-section (1) and (2) in mind but because no express order was made for amendment, the detail does not emerge in her subsequent invocation of Section 214 of the Criminal Procedure Code.

36. For these reasons it is my view that even though the trial court was entitled to have the charge altered to one that did not require proof of erected speed limit road signs, the procedure adopted was wrong and prejudiced the accused's right to a fair trial. Consequently the finding that he had a case to answer in Traffic Case No. 10015 of 2013 was erroneous and cannot stand. At the time the finding was made that there was a *prima facie* case to require the accused to make his defence, there was, technically speaking no specific or known charge against him as no substitution had been done, while the earlier charge had implicitly been found unsustainable. The order therefore was virtually made in *vacuo*. I do therefore set aside the said order.

37. The next issue to be considered is whether a retrial should be ordered. In **Fatehali Manji –Vs- Republic [1966] EA 343** the Eastern Africa Court of Appeal laid down principles governing this question as follows:-

> **"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecutor is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused."**

38. The Court of Appeal also stated in **Mwangi –Vs- Republic [1983] KLR 522** that:

> **"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."**

39. In Traffic Case No. 10015 of 2013 the trial was vitiated through the mistake of the court in its application of Section 214 of the Criminal Procedure Code. The error may not have arisen if the prosecution had in the first place brought a proper charge consistent with the evidence in their possession. The trial had been outstanding for several months at the time the case was closed.

40. It is my view that an order for retrial in the circumstances of this case could amount to assisting the prosecution to mend their case, while occasioning prejudice against the accused. I will therefore substitute an order that the accused had no case to answer and direct that he stands acquitted under Section 210 of Criminal Procedure Code.

41. Returning to the Traffic Case No. 1867 of 2014, I accept the defence argument that without proof of the existence of speed limit road signs the charge under Section 70 (5B) of the Traffic Act could not be sustained. The prosecution having closed its case, the door for amendment under Section 214 of the Criminal Procedure Code also closed. The prosecution plea was that the evidence on records nevertheless could sustain a charge, presumably under Section 42 (1) of the Traffic Act.

42. A *prima facie* case was defined in **Ramanlal Trambaklal Republic –Vs- Bhatt [1957] EA 332** as follows:

> **"A mere scintilla of evidence can never be enough; nor can any amount of worthless, discredited evidence. It is true….that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 'prima facie**
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> **case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."**

43. Upon a consideration of the evidence on record, I cannot conclude at this stage that no minor and cognate offence at least as contemplated by Section 179 Criminal Procedure Code will eventually be found proved. It will not be prudent for this court to speculate on the accused's possible defence or the eventual outcome of the defence hearing. I therefore decline to interfere and direct that Traffic Case No. 1867 of 2014 does proceed expeditiously to defence hearing so that the trial

court can render its final decision in the matter. Traffic Case No. 1867 of 2014 is hereby returned and will be mentioned before the trial court (Mwinzi, SRM) on 25th March, 2015 for fixing a date for the defence hearing. It is so ordered.

44. A copy of this ruling will be placed in both High Court Criminal Revision 3 and 4 of 2014 and the corresponding lower court files namely, Traffic Case No. 10015 of 2013 and Traffic Case 1867 of 2014 respectively.

Delivered and signed at Naivasha this 19th day of March, 2015.

In the presence of:

Court Clerk

State

Advocate for the Applicant

C. W. MEOLI

JUDGE