



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 284 OF 2013

(From original conviction and sentence in Criminal Case 50 of 2013 of the

Senior Resident Magistrate's Court at Tawa, W. C. Kipkoech, Ag. SRM)

HARRISON KIOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. There are two charge sheets in the lower court file in this matter.
2. In the first charge sheet on record, the Appellant HARRISON KIOKO is charged as follows:

Count I: *Carrying excess passengers contrary to Section 100(2) of the Traffic Act, Cap. 403 Laws of Kenya.*

The particulars of offence were that the Appellant on the 4th day of September, 2013 at 11.45 a.m. along Mbumbuni – Wote road in Mbooni East District within Makueni County being a driver of motor vehicle registration KBJ 697S Nissan Matatu carried 16 passengers instead of 14 passengers two (2) being excess passengers in the said vehicle.

Count II: *Carrying un-insured passengers contrary to Section 5(6) of Insurance Motor Vehicle Third Party Risks Act, Chapter 405 Laws of Kenya.*

The particulars of offence were that the Appellant on the 4th day of September, 2013 at around 11.45 a.m. along Mbumbuni-Wote road in Makueni County being the driver of motor vehicle registration KBJ 967S Nissan matatu did carry two (2) un-insured passengers.

Count III: *Failing to maintain parts and equipments of a motor vehicle contrary to Section 55(1) as read with Section 58(1) of the Traffic Act, Cap. 403 Laws of Kenya.*

The particulars of offence were that the Appellant on the 4th day of September, 2013 at 11.45 a.m. along Mbumbuni-Wote road in Mbooni East District within Makueni County being a driver of motor vehicle registration KBJ 697S Nissan matatu failed to maintain pars and equipments; safety belts 14 and cracked windscreen of the said vehicle.

Court IV: *Failing to stop contrary to Section 52(1)(c) of the Traffic Act Cap. 403 Laws of Kenya.*

The particulars of offence were that the Appellant on the 4th day of September, 2013 at 11.45 a.m. along Mbumbuni-Wote road in Mbooni East District within Makueni County being a driver of motor vehicle registration KBJ 697S Nissan matatu failed to stop while being required to stop by a police officer in uniform.

3. The second charge sheet contains the following charges:

Count I - *Carrying excess passengers contrary to Section 100(2) of the Traffic Act, Cap. 403 Laws of Kenya. The particulars of offence were that the Appellant on the 4th day of September 2013 at 11.45 a.m. along Mbumbuni-Tawa road in Mbooni East District within Makueni County, being a driver of motor vehicle registration KBJ 697S, Mitsubishi Canter lorry carried 4 passengers instead of 2, two (2) being excess passengers in the said motor vehicle.*

Count II – *Carrying un-insured passengers contrary to Section 5(b) of Insurance Motor Vehicle Third Party Risks Act, Chapter 405 Laws of Kenya. The particulars of the offence were that on the 4th day of September 2013 at around 11.45 a.m. along Mbumbuni-Tawa road in Mbooni East District, Makueni County being a driver of motor vehicle registration KBJ 697J Mitsubishi FH lorry did carry two un-insured passengers.*

Count III – *Failing to stop contrary to Section 52(1)(c) of the Traffic Act Cap. 403 Laws of Kenya. The particulars of the offence were that on the 4th day September 2013 at 11.45 a.m. along Mbumbuni-Tawa road in Mbooni East District, Makueni County, being a driver of motor vehicle registration KBJ 697J Mitsubishi Canter lorry failed to stop while being required to stop by police officers in uniform.*

Count IV – *Failing to maintain parts and equipments of a motor vehicle contrary to Section 55(1) as read with Section 58(1) of the Traffic Act Cap. 405 Laws of Kenya. The particulars of the offence were that the Appellant on the 4th day of September 2013 at 11.45 a.m. along Mbumbuni-Tawa road in Mbooni East District Makueni County being a driver of motor vehicle registration KBJ 697J Mitsubishi F.H. lorry failed to maintain parts and equipments cracked windscreen of the said vehicle.*

4. When the Appellant was arraigned before the trial court, he pleaded guilty and was convicted and sentenced as follows:-

Count I: Discharged under Section 35(1) of the Penal Code with a warning.

Count II: Fined Kshs. 5,000/= in default to serve three (3) months imprisonment.

Count III: Fined Kshs 10,000/= in default to serve three (3) months imprisonment.

Count IV: Fined Kshs 180,000/= in default to serve twelve (12) months imprisonment.

5. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. The grounds of appeal can be summarized as follows:

- That the trial magistrate failed to read all the charges to the Appellant.
- That the plea was unequivocal.
- That the facts were not read out to the Appellant.

- That the sentence was manifestly excessive.

6. The appeal was canvassed by way of written submissions which I have duly considered.

7. The legal principles to be applied in plea taking were set out in the case of **Adan Vs Republic (1973) EA 445** as follows:

i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

iv. If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

v. If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

8. There being two charge sheets on record, it is not possible to tell which one was read out to the Appellant. The particulars of the offences in the charge sheets on record reflect different motor vehicles. One of the charge sheets reflects the motor vehicle in question as a Nissan matatu while the other one describes it as a Mitsubishi canter lorry.

The parts of the motor vehicle that were stated to be defective in Count No. III in each of the charge sheets are also different. The record does not reflect any amendment or substitution of the charge sheet. It is not clear which charge sheet was read out to the Appellant. The plea was therefore not unequivocal.

9. The appeal has merit. Both charge sheets emanated from the prosecution. The prosecution cannot therefore not be allowed to have a second bite of the cherry by way of a retrial. The appeal is allowed. The money paid as fine to be refunded to Appellant.

Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 20th day of May 2015

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B. THURANIRA JADEN

JUDGE