



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.31 OF 2014

(An appeal against original conviction and sentence of
Sotik PMTR. Case No.277 of 2014 – Hon. P. Olengo – Principal Magistrate)

VINCENT MUTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Vincent Mutai, the Appellant herein, was tried on a traffic charge of four counts relating to the use of motor cycle registration KMDB 310R make Bajaj Boxer, before the Sotik Principal Magistrate's Court. The aforesaid charge and particulars are as follows:-

Count 1: Riding motorcycle on a public road without Insurance contrary to Section 103 B (3) (7) of the Traffic amendments Act No.37 of 2012 Cap.405 Laws of Kenya.

Particulars: On the 26th day of May 2014 at about 7.30 p.m., within Litein Township at Bureti District of Kericho County being the rider of a motor cycle registration KMDB 310R Boxer Bajaj did ride the said motor cycle on a public road without Insurance cover.

Count II: Riding motorcycle on a public road without driving license contrary to Section 103 B (5) (7) of the Traffic Amendments Act No.37 of 2012 Cap.405 Laws of Kenya.

Particulars: On the 26th day of May 2014 at about 7.30 p.m. within Litein Township in Bureti District at Kericho County, being the rider of a motor cycle registration number KMDB 310R Boxer Bajaj did ride the said motor cycle on a public road without driving license.

Count III: Riding motorcycle on a public road without helmet contrary to Section 103 B (1) (7) of the Traffic Amendments Act No.37 of 2012 Cap.405 Laws of Kenya.

Particulars: On the 26th day of May 2014 at about 7.30 p.m. within Litein Township of Bureti District Kericho County being the rider of a motorcycle registration number KMDB 310R Bajaj Boxer, did ride the said motor cycle on a public road without helmet.

The record placed before this court shows that the Appellant pleaded guilty and was convicted in all counts and sentenced to pay a fine of Ksh.10,000/= in each count in default to serve 6 months imprisonment. The Appellant being dissatisfied with the decision preferred this appeal.

Through the firm of J. K. Rono & Co. Advocates, the Appellant put forward the following grounds of appeal:

1. THAT the learned Trial Magistrate erred in law and in facts of the Charge had not been read to the Appellant.
2. THAT without prejudice to the foregoing the Appellant was not accorded an opportunity to mitigate.

Before delving deeper into the merits or otherwise of the appeal it is important to set out in brief the case that was before the trial court. The facts of this case are scanty because the prosecution did not outline the facts which the charge was based before the trial court. The only available material to discern the facts is the charge sheet. It would appear that on 26th May 2014 at about 7.30 p.m., the Appellant was apprehended by police within Litein Township while riding motor cycle registration number KMDB 310R. Upon inspection, the police preferred the aforementioned charge. It is recorded that the Appellant was convicted on his own plea of guilty by Hon. Olengo, learned Principal Magistrate. Having set out the brief facts of the appeal, let me now turn my attention to the substance of the appeal.

When the appeal came up for hearing Mr. Mutai learned senior Prosecution Counsel, conceded the same on two main grounds: First, that the plea was equivocal and secondly, that the appellant was not given a chance to mitigate. Mr. Rono also relied on the same grounds Mr. Mutai conceded the appeal. The first ground argued in support of the appeal is to the effect that the learned Principal Magistrate fell into error when he convicted the Appellant on his own plea of guilty yet the prosecution had not outlined the facts in support of the charge. A cursory look at the recorded proceedings of the trial court will reveal that the prosecution was not called upon to outline the facts in support of the charge as required under Section 207 of the Criminal Procedure Code. It is a requirement of the law that before convicting an accused person, he or she should be called upon to admit, dispute or explain the facts outlined by the prosecution. This never happened in this case. This was a very serious error on the part of the learned Principal Magistrate. In *Adan vs R* [1973] E. A 445 the Court of Appeal for East Africa restated the guiding principles to be followed before recording a plea inter alia 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 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 the facts relevant to sentence together with the accused's reply should be recorded."

The learned Principal Magistrate was not guided by the above principles. In the circumstances and with respect, I agree with the submissions of learned counsels that the plea of guilty was equivocal hence the same must be quashed.

The second ground which was ably argued is that the trial court did not give the Appellant an opportunity to mitigate. It is obvious from the recorded proceedings that the Appellant was not allowed to submit his mitigating factors before sentencing. The Appellant was entitled to have his mitigating factors recorded

and taken into account by the trial court. Those factors would have assisted the court to decide and pronounce a proper sentence. The court was enjoined to do so under Section 216 of the Criminal Procedure which provides as follows:

“The court may, before passing sentence or making an order against an accused person under Section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.”

The consequence of the above lapse is that I have no information on which I can determine whether or not the subordinate court meted out a proper sentence. However, what is clear in my mind is that the offences the Appellant was convicted for, attracts a maximum sentence of a fine of Ksh.10,000/= in default 12 months imprisonment, under Section 103 B (7) of the Traffic Act. The Appellant was ordered to pay a fine of Ksh.10,000/= which is the maximum sentence. The trial court was enjoined by law to justify why it meted out a maximum sentence against the Appellant who ‘*readily plead guilty*’. If the order is not set aside it may discourage first offenders from pleading guilty. I find that the learned Principal Magistrate breached one of the cardinal principles of sentencing thus meting out a harsh and excessive sentence.

I find the appeal to be well founded. I allow the same by ordering the conviction quashed and that on sentence set aside. The fines paid if any, should be refunded forthwith and if the Appellant is serving the default sentence then he should be set free immediately.

Dated, signed and delivered in open court this 20th day of June 2014

J. K. SERGON

JUDGE

In the presence of:

N/A for Rono for Appellant

Mr. Mutai for Director of Public Prosecutions