



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.30 OF 2014

(An appeal against original conviction and sentence of Sotik PMTR. Case No.276 of 2014 – Hon. P. Olengo – Principal Magistrate)

VINCENT TOWETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Vincent Towett, the Appellant herein, was arraigned before the Sotik Principal Magistrate's Court to face a traffic charge of the following four counts:

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 27th day of May 2014 at about 7.00 p.m., within Litein Township at Bureti District of Kericho County being the rider of a motor cycle registration KMDC 250F Boxer Bajaj did ride the said motor cycle on a public road without Insurance.

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 27th day of May 2014 at about 7.00 p.m. within Litein Township in Bureti District at Kericho County, being the rider of a motor cycle registration number KMDC 250F 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 27th day of May 2014 at about 7.00 p.m. within Litein Township of Bureti District Kericho County being the rider of a motorcycle registration number KMDC 250F Bajaj Boxer, did ride the said motor cycle on a public road without helmet.

Count IV: Riding motorcycle on a public road without reflective jacket contrary to Section 103 B (1) (7) of the Traffic Amendments Act Cap.405 Laws of Kenya.

Particulars: On the 26th day of May 2014 at about 7.00 p.m. within Litein Township in Bureti District Kericho County being the rider of a motor cycle registration number KMDC 250F Bajaj Boxer did ride the said motorcycle on a public road without reflective jacket.

The Appellant appeared before Hon. Olengo, learned Principal Magistrate and was convicted on his own plea of guilty and ordered to pay a fine of Ksh.10,000/= in each count in default to serve 6 months imprisonment. The Appellant was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds of appeal:

1. THAT the learned Trial Magistrate erred in law and in fact by not taking into account mitigating factors offered by the Appellant before passing appropriate sentence.
2. THAT the learned Trial Magistrate erred in law and in fact by not considering that the Appellant is a Form 3 student whose right to education ought not to be unduly interfered with as this is the examination season in their school.
3. THAT the learned Trial Magistrate erred in law and in fact by not considering other suitable sentences available to be meted out on the Appellant in the circumstances.
4. THAT the learned Trial Magistrate in law and in fact by failing to inquire into the circumstances of the commission of the offences.
5. THAT the learned Trial Magistrate erred in law and in fact by imposing excessive sentence without considering that the Appellant is a first offender.

When the appeal came up for hearing, Miss. Kivali, learned Prosecution Counsel conceded the same on the aforementioned grounds:-

The facts leading to the Appellant's conviction can only be discerned from the particulars of the offence stated on the face of the charge. The facts are scanty in this case, since the prosecution did not outline the facts under Section 207 of the Criminal Code. It would appear that on 27th day of May 2014 at about 7.00 p.m. within Litein Township, the Appellant rode motor cycle registration number KMDC 250F without a driving license nor an insurance cover and without a helmet nor a reflector. The Traffic Police Officers arrested the Appellant and had him arraigned before the Sotik Principal Magistrate's Court whereof he pleaded guilty in all counts and was subsequently convicted and sentenced as aforesaid. Having given the brief facts of this appeal, let me now consider the substance of the appeal.

The first ground of appeal which was ably argued by Mr. Terer learned counsel for the Appellant is to the effect that the Appellant was denied the opportunity to present his mitigating factors to enable the convicting court to pronounce the appropriate sentence. I have perused the record and it is clear that the learned Principal Magistrate proceeded to pronounce the sentence immediately after convicting the Appellant even before inviting the Appellant to submit facts in mitigation. The learned Principal Magistrate breached one of the cardinal principles of sentencing provided for under Section 216 of the Criminal Procedure Code. Had the trial court invited the Appellant to submit his facts in mitigation, he would have obviously learnt that the Appellant was a form three student who is a young person and therefore his sentence would have been guided by Section 191 of the Children Act as opposed to the provisions the Traffic Amendment Act No. 37 of 2012. The trial court therefore failed to apply the relevant provisions of the law when sentencing the Appellant hence prejudicing the Appellant's rights.

The second ground argued by the Appellant is to the effect that the Appellant was wrongly convicted since the facts in which the charge was based were never outlined. I have perused the record of appeal and it is apparent that the learned Principal Magistrate proceeded to convict the appellant on his own plea of guilty before calling upon the prosecution to outline the facts in support of the charge. The law requires that after the prosecution outlines the facts, the accused is called upon to deny or admit those facts. If the accused admits the correctness of the facts outlined, then a conviction on own plea is entered.

The court of appeal sitting at Kisumu, in Michael Mbaria Kariuki –vs- Republic [1984] KLR 809 held inter alia:

“That the manner in which a plea of guilty should be recorded is:

- a. the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;
- b. he should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;
- c. the prosecution may 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;
- d. if the accused does not agree to the facts or raises any question of his guilt, his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused’s reply – *Adan v Republic* [1973] EA 445.”

The final ground argued on appeal is to the effect that the trial magistrate imposed a sentence which was harsh and excessive. There is no dispute that the Appellant was sentenced to pay a fine of Ksh.10,000/= in default to serve 6 months imprisonment. The record, shows that prosecution was not requested to provide the Appellant’s past criminal record. It is therefore difficult for this court to determine whether or not the Appellant was a first offender. Under Section 103 B (7) of the Traffic Act, the offences the Appellant was convicted for, attracts a maximum sentence of a fine of Ksh.10,000/= in default 12 months imprisonment. The fine imposed is the maximum provided by law. The trial magistrate was enjoined by law to at least give reasons why he deemed it fit to impose a maximum fine. I find no justification at all for the fine imposed in view of the fact that the accused’s past criminal history was never given to the court neither did the court receive any facts in mitigation. I have come to the conclusion that in the circumstances of this case, the sentence imposed is harsh, excessive and goes against the principles of sentencing.

In the end, the appeal is allowed. Consequently, the conviction is quashed and the order on sentence is set aside. If any fines have been paid, the same should be refunded forthwith. If the Appellant is serving a default sentence, I direct that he be set free immediately unless lawfully held.

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

J. K. SERGON

JUDGE

In the presence of:

- Mr. Mutai for Director of Public Prosecutions
- Mr. Motanya holding brief for Terer for Appellant