No. 347/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 83 OF 2014

(ORIGINATING FROM MACHAKOS CHIEF MAGISTRATE'S COURT TRAFFIC CASE NO. 650 OF 2014)

EDWARD GICHERU MUNYUA ….....APPLICANT

VERSUS

REPUBLIC ……..……....……RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of contravening the **National Transport** and **Safety Authority** contrary to **Section 26(1)** as read with **Section 26(7)** of the **National Transport and Safety Authority Act, 2012.** Particulars of the offence being that on the **23rd** day of **May, 2014** at about 08.00 am along **Machakos Kitui Road** in **Machakos County** of the **Eastern Region,** being the driver of motor-vehicle **Registration Number KBL 567F** make **Toyota Townace,** drove the said motor-vehicle on a public road and contravening the **National transport** and **Safety Authority** by operating along **Machakos-Kitui** road instead of **Nairobi Naivasha - Nakuru.**
2. He pleaded guilty to the charge and was convicted. A fine of **Kshs. 200,000/=** was imposed. In default of payment of the fine he was to serve **two (2) years** imprisonment. Being dissatisfied with the decision of the court he appealed on grounds that:-

i. The learned magistrate erred in law and fact in allowing a defective charge sheet to be used, whereby no particular offence is disclosed in the facts in relation to the section of law used.
ii. The learned magistrate erred in law and fact in failing to note that it is not indicated anywhere in the entire proceedings what class of motor-vehicle was allegedly being driven by the appellant, private or passenger service vehicle.
iii. The learned magistrate erred in law and fact in failing to note that the relevant section of the **National Transport** and **Safety Authority Act** required the tare weight of the alleged offending motor-vehicle to be disclosed, an item that is missing from the proceedings herein.
iv. The learned magistrate erred in law and fact in failing to prove their case even after a plea of guilty was entered by requiring the prosecution to produce the route licence allegedly issued to the appellant's motor-vehicle to confirm/contrast it was not for the route used on **23/5/14.**
v. The learned magistrate erred in law and fact in failing to notice that the section of law purportedly creating the offence is in relation to goods and not passengers.
vi. The learned magistrate erred in law and fact in allowing interpretation in Kikamba language while the appellant is evidently a Kikuyu, and hence failing to ensure that the appellant unequivocally understood every element of the offence and facts read out before he could plead to the charge.

vii. The sentence was too harsh under the circumstances of the case, and there is no evidence there was consideration of the appellants mitigation, especially in light of the fact that the appellant was just a driver and not the owner of the motor vehicle in issue.

3. At the hearing **Mrs Abuga,** the learned State Counsel conceded to the appeal on grounds that the charges were defective as particulars of the offence did not support the charge.
4. This being the first appeal, I am enjoined to reconsider the record of the Lower Court as presented and come up with my own conclusions (see ***Okeno versus Republic [1972] E.A. 32).***
5. Under **Section 384** of the **Criminal Procedure Code** a person has no right of appeal against a conviction resulting from a plea of guilty. An appeal can only be allowed in respect of legality of sentence. The court may however interfere with a plea of guilty on the following ground;-.

i. If the plea was imperfect, ambiguous, unfinished such that the lower court erred in treating it as a plea of guilty.
ii. The appellant pleaded guilty as a result of mistake or misapprehension.
iii. The charge laid at the appellant's door disclosed no offence known in law; and
iv. Upon admitted facts the appellant could not in law have been convicted of the offence charged. (See ***Laurent Mpinga versus Republic 193 TLR 166).***

6. When the appellant was arraigned before the court on the **23rd May, 2014,** the charge was read over to him and he replied;-

"True**"**

7. A plea of guilty was entered by the trial magistrate. The Court Prosecutor then stated "*facts as per charge*". To which the appellant responded " *facts are true"*

This court must in the premises interrogate which facts the appellant admitted and whether they supported the charge.

8. Conceding to the appeal the learned State Counsel stated that the charge was defective.
9. The appellant was charged with the offence of contravening the **National Transport** and **Safety Authority** contrary to **Section 26 (1)** as read with **Section 26(7)** of the **National Transport** and **Safety Authority Act, 2012** that stipulate thus;-

"***26(1) A person shall not operate a motor vehicle whose tare weight exceeds three thousand and forty eight kilogrammes for the carriage of goods or passengers for hire or reward unless the vehicle is licensed by the Authority in accordance with this Part and in such manner as the Cabinet Secretary may prescribe***

26(7). A person who contravenes the provision of subsection (1) commits an offence and shall be liable, on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding five years or to both".

10. Looking at the charge, the appellant ought to have operated a motor-vehicle whose tare weight exceeded Three Thousand and Forty Eight kilogrammes while carrying either passengers or goods for hire. Looking at the particulars of the offence, it is stated that the contravention of the law was in respect of operating the motor-vehicle along **Machakos-Kitui** road instead of **Nairobi-Naivasha** road.
11. With due respect to the learned trial magistrate, the charge itself was ambiguous. The **National Transport** and **Safety Authority Act** comprises of more than **62 Sections.** That charge should have been specific. **Section 26** of the **Act** is in respect of licensing of motor-vehicles. **Sub-section (1)** in particular creates an offence in respect of the tare weight of motor-vehicle that carries passengers or goods. Particulars of the offence are in respect of a motor-vehicle operating along a route different from the one authorized. The particulars of the offence do not support the requirement of the provision cited. In the premises, the charge was defective at the outset.

12. It is apparent that the charge *perse* did not discharge the actual offence the appellant was charged with. The appellant pleaded guilty without knowledge of what exactly the charge he faced and looking at the charge itself and facts thereof per the particulars of the offence outlined, the court should never have convicted on the offence charged.
13. In the premises the appeal has merit. It is allowed. The conviction is quashed and sentence set aside. If the appellant has paid the fine, it shall be refunded forthwith. If in custody he shall be released forthwith unless otherwise lawfully held.
14. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **24TH** day of **JULY, 2014.**

L.N. MUTENDE

JUDGE