



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 27 OF 2012**

**GEOFFREY MACHARIA WAWERU .....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

*(Appeal from the original conviction and sentence in Traffic Case Number 223 of 2011 in the Senior Resident Magistrate's Court at Wanguru – HON. D.A OACHARO (RM))*

**JUDGMENT**

***(Criminal Practice and Procedure for of charge and particulars of the charge sheet – Failure to give accused person chance to plead to the particulars and mitigate- whether such leads to miscarriage of justice).***

This is an appeal that arises from the judgment and the sentence of Hon. Resident Magistrate D.A. Ocharo in Traffic case NO. 223/2011 at SRM's Court at Wanguru.

The appellant Geoffrey Macharia Waweru was charged with two counts in said traffic case namely:-

- i. Dangerous loading contrary to **Section 56(1)** as read with **Section 58(1)** of the **Traffic Act cap 403**.
- ii. Exceeding the maximum height of loading contrary to **Section 55(2)** as read with **Section 58(1)** of the **Traffic Act cap 403 Laws of Kenya**.

The particulars of the offence as per the charge presented before the subordinate court were that on 12<sup>th</sup> August 2011 at about 09.30 hours along Mwea-Embu road in Kirinyaga County, the appellant being the driver of a motor vehicle registration NO. KAG 147 Q make Fuso did load goods dangerously (super foam mattresses) on the carrier hence making it a danger to other persons using the road or other persons travelling on the said vehicle.

The particulars written on the 2<sup>nd</sup> count stated that the appellant on the 12<sup>th</sup> day of August 2011 at around 09.30 hours along Mwea-Embu road in Kirinyaga County being the driver of motor vehicle registration NO. KAG 147 Q make –FH Fuso lorry did load goods (super foam mattresses) exceeding to a height of 5.2 meters from the base of the road instead of 4.2 meters (exceeding by 1 meter). The appellant pleaded guilty to both counts and was convicted and sentenced to serve 3 months imprisonment on each count.

Being aggrieved by the said conviction and sentence the appellant preferred this appeal against both conviction and sentence. The appellant contemporaneously also made an application to be released on bond pending the hearing and determination of this appeal which was allowed.

The main ground of this appeal is that the facts were not read out to the appellant and thus rendering the proceedings thereof and conviction irregular. The appellant also contends that being a first offender the sentence was harsh and that he deserved a non-custodial sentence.

I have looked at the charge sheet presented to the subordinate court and noted that while count I of the charge discloses an offence described under **Section 56(1)** of the **Traffic Act Cap 403** which deals with overloading the particulars given are not in tandem with the provision of **Section 56(1)**. The particulars given in the charge sheet discloses an offence under **Section 56(2)** which should have been the correct provision to be invoked by the prosecution. This is because the appellant was accused of carrying goods or loading goods in a manner that was dangerous. The provision of **Section 56(2)** states "**No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or persons travelling on the vehicle.....**"

The subordinate court appears not to have properly directed itself to this anomaly and fell into error on the 1<sup>st</sup> count on the charge sheet

I have looked at the 2<sup>nd</sup> count and find that the offence is clearly disclosed under **Section 55(2)** which states that no vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided by such vehicles by rules made under this Act shall be used on a road. Under **Rule 3** of the **12<sup>th</sup> Schedule of the Traffic Rules** the maximum height of laden vehicle is given as 4.2 meters from the road surface. The particulars given under count II shows that the appellant's vehicle's laden goods measured 5.2 meters from the "base" of the road which I take mean "surface" though it was prudent for the prosecution to always use the language of the statute when expressing charge or describing adjectives. What is however important here is to check whether the learned magistrate can be faulted when he metted out a lawful sentence on a plea of guilty. The appellant herein pleaded guilty by stating that what was read out in court forming the charge and count in question was "true". The learned magistrate convicted the appellant and sentenced him to serve three months imprisonment on this count. The sentence to me does not appear excessive on the face of it. Under **Section 58(1)** of the **Traffic Act cap 403** "Any person who drives or uses on a road a vehicle in contravention of the provisions of **Section 55 or 56** shall be guilty of an offence and liable to a fine not exceeding 400,000/- or to imprisonment for a term not exceeding 2 years or both". So for me 3 months could not be described as harsh if all the procedures were followed. However the appellant herein has pointed out an important aspect in criminal proceedings. This is reading out the facts clearly to the accused person and giving him a chance to plead. I have looked at the proceedings and this is absent. The proceedings just shows the particulars told to the accused which I find vague and blunt. The prosecutor when invited to read the facts stated "**facts as per the charge sheet, Accused is a first offender**". This is a practice that is widespread and bad. Under the new Constitutional dispensation an accused person has rights which must be observed and respected in court in every stage of proceedings. **Article 50(1) (b)** states that an accused person is entitled "**to be informed of the charge with sufficient detail to answer it.....**" In this situation the appellant was obviously denied that right. I agreed with the appellant counsel in his written submissions that the learned magistrate prejudiced the rights of the appellant when he proceeded to convict without giving him a chance to be informed fully of the particulars in sufficient detail to fairly allow him a chance to plead to them. This omission by the learned magistrate was in error and going by the decision of **ADAN-VS- REPUBLIC (1973) EAR 445** quoted by appellant's counsel, I find that the learned magistrate convicted and sentenced the accused person prematurely. It is also good practice for courts to give accused persons chance to mitigate and it does not help matters despite the usual heavy work loads in our courts to skip such an important step in criminal procedure and practice Mitigation often assist courts to exercise their discretion when meting out a sanction and in particular whether to give a custodial sentence or non custodial sentence where the law provides for both.

For the reasons aforesaid, I am not surprised that the State conceded to this appeal. I will allow this appeal set aside the judgment of the subordinate court and order that the bond deposited be released to the

depositor.

**R.LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2014**  
in the presence of:-

The Appellant.

Mr Miano holding brief for Kariuki Njiri advocate for the Appellant.

Mr Sitati for the state.

Mbogo Court Clerk.