



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 112 OF 2013

AMOS OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 537 of 2013 in the Senior Principal Magistrate's Court in Nyando)

J U D G M E N T

1). The appellant was charged with four counts in the lower court namely:

Count I: Dangerous loading contrary to section 56 (2) of the Traffic Act Cap 403 Laws of Kenya.

Particulars: Amos Ochieng on the 8th day of October, 2013 at about 11.30 a.m along Ahero - Kisumu road being the driver of a motor vehicle registration No. KBU 502E Toyota Probox station wagon did load the PSV vehicle with 12/4 where five passengers were loaded at the rear boot and three passengers were loaded at the front seat an act which is dangerous to himself and to other passengers in the said PSV vehicle.

Count II: Carrying excess passengers contrary to section 100 (2) as read with section 6 of the Traffic Amendment Act No. 2 of 2012 Cap 403 Laws of Kenya.

Particulars: Amos Ochieng on the 8th day of October 2013 at about 11.30 a.m along Ahero - Kisumu road in Kisumu County being the driver of a motor vehicle registration No. KBU 502E Toyota Probox station wagon did carry 8 excess passengers by carrying 12 instead of four passengers.

Count III: Carrying un-insured passengers contrary to 5 (b) of the Third Party Insurance Act cap 405 Laws of Kenya.

Particulars: Amos Ochieng on the 8th day of October, 2013 at about 11.30 a.m along Ahero - Kisumu road in Kisumu County being the driver of a motor vehicle registration No. KBU 502E Toyota Probox station wagon did carry 8 un-insured passengers in the said public service vehicle.

Count IV: Operating a public service vehicle without a yellow band contrary to Rule 70 (1) of the Traffic Amendment Rules Cap 403 Laws of Kenya.

Particulars: Amos Ochieng on the 8th day of October 2013 at about 11.30 a.m along Ahero - Kisumu road in Kisumu County being the driver of a motor vehicle registration No. KBU 502E Toyota Probox station wagon did operate the said public service vehicle without a yellow band.

2). The appellant on his own plea admitted the offence and was convicted and sentenced accordingly. The appellant has filed several grounds of appeal through his counsel Mr. Jamsumba. The substantive ground in my opinion is whether or not the plea was unequivocal. The appellant's counsel argued that the same was equivocal and that the trial court should not have convicted and sentenced him.

3). The respondent counsel opposed this appeal on the grounds that under the provisions of section 348 of the Criminal Procedure Code a party is precluded from appealing where he unequivocally pleaded by admitting the charge. In other words regardless of the errors made by the trial court, the fact that he admitted should be a bar from his appealing.

4). I have perused the short proceedings of the trial court carefully. When the substance of the charges were read to the appellant he admitted each one of them. The prosecution then said: **“Facts as per the particulars of the charge in each count”**.

The court then stated:

“Accused person is convicted on his own plea of guilty in each count”.

5). But what does the law on taking pleas demands. Section 207 (1) of the Criminal Procedure Code Chapter 75 Laws of Kenya states as follows:

“ (1) The substance of the charge shall be stated to the accused person by the court and then he shall be asked whether he pleads not guilty, or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise then by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the facts upon which the charge is founded”.

6). This therefore is a comprehensive procedure expected to be undertaken by the court taking plea. The locus classicus case of Aden -VS- Republic [1973] EA 445 explain it further. The court went to state at page 446 as follows:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charge. If the accused then admits all those essential elements, the magistrate should record what the accused has said, already as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecution to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded”.

7). In the instant case the prosecution did not read out the facts to the appellant. To state that facts as per the particulars of the charge in each count is very pedestrian and one can smell some laziness. The law demands that the facts ought to be stated fully as they are available I suppose in the summary of the case. The charge sheet contains a brief summary and ingredient of the case and the facts. The prosecution

ought to look beyond what is stated in the charge sheet in stating the facts.

8). Once the prosecutor does this the court ought to inquire from the accused whether he still admits the same. The proceedings herein does not indicate that the court inquired from the appellant whether the facts were true. It proceeded to convict the appellant straight away. As explained in **Aden -VS- Republic (Supra)** that procedure was wrong.

9). In the premises I do find this appeal meritorious. The other grounds raised by the appellants are not very consequential in my opinion. The option therefore available herein is to set free the appellant or order a retrial. The second option would have been appropriate but considering that this was a traffic offence, there is always a likelihood that the witnesses as well as the subject motor vehicle may not be easily and readily available to conduct another trial.

In the premises the appeal is allowed, the appellant set free unless lawfully held and the sureties if any are hereby discharged.

Dated, signed and delivered at Kisumu this 9th day of December, 2014.

**H.K.
JUDGE**

CHEMITEI