



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 17 OF 2011

WAWERU JOHN KIBIHI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

**(Being an appeal from original conviction and sentence of H. Nyakweba SRM in Traffic Case No.121/2010 in the Senior Resident Magistrate's Court at Kilungu)**

JUDGMENT

The background to this appeal is that the appellant was on 23<sup>rd</sup> June, 2010 driving motor vehicle registration No. KAZ 560M along Nairobi-Mombasa road. Aboard the vehicle were fourteen passengers. At Mahiti he was flagged down by **Snr. Sgt. Rachael Togoma (PW.1)** and **P.C. Paul Muriithi (PW.2)** of Salama Traffic Police Patrol sub-base at about 10.00 a.m. On routine inspection of the same, they noted that at the rear, the motor vehicle had inscriptions “**private**”. On checking the insurance sticker they found it to be for commercial use and not allowed to carry 14 passengers. The appellant had no explanation for this anomaly. Accordingly, he was informed that he was under arrest and was to be charged with the offence of carrying uninsured passengers. They then impounded the motor vehicle and true to their word, the appellant was charged before the Senior Resident Magistrates court at Kilungu with the traffic offence of carrying un-insured passengers contrary to section 4(1) as read with section 17 of the insurance (Motor Vehicle Third Party Risks) Act, the particulars being that on 23<sup>rd</sup> June, 2010 at about 10 a.m. along Nairobi road in Mukaa District of Eastern Province, being the driver of motor vehicle registration number KAZ 560M Toyota Nissan did carry 14 un-insured passengers.

The appellant denied the charge and claimed through the owner of the motor vehicle, **Samuel Njire Gichuhi (DW.1)** and **Christiano Ongoa (DW.2)** an employee of Equity Insurance that the Motor vehicle had a cover for passengers as at the time it was flagged down and impounded. However, the only problem was that the certificate issued omitted the number of passengers to be carried. This omission was due to inadvertence. In other words, Equity insurance had inadvertently failed to indicate the number of passengers the vehicle was licensed to carry on the certificate. Subsequent thereto, DW.1 had been issued with a new certificate No.4457294 indicating the number of passengers being 14 that the motor vehicle was authorized to carry.

The learned magistrate having carefully weighed the evidence on record both by the prosecution and defence came to the conclusion that the prosecution had proved its case against the appellant as required in law. Accordingly, he convicted him and sentenced him to a fine of KShs.3,000/- in default to serve two months in prison.

The applicant was aggrieved by the conviction and sentence aforesaid. He promptly lodged this appeal through **Messrs Modi & Company Advocates** on four grounds to wit:

***“1. THAT the learned magistrate erred in law and in fact by concluding that there was no policy of insurance in relation to motor vehicle registration No.KAZ 560M as at the 23<sup>rd</sup> day of June, 2010.***

***2. THAT the learned magistrate erred in law and in fact by placing too much regard to one exhibit at the expense of others.***

***3. THAT the learned magistrate erred in law and in fact by disregarding and/or ignoring the Accused’s evidence adduced rebutting the allegations in the charge.***

***4. THAT the learned magistrate erred in law and in fact by ignoring the provisions of Section 4(1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 of the Laws of Kenya.”***

When appeal came before me for plenary hearing on 29<sup>th</sup> November, 2011, **Mr. Modi**, learned counsel for the appellant orally submitted that before the appellant was charged the insurer wrote a letter to the police confirming the number of persons insured and validity of the policy. Subsequently, the insurer issued a certificate under the same policy indicating the number of passengers insured. That section 4 of the insurance (Motor Vehicles Third Party Risks) Act qualifies the validity of policy insurance. Once there is a policy issued by an insurance company and the policy covers passengers in respect of body injuries and death then that policy is valid. On this basis the trial magistrate erred in failing to address himself to this provision of the law.

**Mrs. Gakobo**, learned Senior State Counsel opposed the appeal and submitted that the evidence on record demonstrated that on 23<sup>rd</sup> June, 2010 the appellant was driving a motor vehicle not authorized to carry passengers. The defence too had conceded that the insurance sticker displayed had an error which supported the prosecution case. Thus the evidence tendered by the prosecution was sufficient to sustain the conviction and subsequent sentence.

As a first appellate court it is my duty to subject the evidence tendered during the trial to a fresh and exhaustive re-appraisal so as to reach my independent opinion as to whether the conviction of the appellant should be upheld. See **Okena Vs. Republic (1972) E.A. 123.**

It is common ground that on 23<sup>rd</sup> June, 2010 the appellant who was the driver of motor vehicle KAZ 560 M had on board fourteen passengers. He was flagged down by PW.1 & PW.2 who on checking the insurance sticker noted that it did not authorize him to carry passengers, at least as at that time. It matters not that the error was subsequently noted and rectified by the owner of the motor vehicle and his insurer. That can only be a plea in mitigation as correctly pointed out by the learned magistrate. I do not agree with appellant’s submissions that the purport of section 5 of Cap 405 is that once there is a policy issued by an insurance company and the policy covers passengers, such policy is valid. The purpose of an insurance sticker is to show ex facie whether the vehicle is insured, the purpose for which it has been insured, if it is a passenger vehicle, the number of passengers insured, the insurance company involved, the validity period of the cover and the policy number. If any of the above details are not disclosed, then the alleged cover becomes suspect. It is not the duty of the traffic police to go round the details as shown in the sticker and establish their authenticity or not. Prima facie the sticker should provide such details and which should be taken by the police on their value. In these days of rampant fake insurance covers, it will be expecting too much of the police to counter check each and every such detail. It is on that basis

that PW.1 and PW.2 acted on the information then obtaining on the sticker exhibited, impounded the vehicle and had the appellant charged with the traffic offence.

The evidence of the defence, and in particular DW.2 was a clear admission that the insurance sticker displayed on the motor vehicle had an error. It had not been indicated therein the number of passengers who were insured and authorized to be carried in the motor vehicle. That evidence supported the prosecution case all along. Indeed it is even more incriminating that the very same sticker indicated that it was for a commercial policy and was in fact not allowed to carry passengers. This evidence was not at all rebutted by the appellant and or his witnesses. Again a close scrutiny of the debit note dated 18<sup>th</sup> June, 2010 issued by British American Insurance Company (k) Ltd for the period 18<sup>th</sup> June, 2010 to 17<sup>th</sup> June, 2011, shows that the cover is that of “**Motor Commercial – Institutional.**” This cannot be a cover for a motor vehicle ferrying passengers for free as was the case here! Again according to DW.2, when DW.1 reported to him about the impounding of his motor vehicle, he realized that his Insurance Company had issued a certificate of insurance No.B48019441 in error. That according to the policy document issued on 17<sup>th</sup> July, 2010 Motor vehicle registration No.KAZ 560 had a third party cover to carry fourteen passengers. He regretted the error and re-issued a fresh sticker for certificate of insurance B4957294 for carrying 14 passengers. As pointed out by the learned Magistrate what this meant was that as at 23<sup>rd</sup> June, 2010 when the offence was committed, the certificate of Insurance No.B48019441 did not indicate the number of passengers that the motor vehicle was meant or insured to carry. Therefore the fourteen passengers on board then were un-insured. Contrary to the submissions of the learned counsel for the appellant the subsequent correction of the omission if indeed it was done, was done after the appellant had been charged. As already stated that can only be taken into account as a plea in mitigation.

The appeal lacks merit and is accordingly dismissed in its entirety.

**Dated and delivered at Machakos, this 16<sup>th</sup> day of January, 2012.**

**ASIKE-MAKHANDIA**

**JUDGE**