

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 72 of 2008

VITALIS ODUOR ODUNGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case no. 2048 of 2008 of the Chief Magistrates Court at Nairobi, before R.C. Fundi (Mr) R.M. on 7th March, 2008)

JUDGMENT

The appellant was charged with two traffic offences. In count I he was charged with the offence of dangerous overtaking contrary to Rule 73 (4) of the Traffic Rules Cap 403 Laws of Kenya. In count II he was charged with causing obstruction contrary to Section 53 (1) of the Traffic Act aforesaid. That offence is punishable by subsection 4 of the said Section. The record shows that he pleaded guilty to the 1st count and filed Kshs. 2, 000/= in default to serve I month imprisonment. He denied the second count but after the trial he was convicted and sentenced to 20 days imprisonment.

The learned trial magistrate, with respect, failed to observe that the two offences were so intertwined that separating them in one charge exposed the appellant to double jeopardy. In fact, from the evidence of P.W. 1 and P.W 2 it is clear that that was the case. That exposure manifested itself when the appellant was convicted and the prosecutor told the court that the appellant had a previous conviction for dangerous overtaking. That is the same offence contained in count I.

The penalty provided for the offence upon which the appellant was convicted is a fine not exceeding Kshs.10,000/= or imprisonment for a term not exceeding 18 months. The practice is that where the penalty provided includes a fine and or imprisonment, the courts first impose the fine and a default sentence of imprisonment. In the instant case the learned trial magistrate imposed 20 days imprisonment upon the appellant without an option of a fine.

I have looked at the note on sentence. With profound respect, the contents contained extraneous comments totally uncalled for and bordering on malice. I believe the appellant in telling the court that he had a cash bail of Kshs. 8,000/= was not bragging about his financial capacity. This appeal shall however not be decided on that note of sentence.

I find from the record that the two charges should not have been contained in the same charge sheet because as I have said, that amounted to double jeopardy. This appeal is therefore allowed, conviction quashed and sentence set aside. I am told that the appellant is out on bond pending the outcome of this appeal having paid Kshs. 5,000/= cash bail. He shall get a refund of the said sum and in the event the original cash bail deposit of Kshs. 8,000/= was never refunded, the same shall also be paid to him.

Orders accordingly.

SIGNED DATED and DELIVERED in open court this 21st day of March, 2012.

**A.MBOGHOLI MSAGHA
JUDGE**

