



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 113 OF 2008

KALOKI COSMAS KIOKO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Traffic Case No. 2546 of 2008 of the Chief Magistrate's Court at Nairobi by E.C. Cherono – Senior Resident Magistrate)

J U D G M E N T

The appeal before me arises from the decision of Hon. E.C. Cherono (SPM), which was handed down on 7th April 2008. By the said decision, the trial court convicted the appellant on 2 counts, being; Dangerous Overtaking **contrary to Rule 73 (4) of The Traffic Act**, and Causing Obstruction **contrary to section 53 (1) of the Traffic Act**.

For each of the 2 counts, the trial court sentenced the appellant to imprisonment. The appellant was to serve 3 months in prison for the offence of Dangerous Overtaking and one (1) month in prison for Causing Obstruction.

Two (2) days after being convicted the appellant filed an appeal before the High Court. It is that appeal which is before me.

On 19th June 2008, the learned trial magistrate asked the High Court to exercise its Revisionary powers. His request was informed by the realization that the charges against the appellant had been withdrawn prior to the date when the court convicted him.

The issue of the proposed revision was dealt with by Njagi J. In his Ruling, the learned Judge expressed himself thus;

“One of the irregularities, however, is that the accused was charged on the same file as the one on which he was discharged. Where an accused person is discharged, that file ought to be closed. If he is subsequently arrested a new file should be opened, complete with a new case number. Failure to do so will cause an administrative problem as the same file will show that an accused person was discharged and convicted at the same time.”

I am in full agreement with my learned senior brother, on that account.

His Lordship also held that the trial was a nullity because the proceedings had been conducted by an unqualified public prosecutor. The prosecutor was a Police Corporal, who did not therefore qualify, pursuant to **section 85 (1) of the Criminal procedure Code**.

In the circumstances, Njagi J. quashed the convictions and set aside the sentences against the appellant. He did so on 10th December 2009.

It would therefore imply that the appellant's conviction was no longer in place by the time he canvassed the appeal before me, on 24th of January 2012.

But, in the unlikely event that the conviction is still in place, I find that there are 2 irregularities in the proceedings.

First, the facts of the case against the appellant were never provided.

It must be borne in mind that there is always the possibility that although an accused person may admit the charge, he may dispute some of the facts giving rise to the said charge.

Indeed, even after an accused person admits the charge, he cannot be convicted on his own plea of "Guilty", if he disputes the facts giving rise to the charge. When the facts are disputed, the trial court is obliged to enter a plea of "Not Guilty".

The failure of the trial court herein, to provide the appellant with the facts giving rise to the charge, deprived the accused of the opportunity to admit or deny the facts upon which his conviction was founded.

Those facts are important to both the accused and the court. The accused needs to know that the facts alleged against him are accurate, so that his plea is an informed one.

Meanwhile, the trial court needs to know the facts because they inform the court about the circumstances in which the offence was committed. Ultimately, when the court was handing down the sentence, its decision is informed, *inter alia*, by the facts.

In the event, the failure by the prosecution, to give facts to the accused and to the court, before the accused was convicted on his own plea of "Guilty", was a serious irregularity.

The other irregularity was the failure by the trial court to give to the accused to give to the accused an opportunity for mitigation.

The court therefore lacked any basis for determining the appropriate sentence to hand down to the appellant. The sentences were thus arbitrary.

In the result, the conviction cannot stand. It is quashed. I also set aside the sentences.

Dated, Signed and Delivered at Nairobi, this 12th day of April, 2012.

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FRED A. OCHIENG
JUDGE