



1. Criminal Appeal
2. Subject of appeal
  - i) Traffic Law.
  - ii) Charge  
Careless driving contrary to **Section 49(1)** of the **Traffic Act Cap.403 Laws of Kenya.**
  - iii) Particulars of offence  
“On 10.2.09 at about 9.00 a.m. at Kwa Uji area along Kericho-Kisumu road in Kericho District within Rift Valley Province being driver of ....a lorry....caused an accident by ramming into rear of a motor tractor....extensively damaging it and causing injuries to driver...”
  - iv) Plea; Guilty as charged (17.2.09)
  - v) Convicted (17.2.09)
  - vi) Sentenced to serve 3 months imprisonment (17.2.09)
3. Released by same court on bond pending appeal.
4. Appeal against sentence.
  - i) Trial magistrate erred in sentencing appellant to 3 months imprisonment when law provides otherwise.
  - ii) There was no option of a fine.
  - iii) The appellant was a 1<sup>st</sup> offender.
  - iv) Mitigation by appellant ignored.
  - v) Sentence imposed ‘stiff.’
5. State; upholds conviction but concedes to sentence.
6. Held;
  - a) a 1<sup>st</sup> offender is subjected to a fine.
  - b) Sentence of 3 months imprisonment was irregular.
  - c) Appeal against sentence set aside.
7. Case law
  - a) Timothy Orweryo Missiani v R. Cra.39/79 (Law Pille Potter jja).
8. Advocates;
  - F. O. Koko Advocate instructed by the firm of M/S obondo Koko & Co. Advocates,
  - P. Kiprop, State Counsel instructed by the Attorney General.

TOM OKUMU ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the judgment of W. Nyarima (ESQ) – Senior Principal Magistrate delivered on 17<sup>th</sup> February 2009 at Kericho in SPM Traffic Case No.232 of 2009).

## JUDGMENT

### 1. Background

1. The appeal before this High Court concerns a Traffic Court case originally before the Principal Magistrate’s Court case.
2. Tom Okumu Odhiambo was charged with the offence of **Careless driving** contrary to **Section 49(1)** of the **Traffic Act Cap.403** Laws of Kenya.
3. The particulars of offence being;  

**“On the 16<sup>th</sup> February 2009 at 9.00 a.m. at Kwa Uji area along Kericho-Kisumu road in Kericho District within the Rift Valley Province being the driver of motor vehicle KAD 442L make Mitsubishi lorry did drive the said motor vehicle on the said public road without due care and attention and without consideration to other persons using the road, caused an accident by running into the rear of a motor tractor registration No.KAL 460L make Massey Fergusson extensively damaging it and causing slight injuries to its driver Samwel Birgen Cheruiyot.”**
4. He appeared before the subordinate court on 16<sup>th</sup> February 2009 at 3.30 p.m. The case was adjourned to 17<sup>th</sup> February 2009 whereby the said accused pleaded guilty to the charge. The facts read out to him were admitted by him as being correct.

Namely, that he was driving his lorry and attempted to overtake the tractor in front of him. He noticed oncoming vehicle and in order to avoid a collision he diverted to the left and in the process he knocked the tractor from behind. The driver of the tractor sustained injuries.

5. The appellant admitted the facts and was convicted on his plea of guilty.
6. The prosecutor said he had no records. The prosecutor did not state the accused was a first offender nor did the court enquire if he was so.
7. The accused in mitigation stated he was avoiding a collision with a public service vehicle commonly known in Kenya as a “matatu”.
8. A sentence of 3 months imprisonment was imposed.
9. The following day his advocate recently came on record and applied for bail pending appeal which was granted by the same court.

## **II: Appeal**

10. An appeal was preferred to this High Court against sentence only. This being that the trial magistrate erred in sentencing the appellant to 3 months imprisonment when the law provides otherwise. That there was no permission given to the appellant for a fine and that he the appellant/original accused was a first offender. The trial magistrate had ignored the mitigation offered by the appellant. Further the sentence was ‘stiff’.
11. The State supported the conviction but conceded to the appeal on sentence.

## **III. Opinion.**

12. The appellant was charged with the offence of **Careless driving** contrary to **Section 49(1)** of the **Traffic Act Cap.403** Laws of Kenya.

***“Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable for a first offence to a fine not exceeding five thousand shillings and for a second or subsequent offence to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding three months.”***

13. It was the argument by the appellant’s advocate that the offences specifically provide that first offenders should be subjected to sentence of a fine and not imprisonment.
14. The appeal to court was one on legality as to the sentence.
15. Under **Section 348** of the **Criminal Procedure Code** the law provides that;  
***“No appeal shall be allowed in shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of sentence.”***
16. The appellant would have approached this court by way of a revision but he was permitted to come by way of an appeal in any event.
17. The case law of **Timothy Orweyo Missiani v R. Ca.39/79** (*Law, Miller Potter JJa.*) where the appellant ran over a child and caused her death. He was charged with causing death by dangerous driving. He was found guilty and fined to a fine of Ksh.2,500/=. He appealed against conviction but not against sentence. The judges at the High Court on appeal enhanced the sentence to 3 ½ years imprisonment and disqualified from driving a vehicle for 8 years. The Court of Appeal held that though dangerous driving speaks of a term of imprisonment the courts have a right to impose a fine on condition it is not a ‘compelling feature such as an element of intoxication or recklessness’ (*Law, Miller Potter JJa*) following the decision of Madan & Chesoni JJ, in the case of **Govidsharaji v R. Cra.30/75.**

18. The appellant in Missiani(*Supra*) claimed a child ran across the road and he tried to avoid the child by swerving left, witnesses said he veered off the road and ran down the child.
19. In this appeal the appellant swerved right to left to avoid an on coming vehicle.
20. I do not think that on the issue of conviction this case law assists the appellant. He admits he was on the wrong and as such under **Section 348** of the **Criminal Procedure Code** the conviction stands.
21. As to sentence, the law is quite clear that a 1<sup>st</sup> offender is subjected to a fine up to the sum of Ksh.5,000/=. This is on condition that he is a first offender.
22. The prosecution merely stated he had no records. The law requires a 1<sup>st</sup> offender be proved by way of records held with the department dealing with records of previous conviction. The trial magistrate should have called for the previous conviction before sentencing in this Traffic case.
23. I would agree that the sentence is an illegality. It is quashed and set aside.
24. I order that the appellant remain on his bond but appear to the relevant police station to obtain records of his previous conviction if not already available to court.
25. That the appellant/accused thereafter, when the previous conviction records are availed, appear before the trial magistrate for appropriate sentencing on a date convenient to that court.
26. The appeal is allowed on sentencing only.

**Dated this 12<sup>th</sup> day of November 2009 at Kericho**

**M. A. ANG'AWA**  
**JUDGE**

**Advocates**

- F. O. Koko Advocate instructed by the firm of M/S obondo Koko & Co. Advocates for the Appellant.- Present.
- P. Kiprop, State Counsel instructed by the Attorney General for the Respondent; Present.