



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Revision 12 of 2009**

TITUS DAVID NZIOKA ACCUSED

VERSUS

REPUBLIC

REVISION

1. The Applicant, David Nzioka, was charged with the offence of carrying excessive passengers contrary to Section 100 (1) of the Traffic act, Cap 403 Laws of Kenya in Machakos Traffic CM'S Court Case No.3047/2009.

2. Having pleaded guilty, he was sentenced to serve two months imprisonment without an option of a fine. By letter dated 19/10/2009, D Mulyungi Esq, advocate seeks orders of revision to include the option of a fine.

3. I have called for and examined the record in Machakos CM'S Court Traffic Case No. 3047/2009. The reason why the learned magistrate imposed a stiff sentence was because of prevalence of the offence within Machakos Town and which has led to many road traffic accidents.

4. Is there any reason why this court should invoke its powers under Section 362 as read with Section 364 of the Criminal Procedure Code and revise the sentence to include the option of a fine?

5. Section 100 (2) of the Traffic Act provides as follows:-

“100. (1)

(2) If any public service vehicle carries more persons, baggage or goods than it is licensed to carry, the driver, the conductor and the owner of such vehicle shall each be guilty of an offence and liable to a fine not exceeding twenty thousand shillings:

Provided that rules made under this Act may provide that a person who is guilty of an offence under this subsection shall be liable to pay a fine according to a prescribed scale, but so that no person shall be liable to pay a fine greater than the maximum provided by this subsection.

(2A) In the case of a second or subsequent offence against subsection (2) in respect of a public service vehicle within one year of conviction for a previous offence against subsection (2) in respect of the same vehicle, the court shall exercise the power conferred by section 99 (2) by ordering the suspension of the public service vehicle licence for that vehicle for a period of no less than thirty days.

2B) If, in the opinion of a police officer in uniform, subsection (2) is being contravened, he may order –

- (a) any person who appears to him to be an excess passenger off the public service vehicle; or
- (b) the driver, conductor or owner of the public service vehicle to remove any excess baggage or goods.

(2C) If a person refuses or delays or fails to comply with an order by a police officer in uniform under subsection (2B), he shall be guilty of an offence and liable, whether or not he is in addition liable to any penalty for contravening subsection (2) or (3), to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding one month.

(3)

(4)

(a)

(b)”

6. That section clearly provides for a fine as the sentence to be meted out. Other options left to the court are contained in Section 100 (2A) and (2B) of the Act. To mete out sentence is a matter of discretion but exercise of such discretion should not amount to an injustice.

7. In this case, however, there is a more serious anomaly. The Applicant was charged with an offence under Section 100 (1) which provides as follows:-

“100. (1) The Registrar shall in respect of any public service vehicle determine the maximum number of passengers, whether sitting or standing, and the weight of baggage or goods allowed to be carried at any time on such vehicle or on any vehicle of a similar class or description:

Provided that such determination shall have regard to the provisions of this Act with regard to construction seating capacity and weight.”

(2)

8. Clearly no offence exists under Section 100 (1) and to charge and convict the Applicant under that section was a travesty of justice and in fact his conviction is wholly unlawful.

9. In the event, I will set aside the conviction and sentence meted out and order the immediate release of the Applicant.

10. Orders accordingly.

Dated and delivered at Machakos this 9th day of November 2009.

ISAAC LENAOLA

JUDGE