



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

*(Coram: Ojwang, J.)*

**CRIMINAL APPEAL NO. 708 OF 2006**

**BETWEEN**

**FREDRICK MWANGI MWAI.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

*(An appeal from sentence imposed by Senior Resident Magistrate D. Mulekyo on 22<sup>nd</sup> November, 2006 in Traffic Case No. 1377 of 2006 at Kiambu Law Courts)*

**JUDGEMENT**

The charge brought against the appellant herein was in two counts. The first count was: driving a public service vehicle on a public road without a yellow band, contrary to rule 70(1) of the Traffic Rules made under the Traffic Act (Cap.403, Laws of Kenya). The particulars were that on 21<sup>st</sup> November, 2006 at about 1.00pm, along Kamiti road within the Nairobi Area, the appellant, being the driver of motor vehicle registration No. KAH 921J, Nissan Sunny Taxi, did fail to print a continuous horizontal yellow band to the side of the said motor vehicle.

The second count was: driving a public service motor vehicle on a public road without a driver's public service vehicle licence contrary to s.98(1) of the Traffic Act. And the particulars were that the appellant, on 21<sup>st</sup> November, 2006 at about 1.00 a.m. along Kamiti Road, within the Nairobi Area, being the driver of motor vehicle registration No. KAH 921J, make Nissan Sunny taxi, drove the said motor vehicle on a public road without a Public Service Vehicle licence.

The learned Senior Resident Magistrate records that "The substance of the charge and every element of it has been explained by the Court to the accused who on being asked whether he admits or denies the truth of every element of the charge replies", for count 1, "*It is true*", and for count 2, "*It is true*". So the Court entered a plea of guilty, on both counts. The facts relating to the alleged offence were then not set out, but instead, the prosecutor, **Chief Inspector Andanje** said: "*Facts as per charge sheet*", to which the appellant herein responded: "*Facts are correct*". The Court then convicted the accused on "*own plea of guilty*".

As there was no previous record on the appellant, the prosecutor asked that he be treated as a first offender, which request was allowed. The appellant chose to make no plea in mitigation; and the Court

proceeded to sentence him to prison term of 30 days.

On the next day, 23<sup>rd</sup> November, 2006 learned counsel **Mr. Gatitu** for the appellant herein, made an application under s.356(1) of the Criminal Procedure Code, for bail pending appeal, or, in the alternative, for stay of sentence pending the filing of an appeal.

**Mr. Gatitu** contended that the proposed appeal had high chances of success, as the sentence was ambiguous, not specifying which count of the charge it related to. As the prosecutor raised no objection, the appellant herein was admitted to bail pending appeal. Meanwhile, at a scheduled mention on 22<sup>nd</sup> December, 2006 the appellant confirmed to the Court that he had already filed High Court Criminal Appeal No.708 of 2006.

On the occasion of urging the appellant's appeal, learned counsel submitted that the sentence imposed by the trial Court was unlawful, as it was an omnibus sentence; after the appellant had been convicted on two counts, he had been sentenced to a term of imprisonment of 30 days, but *in general mode*, without stating how this sentence was to be attributed to the two counts of the charge.

Counsel brought to my attention a relevant Court of Appeal decision: **Mohammed Warsame & Another v. Reginam** (1956) 23 EACA 576. The law governing the specification of sentence, where there is a plurality of charges, is clearly stated in that case; and the words of **Briggs, Ag. V-P** in that regard may be set out here (p.577):

***“As regards sentence, no authority is needed for the proposition that an omnibus sentence is unlawful. For every count on which a conviction is had there must be a separate sentence. Where, as has happened not infrequently in Kenya in Emergency cases more capital charges than one are tried together and convictions result, the Court may properly adopt either of two courses. It may pronounce sentence of death on each conviction, or it may pronounce sentence of death on one conviction and postpone sentence on the other or others. In the latter case, if the first conviction and sentence are set aside on appeal, the accused may be sentenced on another of the original convictions. In either case it must be made perfectly clear on the record what has been done.”***

Learned counsel further urged that the sentence imposed on the appellant was harsh and excessive for a traffic offence, and given in particular the fact that the appellant was a first offender.

**Mr. Gatitu** further charged that the particulars of the charges as specified, did not prove the offences; as these particulars had not stated that the motor vehicle in question was a Public Service Vehicle: and hence the plea of guilty was a nullity.

Counsel urged that the appeal be allowed.

Learned State Counsel **Mrs. Gakobo**, after considering the proceedings, and advertent to the submissions of learned counsel, conceded to the appeal. She urged that the plea had not been regularly taken – and on this account it was not unequivocal. The facts of the alleged offence had not been read out, and the prosecutor had attempted to discharge the relevant task by merely making a reference to the summary-statements in the charge sheet. It was not, in the circumstances, clear the appellant appreciated the particulars to which he was pleading guilty. **Mrs. Gakobo** also acknowledged that the sentence handed down by the Magistrate's Court was an equivocal, *omnibus* one.

It is obvious, in my view, that the law stands against sustaining the conviction and sentence recorded by the Court of first instance; and that law is clearly stated in **Mohammed Warsame & Another v. Reginam**, *op. cit.* Sentence, as the authoritative, final determination of a criminal trial, must be correctly rendered; and that object is not attained where, as in the instant case, the trial Court has assigned penalty for several offences in a generic manner that *makes no reference to specific charges, nor names the applicable sentence for each one of them*. The mode of sentencing which is being challenged in this appeal, is the “omnibus” type, which the **Mohammed Warsame** decision has censured.

The judgment herein incorporates orders which I made on the occasion of hearing the appeal, on 21<sup>st</sup> November, 2007. On that occasion I had held as follows:

***“Reasoned judgement is to be delivered on 12<sup>th</sup> March, 2008. In the meantime, this Court having considered the submissions of counsel on both sides, and having taken into account the aspects of the trial Court decision which have led to this appeal, hereby orders the immediate release of the appellant”.***

I hereby restate those orders, which flow from the reasoning in this judgment.

**DATED and DELIVERED** at Nairobi this 12<sup>th</sup> day of March, 2008.#

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Appellant: Mr. Gatitu**

**For the Respondent: Ms. Gakobo**