



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 8 of 2006

CHARLES KIMANI NDICHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 621 of 2006 of the Chief Magistrate's Court at Nairobi)

JUDGMENT

CHARLES KIMANI NDISHU, the appellant was charged before the subordinate court with the offence of failing to take proper precaution to passenger contrary to rule 65(c) of the Traffic Act, Cap.403 of the Laws of Kenya

particulars of offence were that on 14th December 2005 at about 2.00 pm along Ring Road within Nairobi Area being conductor in motor vehicle Registration No. KAS 503 G Isuzu Matatu, failed to take precaution to passenger in that he pushed one passenger namely JAMES KAMAU as a motor vehicle was in motion and he sustained slight injuries. He was recorded as having pleaded guilty to the charge and was convicted and sentenced to serve three (3) months imprisonment without the option of a fine. He subsequently appealed to this court through his counsel, Kimandu Gichohi & Company advocates on the following grounds.

1. The learned magistrate erred in law in convicting the accused when it was clear no plea had been entered by him on record.
2. The learned magistrate erred in law in convicting and sentencing the appellant on a defective charge sheet.
3. The learned magistrate erred in law in handing out the accused a sentence which was excessive in the circumstances of the case and which is not provided for in law.

Before the hearing of appeal, the appellant was released on bail/bond pending appeal.

When the appeal came up for hearing, Mr. Ndegwa who appeared for the appellant, abandoned grounds 1 and 2 of appeal. He only argued ground 3, which was on sentence. It was counsel's submission that under rule 69 of the Traffic Rules, the maximum sentence was a fine of Kshs.1000/= and, in default, 3 months imprisonment. Counsel contended that the magistrate did not give the appellant an option of a fine which was an error.

Learned State Counsel, Mrs. Kagiri, conceded to the appeal against sentence. Counsel contended that under rule 65 (c) and Rule 69 of the Traffic Act (Cap.403) which related to the conduct of matatu conductors, the maximum sentence provided for by law was Kshs.1000/= or imprisonment for a term not exceeding 3 months. The appellant had already served one month imprisonment, before he was released.

I have perused the proceedings. Indeed the learned magistrate imprisoned the appellant without giving him an option of a fine. That was an error; as the sentence provided for is a fine, and imprisonment is a default sentence. The appellant had also served one month imprisonment, before he was released on bail pending hearing and determination of appeal.

I find merits in the appeal on sentence. I allow the appeal and set aside the sentence imposed by the magistrate. As the appellant had already served one (1) month imprisonment before he was released on bail pending appeal, it means he has suffered enough. I will not impose on him a fine.

Dated and delivered at Nairobi this 9th July 2007.

George Dulu

Judge

In the presence of –

Mr. Ndegwa for appellant

Appellant - present

Mr. Makura for state

Eric - Court clerk