



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

**Criminal Appeal 707 of 2006**

**MATHEW WAREMA GITHUI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the original conviction and sentence in criminal Case No. 1378 of 2006 of the Senior Resident Magistrate's court at Kiambu – Ms. D. Milekyo SRM)***

**JUDGMENT**

MATHEW WARAMA GITHUI, the appellant, was charged before the subordinate court with two counts under the Traffic Act. Count 1 was for driving a Public Service Vehicle on a public road without yellow band contrary to rule 70(1) of the Traffic Rules (Cap 403 Law of Kenya

The particulars of offence were that on 21<sup>st</sup> November 2006 at about 1.00 am along Kamiti road within Nairobi area being the driver of motor vehicle registration number KAL 621R make Toyota Corolla Taxi did fail to print a continuous horizontal yellow band on the said motor vehicle. Count 2 was for driving a public service motor vehicle on a public road without the driver's public service licence contrary to section 98(1) of the Traffic Act Cap 403 laws of Kenya. The particulars of offence are that 21<sup>st</sup> November 2006 at about 1 am along Kamiti road within Nairobi Area, being the driver of motor vehicle registration No. KAL 621R Toyota Corolla taxi drove the said motor vehicle on a public road without the driver's public service licence. The appellant was recorded as having pleaded guilty to both counts. He was convicted and sentenced to 30 days imprisonment. He was thereafter granted bail pending appeal by the trial court. He has now appealed to this court against both conviction and sentence, through his counsel M/s Gatitu Wang'oo & Company advocates. The grounds of appeal are as follows –

1. The learned magistrate erred in law by allowing defective charges against the appellant.
2. The learned magistrate erred in law by sentencing the appellant ambiguously without stating the 30 days imprisonment was for which of the two counts.
3. The learned magistrate erred in law and in fact by entering a plea of guilty against the appellant when the plea was not unequivocal.
4. The learned magistrate erred in law by sentencing the appellant to a harsh and excessive sentence.

At the hearing of the appeal, Mr. Gachomo, for the appellant submitted in support of the grounds of appeal. Learned State Counsel, Mrs. Gakobo, conceded to the appeal. Counsel submitted that the charge was defective as it did not cite the section of law that provided the penalty for the offence. Secondly, the

court imposed a sentence without indicating the count for which the sentence was imposed. In counsel's view, the proceedings were irregular.

The appellant was charged with contravention of rule 70 of the Traffic Act (Cap. 403) with regard to count 1. That rule puts some certain legal requirements that are applicable to taxis. It neither creates an offence nor does it provide a sentence. Among them is the requirement for a yellow band. The appellant could not be convicted of such a default, as it did not disclose an offence as required under section 77(8) of the Constitution. The conviction count 1 cannot be sustained and has to be quashed.

In count 2, the appellant was charged with contravening section 98(1) of the Traffic Act (Cap 403). Again, that section imposes certain legal requirements for drivers and conductors of public service vehicles. However, it neither creates an offence, nor does it prescribe the penalty for default. The charge is therefore defective for contravening the requirements of section 77(8) of the Constitution. A conviction for this offence cannot be sustained and has to be quashed. Learned State Counsel has conceded to the appeal and, in my view, correctly so.

Consequently, I allow the appeal quash the conviction and set aside the sentence imposed by the learned magistrate. In order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 21<sup>st</sup> day of November 2007.

**George Dulu**

**Judge**

**In the presence of –**

Mr. Chege for appellant

Mrs. Gakobo for State - absent

Eric - court clerk