REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 150 OF 2004

JONATHAN MUTINDA ……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

J U D G E M E N T

The appellant Jonathan Mutinda was charged before Makindu court in CRC 2089/04 with two offences under the traffic Act.

The first charge was one of allowing excess passengers contrary to section 100(2) of the Traffic Act and 2nd one being failing to wear a safety belt Rule 22A of the Traffic Act. The appellant pleaded guilty and was convicted on his own plea. He was then sentenced to a period of 2 months jail on each count and sentences were to ran consecutively. It is only against sentence that the appellant brings this appeal. The ground upon which the appeal is brought is that the sentence is illegal and or excessive.

It was submitted that in regard to count I, under section 100(2) of the Traffic Act, the maximum sentence provided is Kshs.20,000/=. As regards count 2, Rule 22(A) (4) provides a sentence of Kshs.100/= fine. It is submitted that the 2 weeks sentence served is sufficient punishment and appellant should be set free.

The appeal was not opposed by the state because the magistrate failed to address himself to the principles of sentencing and that there were no aggravated circumstances to warrant a non-custodial sentence.

I have considered the submissions of both counsel for appellant and the state counsel and I do agree that the sentence meted on the appellant was illegal, harsh and excessive. Under section 100(2) of the Traffic Act, the maximum sentence provided is Kshs.20,000/= fine. Infact the section does not provide for the default. A reading of that provision automatically shows that before one thinks of any other sentence, fine is first and foremost option available to the magistrate.

Under Rule 22A (6) of this Traffic, the penalty applicable is provided for under subrule 4. The fine is 100/=. There is no provision of default. The magistrate was therefore supposed, in handing down a sentence to exercise his discretion within the said provisions. The magistrate gave an illegal and excessive sentence. It is evident that he did not look up the law which he should be minded, always to do so that he does not keep repeating the same mistake of handing down illegal sentences. That is why he has the grey book which he should always be armed with at the time of taking pleas for ease of reference.

The magistrate is also reminded to take advantage of the other remedies like Community Service Order, Probation instead of resorting to the non custodial sentence. The courts are sensitized in helping to decongest the provisions. He is doing just the opposite. For the above reasons I find that the appeal is notorious and the sentence on both counts is hereby set aside. The appellant will be sentenced to the term of 2 weeks served so far and is hereby set at liberty unless otherwise lawfully held. Dated, read and delivered at Machakos this 29th day of September, 2004.

R. WENDOH

JUDGE – 29.9.2004

Read in the presence of Mr. Mutuku holding brief for Mr. Makau for appellant and Mr.

Omirera state counsel and court clerk.

R. WENDOH

JUDGE