**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERICHO**

**CRIMINAL APPEALS NOS 7 AND 8 OF 2004 (CONSOLIDATED)**

**KIPKURUI ARAP SIGILAI**

**JOHN KIPNGENO KIPLANGAT…..... APPELLANTS**

**VERSUS**

**REPUBLIC……..…RESPONDENTS**

## JUDGMENT

The appellants, Kipkurui Arap Sigilai and John Kipngeno Kiplangat, were charged with the offence of failing to fit a speed governor in a commercial vehicle contrary to rule 41A(6) of the Traffic (Amendment) Rules, of the Traffic Act chapter 403 of the Laws of Kenya. The particulars of the offence were that on the 3rd of February, 2004 at about 10:24am, along Kisumu – Kericho Road in Kericho district being drivers of a motor vehicle registration number KAN 949Y Isuzu lorry and motor vehicle registration number KAP 689W Isuzu lorry respectively, the appellants failed to fit speed governors in the said commercial motor vehicles. The appellants pleaded guilty to the charge. They were sentenced to serve twenty-one days each in prison.

Being aggrieved by the said conviction and sentence the appellants filed appeals against the said conviction and sentence. Contemporaneous with filing the appeals, the appellants made applications to be released on bail pending appeal which applications were allowed. The appellants were consequently released on bail pending the hearing of the appeal.

The main grounds of appeal contained in the petitions of appeal filed by the appellants may be summarized as follows; The appellants were aggrieved that the trial magistrate had convicted them on an equivocal plea of guilty; They were further aggrieved that the appellants were charged and convicted on a non-existent section of the Traffic Act and; finally they were sentenced to a penalty which was not provided by the Traffic Act.

At the hearing of the appeal, Mr Ghandia, learned counsel for the appellants submitted that appellants were charged on a defective charge. It was his complaint that the particulars in support of the charge did not reveal the alleged offence committed, neither was the tareweight of the motor vehicle stated in the charge sheet. Counsel for the appellants submitted that driving a commercial motor vehicle, *per se*, was not an offence. To constitute an offence, it had to be stated and established that the appellants were driving commercial motor vehicles of more than 3048Kg tareweight. Counsel further submitted that the appellants were convicted on a non-existent section of the Law.

The appellants were further aggrieved that they had been sentenced to a custodial sentence without being

given an option of the fine as provided by the Traffic Act. Counsel for the appellants further submitted that the appellants had served seven days in prison before they were released on bail pending appeal. He urged this Court to consider this fact when delivering its judgment on appeal.

Mr Koech, learned state counsel for the respondent submitted that the appellants had not objected to charge sheet before the said charge was read to them when the plea was being taken. The learned state counsel submitted that the appellants were precluded from raising the issue of the defect of the charge sheet at the appellate stage. Mr Koech further submitted that the fact that the tare weight of the motor vehicle was not stated in the charge was not fatal to the case as the Court had taken judicial notice of the fact that the said motor vehicles driven by the appellants weighed more than 3048Kg in tareweight.

Learned state counsel further submitted that the failure to state correct section of the State law was a typographical error which did not vitiate the proceedings of the lower court. It was the State's further submission that the plea taken by the appellants were unequivocal and the conviction thereof should not be disturbed. Mr Koech however conceded that the custodial sentence imposed was illegal. He urged this Court to substitute the said sentence by ordering an appropriate fine.

I have considered the grounds of appeal raised by the appellants. I have also considered the arguments made by the counsel for the appellants and the state counsel. The charge sheet states that the appellants were charged with the offence of failing to fit a speed governor in a commercial vehicle contrary to rule 41A(6) of the Traffic (Amendment) Rules made under the Traffic Act. I have read Legal Notice number 161 of 2003 issued on the 3rd of October, 2003. The said rules do not contain rule 41A (6). Mr Koech has submitted that the said rule was stated erroneously because of a typographical mistake. It was his submission that the rule that was actually meant to be stated was rule 41A (1). Rule 41A (1) provides as hereunder;

"With effect from the 1st of February, 2004 the engine of –

(a) every public service vehicle except taxis and private hire vehicles;

(b) every commercial vehicle whose tare weight exceeds 3048Kg shall be fitted with a speed governor which

(i) is of a type approved in writing by the Minister; and

(ii) is adjusted so that at all times and in any load condition the vehicle cannot exceed 80kph."

The said rule did not state the penalty that would be meted to an accused person found guilty of contravening the said rule. The requirement of the said rule is that all commercial motor vehicles of the tareweight exceeding 3048Kg were required to be fitted with a speed governor. For a person to be competently charged for the offence of failing to fit a speed governor in a commercial vehicle, the charge sheet must state that the said commercial vehicle is of a tareweight exceeding 3048Kg. Where the charge sheet does not state the tareweight of the motor vehicle, the charge sheet would be defective.

In the instant appeals, the charge sheet did not state that commercial the motor vehicle driven by the appellants were of a tareweight exceeding 3048Kg. Further the said charge sheet quoted a non-existent provision of the law.

I agreed with the submissions made by Mr Ghandia that the charge sheet was so defective that the appellants - could not have possibly pleaded guilty to it. Mr Koech has argued that the fact that the tare weight of the commercial motor vehicle was not stated was remedied by the trial court which took judicial notice of the fact that the commercial motor vehicles driven by the appellants were of a tareweight exceeding 3048Kg. I do not accept that a court may on its own motion decide that the omissions made in a charge sheet are remediable by judicial notice being taken of the said omissions made.

The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional under pinning. (See section 77 of the Constitution of Kenya).

In the circumstances of this case I do therefore find that the appellants' appeals have merit. They were charged under a rule that did not exist in law. The particulars of the offence did not disclose any offence known in Law. The charge was defective. The appellants could not therefore have pleaded guilty to defective charges. The appeals are consequently allowed, the conviction quashed and the sentence imposed set aside. The appellants are hereby ordered set at liberty unless otherwise lawfully held. It is so ordered.

Dated and delivered at Kericho this 29th day of October , 2004

**L. K. KIMARU**

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**Ag JUDGE**