



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.27 OF 2003

(From original conviction and sentence in Traffic Case
No.339”B” of 2003 of the Chief Magistrate’s Court
At NAKURU - G. A. NDEDA,(MRS)

DUNCAN KAMANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant has through his Counsel appealed against the conviction and sentence metted against him in Traffic Case No.339’B’ of 2003 on 21st January, 2003. He is aggrieved with the conviction and sentence on three grounds cited on his Petition of Appeal.

These are:-

- (1) That Learned Magistrate erred in law by convicting him when the plea was not unequivocal.
- (2) That the Learned Magistrate erred in law by sentencing the Appellant to two months imprisonment without option of fine.
- (3) That sentence was in all circumstances of the case excessive.

The defence Counsel has argued that by convicting the Appellant on the facts of the case as per the charge sheet, the Magistrate erred in law and that the plea was equivocal.

The Learned State Counsel does not support the conviction on two g rounds.

One that the plea of guilty was pleaded on the particulars of the charge and not on the facts of the case as none were given by the Prosecution. Two that the offence called for a fine and not a custodial sentence.

I have carefully considered the submissions made before me by both Counsels. I have also carefully scanned through the proceedings of the Chief Magistrate’s Court.

The Appellant was charged with TOUTING Contrary to Section 103(2) of the Traffic Act. The particulars of the charge are: -

“That on the 20 th day of January 2003 at about 4.30 pm at Eldoret stage in Nakuru township within Nakuru District of the Rift Valley Province was found

making noise at the said place for the purposes of obtaining passengers in motor vehicle Reg. No.KAD 886T Nissan Matatu likely to cause annoyance to the members of the public.”

When the charge was read to the Appellant, he admitted it. The particulars of the charge were also read and he admitted them. No facts were however read to him because the Prosecutor stated:-

Prosecutor

“Facts are as per charge sheet.”

To that the Court record shows that the Appellant made following statement.

“Facts are true.”

He was then convicted on plea of Guilty and sentenced to two months imprisonment.

Particulars of the charge and facts of the case are two very different set of things. Particulars of a charge set out in brief what it is alleged an Accused person has done which constitutes the charge for which he is charged. Particulars are so to speak the skeleton of the charge. The facts of the case are so to speak the flesh that fit into the skeleton to form the offence charged. Particulars of the charge cannot be said to constitute the facts and by pleading to them, the Appellant cannot be said to have pleaded to the facts.

The Prosecution has a duty to provide facts of the case when an accused person is pleading to the charge and more so when the plea is that of guilty. The moment the facts are as per the particulars of the charge, the court ought to immediately enter a plea of not guilty. The conviction in this case was irregular and cannot be allowed to stand.

Turning to the sentence it would appear that more than half of it has been served or is almost served. In the circumstances I will not order for a retrial of this case as that will amount to double jeopardy to the Appellant.

Accordingly, I quash the conviction and set aside the sentence and I order for the immediate release of the Appellant unless he is otherwise lawfully held.

Orders accordingly.

Dated and Delivered at Nakuru this 12th day of February, 2003.

In the presence of Mr. Mutuku for the State.

JESSIE LESIIT

JUDGE