



**Republic v Waweru (Criminal Revision 179 of 2023)
[2023] KEHC 17378 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION 179 OF 2023**

A MSHILA, J

MAY 4, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH WAWERU ACCUSED

RULING

1. This Criminal Revision matter was brought to this Court through a letter signed by the Honorable Magistrate Njuguna dated May 4, 2023. The Honorable Magistrate through her own motion urged this Court to exercise its powers and call for and examine the record of proceedings before the trial court for the purpose of satisfying itself on the correctness, legality and propriety of the sentence passed and enhance it accordingly.
2. From the trial court record, the Accused herein Joseph Waweru was charged at the Chief Magistrate’s Court Kiambu with the offence of operating without a PSV badge contrary to section 103 A (1) as read with Section 103 (A)(7) of the *Traffic Act*. The particulars are that on 3rd May 2023 at around 0800 hours along Kiambu road in Kiambu County being a conductor of Motor Vehicle Registration Number KCX 357E did operate without a PSV badge.
3. In the alternative charge he was charged with failing to display a PSV badge Contrary to Section 103 A (1) as read with Section 103 (A)7.
4. The Accused was arraigned in court and pleaded guilty. He was convicted on his own plea and sentenced to pay a fine of Kshs 5,000/=for each count or in the alternative serve 1(one) Month imprisonment, the sentence was to run concurrently.



5. This file has been placed before the court for revision in the exercise of powers conferred by section 362 of the *Criminal Procedure Code* which provides: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

6. Further, Section 364 of the *Criminal Procedure Code* provides:-

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may:-

- a. In the case of a conviction exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and may enhance the sentence.
- b. In the case of any other order other than an order of acquittal alter or reverse the order.
2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”

7. From the record the Accused pleaded to the main charge, the particulars of the charge were read out to him in Kiswahili and he responded ‘ni ukweli.’ The Accused having pleaded guilty to the main charge it is therefore unnecessary to plead to the alternative charge.

8. It is trite law that when an accused is convicted on the main count, the alternative count becomes irrelevant. It is illegal to convict on both the main and alternative count

9. In *Moses Alusa Imbitsa v Republic* [2016] eKLR the court stated:-

“When an accused person is charged with both the main count and an alternative, and the court finds him guilty or he pleads guilty to the main count, the alternative count becomes irrelevant. The court can only turn to the alternative count if it dismisses the main count. The trial magistrate was therefore in error in convicting the accused on the main count as well as the alternative count which had not even been read to him and sentenced him on both. This caused the applicant prejudice as well as injustice. He was denied the opportunity to plead to the alternative charge (which was unnecessary) but was convicted on it even without facts being read to him, admitting them or denying them.”

10. In the instant case the trial magistrate ought to have disregarded the alternative count and proceed to convict the accused on the main charge.

11. In the circumstances I thus find the trial magistrate erred in convicting the accused on the main and alternative count.

12. For the above reasons and pursuant to powers conferred on this Court by Sections 362 and 364(1) of the *Penal Code*, the court finds the application for review has merit and it is hereby allowed as follows:

- i. The conviction and sentence on count 1 is hereby upheld.



ii. The conviction and sentence on Alternative count is hereby set aside.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 4TH DAY OF MAY, 2023.

HON. A. MSHILA

JUDGE

