



REPUBLIC OF KENYA



**KENYA LAW**  
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**Watheke v Republic (Criminal Appeal E197 of 2022)  
[2023] KEHC 20125 (KLR) (Crim) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20125 (KLR)

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

**CRIMINAL**

**CRIMINAL APPEAL E197 OF 2022**

**LN MUTENDE, J**

**JULY 10, 2023**

**BETWEEN**

**ISAIAH NGOTHO WATHEKE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the original conviction and sentence in Traffic Case No. 4325 of 2021(e4298/21)  
at the Chief Magistrate's Court Makadara by Hon. M. Kivuti - SRM on 14th September, 2022)*

**JUDGMENT**

1. Isaiah Ngotho Waitheke, the Appellant, was arraigned to answer charges following allegations of having contravened the law. The charges were as follows:
  - a. Causing obstruction contrary to section 53(1) of the *Traffic Act*. The particulars of the offence being that on the November 11, 2021 at around 11:18hrs along Lusaka road within Nairobi County being a driver of motor vehicle registration number KCF 693 V Caravan he allowed the said motor vehicle to remain in a position on a public road in a manner likely to be a danger to other road users by making a wrong turn.
  - (b) Driving a motor vehicle on a public road without a driving licence contrary to section 30(1) of the *Traffic Act*. Particulars being that on the stated date, at the same time, along Lusaka road the appellant drove the said motor vehicle without a licence.

In the alternative, the appellant faced a charge of failing to carry a driving licence contrary to Section 36 (1) of the *Traffic Act*. Particulars being that the 11<sup>th</sup> day of November, 2021, being the driver of the aforementioned motor vehicle, he failed to carry a driving licence contrary to Section 36 of the *Traffic Act*.



2. Having denied the charges, he was taken through full trial, found guilty on the first and alternative count to the second charge, respectively, and, fined thus:

Count 1: To pay Ksh: 40,000/- and, in default to serve twelve (12) months imprisonment.

Alternative to Count 2: To pay a fine of Ksh 5000/- and, in default to serve thirty (30) days imprisonment.

3. Aggrieved, the appellant proffered the appeal against the conviction and sentence on the grounds that: The trial court shifted the burden of proof to the appellant; It considered irrelevant matters which had no connection with the alleged traffic offence; the court erred in relying on inaccurate evidence without corroboration; there was no evidence adduced by the prosecution to prove the offences, and, that the sentence was harsh and excessive.
4. Briefly, the prosecution case was that on the 11<sup>th</sup> day of November, 2021, PW1 No 11253 PC Nora Waeni and PW2 No 696 PC Ronald Asiga were performing traffic duties along Lusaka road when motor vehicle registration No KCF 693V cut across the highway from Pembe Street through Lusaka road moving intending to go towards DT Dobie direction. PW2 flagged down the motor vehicle that was being driven by the appellant and he stopped. He informed him of the offence he had committed and requested him to open the door to the motor vehicle but he declined. PW1 intervened and pleaded with him to comply and he did. Upon being asked for a driving licence he had none. He was escorted to the police station and charged as he had caused obstruction by making an illegal turn, an act that made other motorists hoot relentlessly. Hence the charges.
5. Upon being placed on his defence the appellant stated that on the material date he was coming from the garage and at some 300 meters away from DT Dobie round about is a provision for an L-Turn and U-Turn or motorists to join the Lusaka road. That he gave way on the first lane with dotted white lines and got to Lusaka road heading to Industrial area. On reaching at the DT Dobie, round about he was stopped by a female police officer who alleged that he made a wrong turn. That he challenged her to go the place in question and prove the allegation but she accused him of committing obstruction and commanded him to go to Industrial Area Police Station. On their way to the police station, he was asked for a driving licence that he did not have, and, having declined to check for it on the NTSA Website, she demanded to be bribed Ksh 1000/- that he declined and angrily told her to charge him.
6. The appeal was canvassed through written submissions. The appellant through learned counsel Dr P Opendi advocate, submitted that there was no evidence to prove obstruction. That there was no reason given by the magistrate for preferring the evidence of PW1 and PW2, as the appellant abided with the traffic rules by changing lanes as per the dotted white lines to get to Lusaka road which is not a highway but a road that is governed by Kenya Urban Rural Authority (KURA).
7. That the prosecution did not adduce evidence that he was to drive to city stadium round about and then turn to DT Dobie. The prosecution did not present evidence of the markings and proper road signs and what they symbolised. That the evidence was not corroborated and the court failed to appreciate that the road was not a highway likened to Uhuru Highway Thika superhighway.
8. That the court misdirected itself when it failed to consider markings at Pemba road as the intersection joining Lusaka road was marked white, that to a reasonable man this meant that the motorists would make an L- turn, there was no sign prohibiting an L- turn at the junction and there was no other way to know it was prohibited. That the court failed to consider the case on merits, disregarded the defence case, hence shifting the burden of proof from the prosecution to the defence.



9. On the issue of the driving licence, it was urged that there was no requirement in law for the appellant to carry a physical licence, as it could be accessed electronically through the NTSA portal or an SMS. The appellant argues that he gave the police access to his portal to satisfy them that he had a licence according to other evidence in the provision, a proposal that was disregarded. That the appellant later produced his licence within 24 hours at the police station that was a requirement of law which was also used as a reference document in the charges and the witness statement recorded on November 12, 2021 while he was charged on November 11, 2021. It was concluded that the case was a malicious prosecution, the appellant having been asked for a bribe of Ksh 1000/- that he declined to give.
10. The respondent/State opposed the appeal. Through learned prosecution counsel, Mr Mutuma Mwereru, it was submitted that the charges were proved. That the statements of PW1 and PW2 confirmed that the conduct of the appellant on the road caused obstruction; and, he was driving without a driving licence as it was not produced on request. He urged the court to dismiss the appeal in its entirety.
11. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. (See *Okeno vs Republic* [1972] EA 32).
12. It is trite that the person seeking to rely on a fact must prove it. Section 107 and 109 of the [Evidence Act](#) provides thus:
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 

-The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
13. It was upon the prosecution to prove allegations put forth. The appellant was accused of contravening the law by causing an obstruction. Section 53 (1) of the [Traffic Act](#) enacts that:
  1. No vehicle shall be allowed to remain in any position on any road so as to obstruct or to be likely to obstruct or cause inconvenience or danger to other traffic using the road, and, save where the contrary is expressly provided in this Act, every vehicle on a road, when not in motion, shall be drawn up as close to the side of the road as possible.
14. According to the particulars of the offence, the appellant
 

“...did allow the said motor vehicle to remain in a position on a public road in such a manner likely to be a danger to other road use(sic) by making a wrong turn.”
15. The prosecution had a duty of proving that the appellant acted in a manner that impeded passage of other vehicles. It was alleged that appellant cut across the Lusaka road instead of going to the City Stadium roundabout prior to going to DT Dobie. This is the version that was believed by the trial court which disregarded the explanation given by the appellant that he complied with the signage at the place and made an L-Turn.
16. Evidence adduced by the prosecution did not state that the appellant’s vehicle remained in a position on the road that obstructed or was likely to obstruct or cause an inconvenience to other motorists, who



could have been called to testify. The motor vehicle having been in motion the question of obstruction did not arise. This being the case it could have been a question of breaking Traffic rules specific to the locus in quo.

17. In its judgment, the trial court rendered itself thus:

“...The accused was driving from Pemba Street to Industrial Area through DT Dobie roundabout. To access Industrial Areal from Pemba Street through DT Dobie, one is required to join the other side of the dual carriage. As to how to joint that other side or any other equivalent side of dual carriage, every motorist knows that they cannot drive across the highway.

In this digital era, the location of any road; and in this case Pemba Street, Lusaka road and DT Dobie roundabout are available on Google maps. There is no provision for an L turn from Pemba Street to DT Dobie roundabout. There is however a provision for a U turn for motorists coming from DT Dobie roundabout back to the roundabout and into Industrial Area...”

18. The prosecution was obligated to adduce evidence of the sketch map of the road that would have shown traffic signs erected at the side of the road at the specific location where the incident was alleged to have taken place. This would have guided the court. It was not the duty of the court to use its imagination based on google maps. The judgment of the trial court was based on the honourable magistrate’s knowledge of the area but not according to evidence presented.

19. Evidence as a rule is presented to establish the truthfulness of an allegation. Sufficient evidence should have been presented before the court to enable it draw an inference to reach a logical conclusion. The learned magistrate took judicial notice of facts according to google maps, instead of appreciating that the allegation of obstruction at a particular place along the road could not be stated to have been of such common knowledge such that establishing it would have been absurd. The duty upon the prosecution was therefore not discharged.

20. On the issue of having a driving licence as required by Section 30 of the Act, it was later established that he was a holder of a driving licence No DD137 that was valid from January 21, 2019 to January 20, 2022. However, the licence was not produced on demand hence the alternative count. Section 36(1) off the [Traffic Act](#) provides thus:

- (1) Any person driving a motor vehicle (1) on a road shall carry his driving licence or provisional licence, and, on being so required by a police officer, produce it for examination.
- (2) For the purposes of this section, “driving licence or provisional licence” includes such other evidence as will satisfy the police that there is no contravention of section 30.
- (3) Any person who contravenes or fails to comply with this section shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings.

21. The appellant argues that pursuant to the requirement, he asked PW1 to confirm his licence from the NTSA online portal, but, she declined. However, he managed to produce the licence the next day which was within 24 hours.

22. The details, ease or access does not exonerate or diminish the driver’s responsibility to carry the licence with him, to have it physically or at least have a copy of it. From the evidence adduced by the prosecution and defence, it seemed that the appellant who was uncooperative did not explain why he did not carry the licence and instead directed the police to confirm details from the online portal, per his



allegation that was not brought up during evidence in chief. As correctly found by the trial court, the police did not have an obligation to search for the licence but the appellant was obligated to produce it either on the portal or a physical copy which he did not.

23. The upshot of the above is that the appeal succeeds partially, in that the conviction on Count 1 is quashed and the sentence meted out set aside. The fine imposed, if paid shall be refunded to the appellant. The conviction for the offence of failing to carry a driving licence and the fine meted out is affirmed.

24. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT  
NAIROBI, THIS 10<sup>TH</sup> DAY OF JULY 2023.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Atieno for Appellant

Mr. Kiragu for ODPP

Court Assistant – Mutai/Kathomi

