



**Musungu & another v Republic (Criminal Appeal E68 of 2023)
[2023] KEHC 24010 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24010 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E68 OF 2023
SC CHIRCHIR, J
OCTOBER 12, 2023**

BETWEEN

MARK MUSUNGU 1ST APPELLANT

ISAAC LUSWETI MASENGELI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The first Appellant was charged in Butere Chief Magistrate's Traffic Case No.42 of 2022 with the offence of driving a motor vehicle at a road with a load greater than the load specified Contrary to section 56(1) as read with Section 58(1) of the Traffic Act Cap 403 Laws of Kenya.
2. The particulars were that on 13/4/2022 at about 18.30 hours along Shinamwenyuli – Mulambo road at mobile weighing unit in Kakamega County within the Republic of Kenya, being the driver of motor vehicle registration No. KCM 112Y make Isuzu FVR drove the said motor vehicle on a road with a load greater than the load specified by carrying gross vehicle weight of 32,833 Kgs instead of permissible gross weight of 26,000 Kgs thus, an excess of 6,833 Kgs. as per the attached computation sheet.
3. The 2nd Appellant was charged in the same court in Traffic Case No.43 of 2022 with the offence of permitting the use of a motor vehicle on a road with a load greater than the road specified contrary to section 56(1) as read with section 58 (1) of the Traffic Act.
4. The particulars were that on 13/4/2022 at about 1830 hours along Shinamwinyuli – Mulambo road at mobile weighing unit in Kakamega County within the republic of Kenya, being the owner of motor vehicle registration number KCM 112Y make Isuzu FVR (3A Configuration) permitted the use of the said motor vehicle on a road with a load greater than the Load specified by carrying gross vehicle weight of 32,833 Kgs, instead of permissible gross vehicle weight of 26,000 Kgs, thus an excess of 6,833 Kgs as per the attached overload computation sheet.



5. After a full Trial each of them was convicted and sentenced to a fine of Ksh.75,000 or 12 months imprisonment in default.

Petition of Appeal

6. Being aggrieved by the outcome, they jointly filed this Appeal, and set out the following grounds:
 1. That the Trial Magistrate erred in law by finding Kenya National Highways Authority (KENHA) has jurisdiction or Authority on Rural Roads.
 2. That, it was a misdirection on the part of the learned Trial Magistrate to admit that scientific measurement of the motor vehicle KCM 112Y provided actual weight of the truck
 3. The learned Magistrate erred in law and in fact in dismissing the Appellant's defence that there were no measurements by the KENHA officials on the ground, that the same was not proved.
 4. The learned magistrate erred in not finding that the prosecution had not proved its case beyond reasonable doubt.
 5. That the Judgment of the court was against the weight of evidence.
7. The appeal proceeded by way of written submissions.

Appellants' submissions

8. The Appellants submit that Musanda – Butere road, where the offence is alleged to have been committed was a Murram road that fell within the management of the Kenya Rural Roads Authority (KURA) and not KENHA and therefore the latter does not have jurisdiction over the use of Rural Roads. Therefore, the Appellants contends, any evidence collected and presented by the complainant should have been inadmissible as they were obtained illegally. That evidence obtained by a body not authorized to do was evidence that was illegally obtained. They argue that permitting the use of such evidence led to an unfair trial.
9. The Appellants further argue that the prosecution case was not beyond reasonable doubt in the sense that the method used by the complainants to arrive at the weight of the motor vehicle was not scientific, and hence could not have provided the actual weight of the truck.
10. It is further submitted that there was no weigh-bridge along Musanda – Butere road, and therefore the measurements alleged to have been taken by the complainant were false. The Appellants have relied on the decision in the case of Chepkoech Maritim –vs- Kenya Highways Authority (2015) eKLR in this regard.
11. The Appellants further argue that the trial court ignored the rules of precedent as he founded otherwise despite the High court decision in Chepkoech Maritim (Supra) being brought to her attention.
12. The Appellant has also relied on the case of Dodhia –vs- Natiael & Grindlays Bank Limited & Another (1970 - E.A 195 to buttress their submission on the principle of stare decisis.
13. The Appellants further submit that the vehicle was not weighed as per the requirement of sections 106(1) and 106(4) of the *Traffic Act* so as to determine if indeed it had excess weight. Reliance has been placed on the decision of Justice Muchemi in Manyota Ltd vs Kenya National Highways Authority To that extent , they argue, no criminal conviction could not issue.



14. It is argued that the alleged excess weight was based on measurements of the body of the vehicle , and such measurements cannot be used to determine the weighed of the vehicle. That the alleged excess weigh was the creation of KENHA officers.

Respondent's submissions

15. On the question of whether KENHA, is the rightful complainant, the Respondent argues that within the context of the criminal procedure code, the complainant, in all criminal proceedings, is the Director of Public prosecutions (DPP). The Respondent relied on the decision of the court in Republic –vs- Judith Achola Mulala (2019) eKLR, in this regard. It is further stated that KENHA was simply a witness in the proceedings.
16. The Respondent further argues that, in any event the Appellants have not suffered any prejudice in the manner in which the evidence was obtained.
17. On whether the prosecution proved its case beyond reasonable doubt, the Respondent submits that it was able to prove that the Appellant's lorry was carrying excess weight.

Summary of the evidence

18. The proceedings were recorded in criminal case No.42/2022 and adopted in its entirety in criminal case No.43/2022. PW1 was the Assistant weighbridge manager based at Busia weighbridge. On the material date they were on mobile patrol along Musanda – sabatia road , when they spotted motor vehicle registration number KCM 112Y an Isuzu FVR parked along the road.
19. On approaching the vehicle, she noticed it was carrying wet sand. They found a person inside the truck , who upon being told that the truck needed to be weighed, told them the driver had gone to look for fuel. After waiting for 1½ hours without the driver turning up, they decided to weigh the truck using scientific method. She then proceeded to provide details of how the weighing process was carried out. She established that the truck was carrying excess weight. She produced the overload computation document as Prosecution Exhibit 1. The vehicle photographs showing it loaded with sand were also produced.
20. On cross-examination she told the court that, the road on which the truck had been parked was not tarmacked; that vehicles can be weighed on any road, whether tarmacked or not. That she did not weigh using joule as the driver was absent; that the excess weight was 6,833 kgs.
21. PW2 was Police constable Evans Odero. He told the court that he was attached to Busia weighbridge performing traffic duties. His evidence in chief was a replica of PW1's. He added they decided to use the scientific method when the driver failed to turn up. They removed the vehicle number plates – both rear and front and left their contacts with the person they had found in the lorry and who had identified himself as the turn boy, with instructions that the driver should call them. They later went back and found that the truck had left the scene.
22. On cross- examination, he told the court that they took the photographs of the lorry at 18.30 hours; that they waited for the driver for about 2 hours.
23. PW3 was sergeant Stephen Kimaru attached to Busia weighbridge performing traffic duties. He reiterated what the first two witnesses told the court. He added however that when they inquired about the driver the turn -boy told them he had gone looking for fuel. He later got to know that the owner had reported a case of stolen number plates to the DCIO He further stated that they weighed the truck using a scale they carried around in their mobile patrol. He told the court that they took photographs



- of truck when it had sand and later when empty, when they found it parked at a petrol station. He produced the photographs as PEXB 2
24. On cross- examination, he told the court that he served the order to remove the vehicle on account of excess weight on the driver the following day. He further stated that there was no permit shown to him allowing the Appellants to carry excess weight. He insisted that the method they used gave them the correct measurements.
 25. The Appellants were put on their defence.
 26. DW1, was the 2nd Appellant herein. He told the court that on the material date, he got a report from his driver that some people had removed his vehicle's number plates. He reported at Butere police station to the effect that the number plates had been stolen. He told the court that the vehicle was not weighed, that he did not get any report showing that the truck had excess weight.
 27. On cross-examination he stated that he was the owner of the vehicle; he was aware that the vehicle was carrying sand; he was not present when the truck was being weighed. He insisted that the truck was not weighed.
 28. DW2 was the 1st Appellant and the then driver of the truck. He told the court that he had gone to look for fuel and on coming back he found the vehicle number plates missing as well as the turn- boy whom he had left with the truck. The turn- boy did not inform him that some KENHA officials had come. That some people standing by told him some people came and removed the plates of the truck. He further told the court that there is a mark on the truck showing the level of loading. It indicates to them if the vehicle is overloaded or not.
 29. On cross- examination, he said he did find the turn-boy when he came back. He confirmed that there is a level on the vehicle showing the limits of loading.

Determination

30. This is a first appeal and the duty of this court is to relook at the evidence. Re - evaluate it and arrive at its own conclusion. This court is also required to give allowance to the fact that the trial court had the benefit of hearing and seeing the witnesses first hand. (see *Selle & Ano Associated Motor Boat Co Ltd(1968) E.A 123*)
31. I have considered the grounds of appeal, the parties' submission and the record of trial. The following issues present themselves for determination:
 1. Whether the Evidence against the Appellants was illegally obtained?
 2. Whether the prosecution proved its case beyond reasonable doubt.

Whether the Evidence was illegally obtained.

32. The Appellant has argued that KENHA ought not to have been the complainant in this case as the offence was allegedly committed in a Rural Road which does not fall within the management of KENHA. It is argued that jurisdiction is everything and anybody who does not have it should down their roles.
33. It is further argued that the evidence obtained was therefore illegally procured as it was obtained by KENHA; that any evidence obtained by an entity outside its statutory powers was illegal and that such illegally obtained evidence ought not to have been admitted.



34. The Respondent counters this, by stating that the Director of Public Prosecution is the complainant; that KENHA was a witness and that all criminal offences are offences against the state.
35. In the case of *R Vs Judith Achola Mulala (2019)* relied on by the respondent, Musyoka J held as follows;” My view is that the complainant , within the context of the criminal procedure code, , would be that person who initiates the complain that is envisaged in section 89 of the criminal procedure code. That complain or charge is what initiates the criminal proceedings. Under the Kenyan criminal justice system, criminal proceedings are initiated in court by the Director of public prosecutions, and it is that office that conducts the actual prosecutions. My understanding therefore is that the complainant is the prosecutor who stands for the Republic or state in a criminal proceeding. Proceedings are started, continued and terminated, at the behest of the state through the prosecutor. It is the state through the prosecutor that is the party to criminal proceedings, and the matter is styled as a dispute between the state and the accused person. Reference therefore, to the complainant in the criminal procedure code must be reference to the prosecutor, the initiator of the criminal case.”
36. I entirely associate myself with the above views. I agree with the Respondent that the complainant in all criminal matters is the state. Were it not so, then some crimes will never be prosecuted. Who is the complainant for example in a murder case or manslaughter? Must the state wait for the “complainant” before the crime is prosecuted? In my view, the Appellant’s concern should only have been whether the officer who weighed the truck was competent and authorized. The competence or Authority of the officer who weighed the truck would then lead to the credibility or validity of the results. The KENHA officers were merely witnesses in the case.
37. In any event the issue of admissibility of the alleged illegally obtained evidence should have been raised by way of preliminary, at the trial court. This was not raised by way of preliminary, or even during the cross- examination of prosecution witnesses. It would then have been dealt with at that point. The issue was only raised in the Appellants’ submissions.
38. Appellant’s complain in this regard is without merit and the same is dismissed.

Whether the prosecution proved its case beyond reasonable doubt

39. The Appellant disputes the weighing method applied and argues that the same was not scientific. That there was no weighbridge at Musanda – Butere road; that the weighing done by KENHA officers were false and was arbitrarily arrived at.
40. PW1 told the court that they used the scientific method of getting the weight of the truck. It is true that there was no static or virtual weigh bridge. But that is not the only method of weighing trucks PW1 took the court through the process of scientific method of weighing a truck. Her evidence went as follows: “You get the volume of cargo by getting the length, width, height, then multiply the volume with density. You take the mass and add to the tare weight (weight of the vehicle while empty). When you take tare weight, you get gross vehicle weight then you subtract legal weight/ permissible weight. The you get excess weight. I established that the vehicle had excess weight”
41. The Appellant has argued that the measurements were false but has not demonstrated the falsity of the measurements arrived at; they did not even attempt to challenge its falsity or arbitrariness during trial. The scenario in *Chepkoech Maritim’s case (supra)* was different. There was no evidence of any weighing that had taken place and there were no photographs taken of the truck. In the present case the method used was demonstrated and the results were documented (PEX1).The photographs of the loaded truck were produced(PEX 2A-2F)



42. The assertion by DW1 and DW2 that the vehicle was not weighed has no basis because they were not in the scene in the first place. It is apparent that they are equating their absence with non-weighing of the truck. It was upon the Appellant to dismantle the authenticity and accuracy of the scientific method used and the outcome. They did not. This ground of appeal is again without merit.
43. In conclusion, I find that the Appellants were properly convicted. The conviction is therefore upheld and this Appeal is consequently dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 12TH DAY OF OCTOBER 2023.

S. CHIRCHIR

JUDGE

In the presence of:

E. Zalo- court Assistant

Mr. Luango for the Appellants

No appearance by the Respondent.

